



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondent

Mrs Lorraine Lawrence

Secretary of State for Justice

Held at: Huntingdon

On: 25-26 January and 28 February
2017 in chambers

Before: Employment Judge Southam

Appearances:

Claimant: In Person

Respondent: Ms Louise Price, Counsel

JUDGMENT

1. The claimant's dismissal from her employment was not unfair.
2. Insofar as the claimant's dismissal amounted to an interference with her human rights, the interference was justified.
3. The provisional remedy hearing, listed for 14 March 2017 at Huntingdon will not now take place.

RESERVED REASONS

Claim and Response

1. The claimant submitted this claim to the tribunal on 2 October, 2016. She did so having entered into early conciliation with ACAS by sending them the requisite information about her intended claim on 21 August, 2016. The ACAS certificate of early conciliation was issued by email on 15 September.

2. In the claim, the claimant said that she had been employed by the respondent from 11 August, 1981 until her dismissal on 9 June, 2016. Her last employment was as a Delivery Manager. The only complaint she brought within the claim was a complaint of unfair dismissal. She was dismissed for activities in her private life which, she acknowledged, the respondent contended amounted to breaches of the Civil Service Code and potential damage to the reputation of the respondent. However, it was something that she did in her private life and in her own time, something she describes as a hobby in which she had participated some 15 years, which involved the creation of erotic images. She complained that her dismissal was unfair because the process infringed her right to a private life under article 8 of the European Convention on Human Rights and because her activities were kept entirely separate and detached from her work life, because the respondent did not follow its own policy or timeframes in relation to the process and displayed dishonest and underhand behaviour, that what she had done did not cause any damage to the respondent's reputation, that the respondent ignored evidence and that the investigation was, in the claimant's words, farcical and an exercise in which the respondent merely ticked boxes. By way of remedy, the claimant sought compensation for the remainder of her career, a period of some 14 years.
3. The claim is resisted. The claim was brought against the Ministry of Justice. The respondent stated that that was an incorrect way to describe the respondent, who should be described as the Secretary of State for Justice. They said that in January 2016 a member of their staff advised the claimant's line manager that he had seen sexually graphic images of the claimant on the Internet. The line manager carried out some research and discovered the same images. The claimant was suspended from her duties and she was told that the allegation against her was that she had been participating in and making films and uploading pictures to the Internet without requesting authorisation from her employer, which could cause reputational damage to the respondent. She was advised that, if proved, the allegations may constitute gross misconduct and she may be dismissed from her employment. The claimant admitted she appeared in the images showed to her by her line manager. Thereafter there were investigations and in due course, the claimant was invited to a disciplinary hearing. The claimant complained about terminology used in the disciplinary charges and the matter was reviewed. There was a further investigation carried out by a different employee of the respondent and a further report was prepared. It was the view of the person conducting the later investigation that the claimant had been participating in acts and uploading images of a sexual nature to the Internet, contrary to the Civil Service Code, and which had the potential to cause reputational damage to the respondent. The claimant resigned her employment but then, having been advised that she had seven days in which to reconsider the decision to resign, rescinded her decision. She was thereafter invited to a disciplinary hearing and dismissed for gross misconduct. The claimant appealed against the dismissal, but the appeal was itself dismissed and the decision to dismiss the claimant from her employment was upheld. On the basis of those contentions, the respondent contended that the claimant

was dismissed for reasons related to her conduct, a potentially fair reason, and that the dismissal was fair. They denied any procedural unfairness, but contended that if the tribunal should find that there were any, it would have made no difference to the decision to dismiss the claimant and, in any event, any award should reflect the claimant's conduct, which they contended, contributed significantly to the decision to dismiss her. They denied that the claimant was dismissed in breach of her right to private life under article 8.

Case Management

4. The claim was listed for a one-day hearing as soon as it was issued, in accordance with standard practice. There were standard case management directions. After the response was filed, and the respondent applied for an extension of the time allocation to three days, Employment Judge Moore agreed to extend the hearing allocation to two days, and the case was to be heard on 25 and 26 January, 2017. Thereafter there was much correspondence between the parties, copied to the tribunal, which showed that the parties had difficulty in agreeing matters relating to case preparation. There were no further case management orders.

The Hearing

5. The hearing was listed before me. The claimant attended. She was not represented. She had her husband with her as an observer. The respondent was represented by Ms Price of counsel.
6. Before I began to hear evidence, there were three applications. The first was in relation to information in the tribunal bundle relating to the claimant's activities for which she had been dismissed. She had used a website for those activities and an alias. The full name of the alias appeared in some documents. The claimant wanted me to make an order to redact the documents where the full name was shown, so as to avoid members of the public making a connection between the claimant and the website. The respondent was neutral about the application, and Ms Price referred me to the case of *BBC v Roden* [2015] IRLR 627. I decided that that case was not strictly relevant, that there was no particular public interest in members of the public knowing the precise name of the website the claimant used and that it was not necessary in the public interest that the public be provided with information to link the website to the claimant. It is to be emphasised that the claimant did not seek anonymity in respect of her own actual identity. I therefore made an order for redaction, which the respondent carried out during the course of the hearing.
7. The second matter related to an additional bundle of documents brought by the claimant. She said that she wanted to put some questions based on documents in her additional bundle. She said that those documents had been compiled once she had been through the bundle prepared by the respondent so as to provide context and completeness in the bundle. I gave permission for her to do so.

8. The third matter related to the correct name of the respondent. The respondent assured me through their counsel that the Ministry should be sued in the name Secretary of State for Justice, and no other description of the respondent would be adequate for the purposes of enforcement of any judgment. In those circumstances, the claimant agreed that that is how the respondent should be described.
9. I read the witness statements and considered some documents first. Then I heard from the witnesses. Ms Price called as witnesses for the respondent, Lynn Shepherd, an Operations Manager, Jan Foster, another Operations Manager, Graham Rugg, another Operations Manager, Kerry Nickless, a Legal Adviser and Emma Langham a Deputy Justices Clerk. The claimant gave evidence.
10. Although the number of witnesses and the size of the tribunal bundle, extending to more than 1000 pages, suggested that it would be difficult to complete the case within the two-day allocation and, although that proved to be the case, the evidence was completed by lunchtime on the second day. The parties wanted to make written submissions and I agreed that they should have seven days to do so. I spent the second half of the second day in considering my findings of fact and a further day of deliberation, once I had received the written submissions. Before the parties left during the second day we agreed the date of a provisional remedy hearing, on 14 March, 2017, should that prove to be appropriate.
11. Although the respondent prepared the bundle, it proved to be an agreed bundle and there was only one reference to a document in the claimant's additional bundle. In these reasons references to page numbers are to the numbered pages of the respondent's bundle.

Issues

12. At the start of the hearing I agreed with the claimant and the respondent's counsel what were the issues I would have to determine, once I had heard the evidence. They were as follows:
 - 12.1 Had the respondent established the reason for the claimant's dismissal, and was that reason a potentially fair reason for the dismissal of an employee by reference to section 98 Employment Rights Act 1996?
 - 12.2 If the reason established was related to the claimant's conduct, then the following questions arise:
 - 12.2.1 Did the respondent's dismissing officer and appeal officer believe the claimant to be responsible for the misconduct alleged against her?
 - 12.2.2 If so, were those beliefs based on reasonable grounds?
 - 12.2.3 Did the respondent carry out an investigation at least to the standard of the reasonable employer?

12.2.4 Was dismissal within the range of reasonable responses, that a reasonable employer could adopt having regard to the matters which had been established, having regard to whether the dismissal amounts to an interference by the respondent with the claimant's right to private life, and, if so, whether that was justified?

Relevant Law

13. Before reaching my decisions, I considered and applied the following legal provisions and case-law:
- 13.1 Section 98 Employment Rights Act 1996 provides that it is for the employer to show the reason for the dismissal and that it is one of the potentially fair reasons set out in sections 98(1)(b) or 98(2) of that Act. A reason related to the conduct of the employee is one of those reasons and is provided for at section 98(2)(b).
- 13.2 When that requirement has been fulfilled the determination of the question whether the dismissal is fair or unfair 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. That question is to be determined in accordance with equity and the substantial merits of the case: section 98(4) Employment Rights Act.
- 13.3 The leading authority on misconduct dismissals remains British Home Stores v Burchell [1978] IRLR 379, save that, since that case was decided, the burden of proof as to the matters set out in that decision as requirements became (on 1 October 1980) a neutral one (Employment Act 1980). Therefore, recasting the requirements set out in that case in neutral terms, the decision of the Employment Appeal Tribunal is to the effect that, where an employer has dismissed an employee for an act of misconduct, for the dismissal to be found to be not unfair, the tribunal has to make findings about three matters. First the tribunal must find that the employer's officers believed the employee to be guilty of the misconduct alleged. Secondly, the tribunal must find that the employer had in his mind reasonable grounds upon which to sustain that belief. Third, the tribunal must find that the employer carried out as much investigation into the matter as was reasonable in the circumstances. If the tribunal finds these matters, then the employer must not be examined further. It is not necessary that the tribunal would have shared the same view. Nor should the tribunal examine the quality of the material the employer had before him, for instance to see whether it was the sort of material which, objectively considered, would lead to a certain conclusion on a balance of probabilities.
- 13.4 In Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23,

the Court of Appeal held that the range of reasonable responses test (which is applied to determine the reasonableness of the sanction adopted by an employer in relation to misconduct, see below), applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to procedural and other substantive aspects of a decision to dismiss an employee for a conduct reason.

13.5 As regards dismissal itself, the case of Post Office v Foley [2000] IRLR 827 and other authorities show that the Tribunal's responsibility is to determine whether or not dismissal in the particular circumstances fell within the band of reasonable responses that a reasonable employer might have adopted. The Court of Appeal said, in that case, that the tribunal must not substitute its decision as to what was the right course for the employer to adopt. The Court of Appeal recognised, in Foley, that, if application of the reasonable responses test led the tribunal to conclude that the dismissal was unfair, they would, in effect, be substituting their view for that of the employer, but the process must be conducted by reference to the objective standards of the hypothetical reasonable employer, and not by reference to their own subjective views.

13.6 In relation to matters which are classed by the employer, or which appear to the tribunal to amount to gross misconduct, the Employment Appeal Tribunal held in Brito-Bapapulle v Ealing Hospital NHS Trust [2013] IRLR 854 that dismissal is not an inevitable conclusion. A logical jump from gross misconduct to the proposition that dismissal must then inevitably fall within the range of reasonable responses gives no room for considering whether, though the misconduct is gross and dismissal almost inevitable, mitigating factors may be such that dismissal is not reasonable. In assessing the employer's conduct and the question of fairness, the tribunal should have regard to whether long service, the previous unblemished record and the consequences of dismissal should have played any part.

Findings of Fact

14. Having heard the evidence, I made the following findings of fact:

14.1 The respondent has a Conduct Policy, issued by its Human Resources Directorate, in August 2012. It is divided broadly into two sections, the first of which is described as the conduct policy and the second, a set of rules.

14.2 In section 2.2, headed Principles, the policy states that the ministry wishes to see a positive commitment to high standards of behaviour and conduct from all of their employees. Their standards are built on what the public expects of those who provide services for them. The standards take account of the values and standards expected

of all civil servants, which are separately set out and described in the Civil Service Code, (as to which see below). This section says: "if you fail to meet these standards, it undermines our work and we will deal with it using our disciplinary procedures".

- 14.3 Section 2.3 sets out a series of standards of behaviour. These standards are not in terms restricted to the way in which employees carry out their work, but nor do they purport to control the activities of employees away from work, unlike other aspects of the policy. For instance, the standards direct that employees will carry out their duties following the civil service values of honesty, integrity, objectivity and impartiality, to treat people decently and with respect, to take care of official property and to be polite, reasonable and fair in their dealings with people who use their services. The standards make clear that discrimination, harassment, victimisation and bullying are unacceptable. Also included in a list of examples of unacceptable behaviour is "displaying literature, pictures, films, videos or CDs or other items that could offend". It is stated that that is not a full list.
- 14.4 Section 2.5 states if an employee's conduct and behaviour does not meet the high standards set out in the policy, a manager may take appropriate action to stop misconduct continuing and to prevent it from happening in the future. The disciplinary procedure could be used. If there are repeated breaches of the conduct policy or it is broken in a serious way, there could be a formal warning or dismissal without notice.
- 14.5 In the rules section, section three, the respondent placed reliance on section 3.11 which is headed "Personal Affairs". The broad principle is that an employee shall not put herself in a position where she has a conflict between her duty and her private interests. If she does, she will be reported to her manager. It is stated that an employee should be sensitive to the public view that these kind of conflicts could prevent the employee from being impartial when carrying out their duties.
- 14.6 In section C of this particular part, part 3.11, which is headed "Personal Financial Affairs", there are a number of restrictions in relation to investments, the holding of business interests and what happens if an employee gets into financial difficulties. Within this section it is stated: "we will take disciplinary action against you if you have done something deliberately which has affected our reputation".
- 14.7 In the next section, 3.12, headed "Other Employments", the policy states: "you will get written permission from your manager before taking up another job, whether paid or unpaid, while you are employed by us. This is because your manager needs to make sure that it does not conflict with your official position, or with our interests, or damage public confidence in MoJ.

14.8 In the Civil Service Code, there is a separate statement of standards of behaviour expected of all civil servants. There are various headings: integrity, honesty, objectivity, impartiality and political impartiality. Under the heading of integrity there are these requirements:

"Always act in a way that is professional and that deserves and retains the confidence of all those with whom you have dealings; and

"Comply with the law and uphold the administration of justice".

14.9 In relation to the first of those, the use of the word "always" contrasts with other responsibilities, which are plainly referable to the carrying out of the employee's job, such as fulfilling duties and obligations responsibly, dealing with the public and their affairs fairly, and keeping accurate records.

14.10 The claimant did not, in her evidence, nor did any of the respondent's witnesses, clearly explain the job the claimant did for the MoJ. I was left to make an inference, based on the response submitted by them. I find that she commenced work at Luton Magistrates Court on 11 August, 1981. Her employment in due course transferred to Her Majesty's Courts and Tribunals Service and she became an employee of the MoJ. At the time of her dismissal she was in a managerial role as Delivery Manager for what is described as Bedfordshire and Hertfordshire NCS. I was told that this role involves the management of staff engaged in the enforcement of fines.

14.11 On 2 February, 2016, the claimant was suspended from her duties. She was told that it was concerned with her having posted explicit photographs of herself on the Internet. At the time, the claimant knew that the respondent had a disciplinary policy. She was familiar with it and had access to it.

14.12 The claimant's line manager was Lynn Shepherd. She suspended the claimant and conducted an initial investigation. The result of her investigation was not shared with the claimant at this stage or even later. During the course of a meeting on that day, Ms Shepherd told the claimant she had concerns that she had been making and participating in films and uploading these and other pictures to the Internet. She showed the claimant some examples and asked if the claimant was the person shown in the pictures. The claimant agreed that she was. When the claimant was asked how long she had been engaging in this activity, she said that it was in her private life and she was not using her real name. The claimant agreed that she was aware of the conduct policy. She said that the websites did not say who she was or where she worked. Ms Shepherd told the claimant that she did not have permission to do this and, if she had sought permission it would not have been granted because the reputational risk to the respondent was high. She informed her that,

on advice from HR, if the allegations were upheld, it is likely that they would constitute gross misconduct and dismissal could be the outcome.

- 14.13 In her report, Ms Shepherd said that she had been contacted by a member of the respondent's staff over some photographs they had seen on the Internet. The pictures were described as being "fairly graphic" and that the person posing in them was the claimant, using an assumed name. The images were regarded as pornographic and it was said, for the claimant to take part in them was in breach of the conduct policy. Ms Shepherd had been able to find the websites by means of her own Internet search. She thought that it was evident that there were photographs and films, some of which had to be paid for, and that the claimant was advertising her availability as a paid escort. She said that the claimant had admitted that she is the person in the websites and that it was clear that this conduct had been ongoing for some considerable time. She had not requested permission to undertake a second job. It was Ms Shepherd's view that such activities created a high reputational risk to the organisation, should this become public knowledge, and there was the risk of it being used as leverage by individuals for gain.
- 14.14 The letter of suspension, page 61, dated 2 February, does not refer in terms to the detail of any allegations but instead confirms the suspension and explains what, in practical terms, the suspension involved. The claimant would be entitled to her normal pay during the suspension. Despite the lack of information, the claimant understood that the suspension was to do with the images which had been seen on the Internet.
- 14.15 The claimant received the suspension letter on 9 February and requested from her employers a copy of the conduct policy. There was never a complaint from the claimant that she did not have access to that policy.
- 14.16 On 12 February, Graham Rugg wrote to the claimant (page 145) and gave her notice that there would be a disciplinary investigation. He said that it was alleged that the claimant had participated in the making of films and uploading pictures onto the Internet without permission, which could cause reputational damage to the Department. The risk to the Department's reputation was high because of the alleged nature of the films and pictures. He also said that permission should have been obtained before taking up another job, whether it is paid or unpaid. A formal investigation was required, he said. The investigation would be conducted by Lynn Shepherd. The claimant was referred to the disciplinary policy, a copy of which, it was said, had already been supplied to her by Lynn Shepherd.

- 14.17 On 22 February, Lynn Shepherd invited the claimant to attend a disciplinary investigation meeting on 2 March at Bicester. She could be accompanied by a work colleague or trade union representative: see page 181. The meeting was rearranged twice, the first time to 11 March. Then it was brought forward by one day to 10 March, so as to accommodate the claimant's union representative.
- 14.18 The claimant attended the disciplinary investigation meeting on 10 March.
- 14.19 The claimant had the opportunity to amend the minutes of the meeting and she did so, through the union representative at the meeting, David Lovell. The amended version of these notes appears in the bundle starting at page 344. The meeting was chaired by Lynn Shepherd and she had support from Rebecca Davies of the HR Department. Ms Shepherd put various images which she had drawn from the Internet to the claimant and she asked the claimant to confirm that it was she who appeared in the pictures. The claimant confirm that it was her. The pictures are described as "set A". These appeared in the bundle pages 880-883. They show the claimant wearing only underwear, in one case in an outdoor location, and three of the four photos show her engaged in sexual acts, not in public. The claimant was asked how long she had been doing this work and she replied that it was not work, it was a hobby and she did not get paid for it. Ms Shepherd then put to her that she was charging for some of the work, and she showed her images from set B, in the bundle at pages 884-892. These images from the Internet referred to the provision of services including worn underwear, and personal services which could include an appointment at a hotel and rates charged for services, the details of which are not clear. These pages include pictures of the claimant wearing underwear and in provocative poses. In response to this, the claimant said that she did not get paid much, only a small amount after fees and commissions were taken. She denied that it was a business. She denied that it was paid employment. She said that she used an assumed name.
- 14.20 It was then put to her that some of the pictures were taken outside and she could be arrested for this kind of activity, although Ms Shepherd confirmed that she is not legally trained. The claimant said the pictures outside were taken during the evening and quickly when no one was about. She did not believe that they break the law. There was no impact on her ability to do her work; it was a hobby. She denied that it would have any adverse effect on her ability to manage a team. Ms Shepherd asked the claimant what impact she thought it would have if a national newspaper heard about it. The claimant replied that it would only be news on the day it was published. The claimant did not have a personal Facebook or Twitter account. It is not minuted, but the claimant appeared to accept that she had a Twitter account in her assumed name. The claimant said that she did not work with the public and had not done

so for some years. She had been doing this activity since 2007 and she had only made a few hundred pounds, not enough for a tax return. She did not see why she should discontinue it just because her employer does not like it. She did not regard it as employment and did not see any conflict between this and her work. It was put to her that she was advertising services which included the provision of sexual services as well as the service of an escort. Although the claimant said that she had removed a number of the websites, Ms Shepherd put to her that most of the images she was showing her been taken from the Internet that week. Before me, the claimant confirmed that she agreed at this meeting that her activities carried a reputational risk for the respondent: see page 346.

- 14.21 On 16 March, Ms Shepherd informed the claimant by email that she intended to forward some correspondence she had received from the claimant, which she regarded as relevant to mitigation, as well as her investigation report to Graham Rugg, who would decide how to proceed. In the meantime, she intended to send the claimant the following day copies of the notes of the meeting on 10 March for her to approve. The claimant complained about that, suggesting that the notes should have been approved before any report was sent to Mr Rugg, see page 297. Mr Rugg replied to say that he had not received the investigation report and had not decided how to proceed. He said that, if the claimant presented any amendments to the minutes of the meeting, he would consider them.
- 14.22 The claimant submitted her amendments to the minutes by email to Lynn Shepherd on 22 March, and Ms Shepherd promised to send her amendments to Mr Rugg. As mentioned above, the version of the minutes I considered is the version containing the claimant's amendments.
- 14.23 In a separate email to Lynn Shepherd of 24th March, page 350, the claimant complained about the submission of the report before she had approved the minutes. Ms Shepherd sought advice about a proposed reply which would have said that the policy did not require her to wait for any response to the meeting notes before filing or submitting her report to the deciding officer, only that if there are amendments they should be forwarded to the deciding officer. I cannot trace that such a reply was in fact sent.
- 14.24 On 24 March Mr Rugg wrote to the claimant, page 358A, and said that certain allegations were made against the claimant, that there had been an investigation and that he was satisfied that there was sufficient evidence to justify holding a preliminary hearing. Summarised, the charges were that claimant had failed to inform management of secondary employment and that, in a number of online photographs, the claimant was seen and 'tagged' to be "flashing and dogging in a public place" which may have been pursued as a criminal offence of indecent exposure. He said that, in the latter respect, the acts that the claimant had displayed online fell

short of the standards required of a civil servant, in that the Civil Service Code provided that the claimant must uphold and comply with the law. Her conduct fell short he said, of the standards required and brought "reputational risk and damage to the public confidence in the Ministry of Justice".

- 14.25 In the letter, Mr Rugg made clear that one outcome of the hearing could be the claimant's dismissal, although she would have a right of appeal. He set out the arrangements for the disciplinary hearing, which was to be on 14 April. The claimant understood that dismissal was a possible outcome. She received a copy of the investigation report, including the documentation referred to in it.
- 14.26 The claimant complained about the use in Mr Rugg's letter of the term "dogging". She said that she hoped that he could prove her involvement in such an activity. She said she had never participated in that activity.
- 14.27 As a result of that, Mr Rugg decided that there should be a further investigation. In a letter to the claimant on 5 April, page 389, he said that some matters, specifically those relating to indecent exposure and sexual activity in a public place, were not included as part of the original investigation and he was of the view that those matters should be properly investigated before the disciplinary hearing could proceed. A fresh investigation was required and the disciplinary hearing on 14 April was cancelled. The claimant would remain suspended.
- 14.28 The claimant was then informed by letter from Mr Rugg dated 12 April, page 400, that there would be a fresh investigation. It would be conducted by Jan Foster. The claimant would be invited to attend a meeting to discuss additional allegations. At the end of that meeting there would be a report. She should only discuss the matter with her nominated representative.
- 14.29 Three days later, the claimant was invited by letter at page 403 to a further investigation meeting, to take place at Cambridge Magistrates Court on 20th April. The claimant was not specifically told in this letter, page 403, the nature of the additional allegations but she already knew what they would be. The meeting was later postponed to 4 May: see page 419. The meeting was scheduled to take place in the afternoon, at the claimant's request. It went ahead. The minutes are at pages 432-435. The claimant signed the minutes.
- 14.30 Ms Foster put to the claimant a number of photographs of the claimant, some of which were apparently taken in public places. These photographs appeared in the bundle in the range of pages 440-456AA. They were in due course annexed to Ms Foster's report as Annex B. Ms Foster put to the claimant that a number of the photographs were taken in a public place. An example is

photograph number 15 (at page 456AA). Others were photographs numbers 1 and 2 (at page 449). In these photographs the claimant is not taking part in any sexual act. She is shown in her underwear in places where she could be seen by members of the public, if any were nearby. She was then asked about photograph number 10, (at page 455) in which the claimant is shown on her own in a public place performing a sexual act. The claimant denied that this was "dogging" and said that it was more "flashing". She was not responsible for the label which the website placed on the caption to this particular photograph or any photograph. In photograph number 8, (at page 456) she is shown kissing another woman when both are wearing underwear, on a balcony, visible to any members of the public who happened to be there. She was asked about a photograph of her in a public place, photograph 6, same page, exposing her bottom, where the photograph bears the caption "been out flashing today".

- 14.31 The claimant's response in relation to the photographs apparently taken in public, was that they were not taken when members of the public are nearby, but the photographs were staged so that people could not see, and that, if anyone came near, they would cease taking photographs. The claimant said that she did not come into contact with members of the public in her job. The claimant denied that she takes part in "dogging", which she defined as a group activity done in public with the intention of being watched. She denied undertaking any sexual act in public. The claimant insisted, probably rightly, that these photographs were not part of the original investigation, but she appears thereby to have missed the point of the holding of the second investigation, which was expressly to include material that had not been included in the first investigation. The claimant agreed that a number of her colleagues were now aware of her Internet activities. The claimant did not think that this would be an issue in relation to management of staff.
- 14.32 In her report, at pages 429-431, Ms Foster listed the evidence she had considered. This evidence consisted of the notes of the meeting with the claimant, the photographs described above, a list of Internet sites in the name LC, and the claimant's own explanation. Ms Foster said in her conclusion that she was concerned about the number of photographs taken in public places. She said that it was her view that there was a risk, albeit a fairly small risk, that a member of the public could have been exposed to indecent behaviour and the claimant was therefore committing illegal acts in public places. She said that the Civil Service Code requires all employees to uphold the law. She then said that a number of the photographs are labelled "dogging" or "flashing". It was her view that the Internet site was responsible for placing the captions on the photographs. Despite those qualifications, Ms Foster thought that the claimant's behaviour fell well short of the professional standard required. She then made reference to the conduct policy and in particular the reference to "displaying pictures

that could offend". It was her opinion that the photographs were still available on Internet sites and could be accessed by HMCTS staff. Finally, she concluded that the claimant was failing to set a positive example to her staff in her managerial and professional behaviour. She thought that the claimant had a case to answer. She recommended that the claimant be invited to a disciplinary hearing.

- 14.33 The claimant's own statement was not clearly identified in the bundle before me. I was provided at pages 456B-E, with two pages of text, then some text about article 10 of the European Convention of Human Rights (right to freedom of expression), then a note with a comment about offences under section 66 Sexual Offences Act 2003. I read all of this material and I have assumed that this is the claimant's contribution to Ms Foster's report.
- 14.34 After this meeting there was a complaint by the claimant (by email of 14 May, page 457) that Ms Foster sent her report to Mr Rugg before the claimant had had the opportunity to approve the minutes of the meeting with Ms Foster. Mr Rugg became aware of the complaint and immediately returned the report to Ms Foster. In evidence before me, the claimant agreed that the respondent met her concerns in this respect. Mr Rugg informed the claimant by letter dated 16 May, page 457E that he thought it was reasonable that the disciplinary case should be passed to a new decision-maker and he would not be further involved. He promised to inform her the name of the new decision-maker, but I cannot find any communication in which he did so.
- 14.35 In a document sent by email on 22 May 2016, page 480-483, to which the claimant attached some material in support of her defence, the claimant resigned her employment, giving four weeks' notice expiring on 17 June. In a reply sent the following day, Mr Edgington gave her the opportunity to retract her resignation, if she wished to do so. Although the claimant said initially that she would not do so, in the end she did retract her resignation, and the respondent continued with the disciplinary process.
- 14.36 On 31 May, the new decision-maker, Kerry Nickless, wrote to the claimant, page 510-511, and put two disciplinary charges to her. She said in the letter that she was satisfied that there was sufficient evidence to justify holding a disciplinary hearing to consider a charge of gross misconduct. There were two disciplinary charges. In the first, it was said that the Civil Service Code provides that you must act with integrity, namely putting the obligations of public service above your own personal interests and always act in a way that is professional and that deserves the confidence of all those with whom you have dealings. It was then said that the claimant had fallen below the standards of behaviour required by the Civil Service Code and the MoJ Conduct Policy in that she had participated in the creation of images which showed her in a variety of poses of an overtly sexual nature, some in private premises and

others in outdoor locations potentially accessible or visible to the public. It was then said that she had provided those images to a company, which published them by posting them on the Internet in addition to the claimant's own personal site. She said that the photographs could cause offence and could risk the Ministry of Justice's reputation and damage public confidence.

- 14.37 In the second charge, it was said that the claimant had failed to comply with the MoJ Conduct Policy: 3.12 Other Employment, by not informing management of her pursuing secondary employment, by providing escort services.
- 14.38 The claimant was now required to attend a disciplinary hearing at the Northampton Combined Court Centre on 9 June 2016 at 11am. Ms Nickless would conduct the hearing. The claimant could have a companion or representative to assist her. The hearing could result in a final written warning or dismissal.
- 14.39 The claimant asked for the hearing to be put back to 12 noon and the respondent agreed. She agreed that she had an opportunity to consider all the documents she was sent.
- 14.40 The claimant attended the hearing on 9 June with a representative, Dave Lovell of the PCS Union. She agreed that she had the opportunity to say what she wanted to say.
- 14.41 In the minutes of the hearing at pages 586-596, the claimant said that her websites are still live, but the parts which suggest that she would be willing to meet people for sexual services have been removed. The claimant said that she does not use Facebook or Twitter for this hobby and the Twitter account in the name LC is available to friends only. There was a discussion about the extent to which the claimant offered escort services. There were links to pornographic sites, which are pay per view, but which do not feature the claimant, by the use of banners, which contain the links. The claimant agreed that there were pay-per-view sites featured her performing sexual acts. The claimant would be able to recover the videos and photographs. The claimant agreed that there were indications on a website called Adult Ways, which suggest that claimant is willing to sell sexual services. These indications have not been removed, even though similar indications from the claimant's own website had been removed.
- 14.42 The claimant denied that this activity amounted to any form of employment. She was not contracted to do any work and there was no commitment on her part. If contacted, the claimant said that she would inform any potential customer that she does not offer sexual services. The claimant agreed she had earned money from the publication of photographs. The claimant said that she did not know whether she had informed her employers of this activity. My impression was that claimant's case was that she had not informed

them and that she did not need to inform them. There was a discussion about what would happen if anyone with whom the claimant deals within the course of her employment by the respondent should recognise her on one of her websites. The claimant said that anyone looking for such material would have been intending to look for material and, in effect, did not come across it by accident. The claimant does not deal with members of the public, she said.

- 14.43 There was a discussion about pictures taken outside. She said that there was no possibility of her being arrested for such activity, that such photographs would be taken in such a way that members of the public could not see the subject of the photograph. The claimant sought to suggest that the risk of such activity being captured by CCTV was minimal.
- 14.44 Those present then moved on to a discussion whether the claimant's participation in these activities amounted to a reputational risk for the respondent. The claimant emphasised that the activity is not in her own name, that she uses an alias. She repeated that she does not deal with the public in the normal course of her duties. There was further discussion about photographs apparently taken in public. The claimant put her case in this respect, which was that the public were not able to see the subject matter. The claimant denied that she took part in what was described as "dogging". There was a discussion about whether the claimant might be guilty of an offence under the Sexual Offences Act, or the offence of outraging public decency. The claimant gave similar responses to those given earlier.
- 14.45 After a break at 1247, the claimant returned and was able to make some final submissions. She said that her work was not affected by this activity. Her private life never crossed into her work, she said. She would not have a problem in disciplining somebody who worked with her, who was aware of the activity. The only persons who are likely to view the material on the Internet are people who are determined to find such material. It cannot be found by accident. The claimant compared her case with that of a group of people doing a naked cycle ride. In connection with the city of Hull being the City of Culture 2017, a group of 2000 naked people were to be photographed in a public place. There had been a similar activity in Trafalgar Square. The claimant referred to the case of an appeal court judge arrested for indecent exposure on the underground, who still kept his job. Finally, the claimant referred to a similar Employment Tribunal case, where the employee was forced to leave her job because of "adult work" she had done. She did not give the outcome of the case, which was heard in Liverpool, but instead referred to an opinion poll which suggested that 75% of respondents thought she should not have lost her job.

- 14.46 After an adjournment of one hour, Ms Nickless returned and informed her that, in her opinion, the disciplinary charges were substantiated. She dealt with the second disciplinary charge first. As regards charge two, she was satisfied that the claimant did not seek permission before undertaking other activities, for which she was paid. As regards the first charge, she was satisfied that the claimant uploaded to the Internet images of a sexual nature and that she had participated in the creation of those images. She was particularly concerned that some of the images were photographed in public places. Ms Nickless thought that this was a breach of the Civil Service Code standards of behaviour, because the claimant could have been arrested for outraging public decency, because the claimant had displayed items which could offend, and that the claimant could not be said to have been independent, honest and fair when carrying out her duties in that she had not been careful in her private life and had not avoided doing something which might conflict with her duties. She then invited the claimant to put forward any mitigation.
- 14.47 The claimant said that she would remove from her website images taken in public places, in order to save the service from embarrassment. If this had been put to her at the time of her suspension as something she could do, she would have done it.
- 14.48 After a further break of 15 minutes Ms Nickless returned to say that she was dismissing the claimant. She said that she found the claimant's conduct was so serious as to justify summary dismissal. It was gross misconduct. She considered that the claimant did not acknowledge that her behaviour and pictures could cause offence or constitute a criminal offence. She thought that there was an irretrievable breakdown in trust between the claimant and her employer. She said that minutes of the meeting would follow in three days and a letter confirming the decision within five days. Thereafter the claimant would have 15 days in which to submit an appeal.
- 14.49 The claimant submitted an appeal against this decision. It is at pages 601-606. In her appeal document, the claimant said that she had removed a number of photographs from her website. She asked why she had not been requested to remove them earlier, and appeared to blame her employers for not doing so. She repeated that the photographs taken in public were taken in such a way that no members of the public could observe the activity. They had been taken some time ago and there was no possibility of any criminal action against her. She did not think it was necessary for her to inform her employers of this activity. She said that most her colleagues have accounts with Facebook, Twitter and the like and are not prevented from uploading images to those sites. Any requirement by her employers to see the images before she uploads them would amount to an interference with her human right to private life and freedom of expression. The websites were not in

her own name; an alias is used. The websites have disclaimers which entail anyone wishing to visit them being over the age of 18, understanding that sexual content is being offered and not being offended by it. Nothing that she did would compromise her independence, honesty or fairness when undertaking her duties. She submitted that the code of conduct does not apply to the private life of a civil servant. The claimant said that she had not broken the law or been arrested and yet she had been dismissed. She thought that no sanction short of dismissal had been considered. She again referred to examples of other kinds of activity to which she had referred at the disciplinary hearing. She submitted that the decision to dismiss her was overly harsh. Finally, she said that this activity was not employment, just a hobby, not dissimilar to selling objects on eBay or gumtree. Her appeal was submitted on 16 June.

- 14.50 The claimant then received correspondence in which the respondent sought to agree with her the date of the appeal hearing. The claimant was not satisfied with the dates offered. The intended chair of the appeal hearing, Stephen Abbott, therefore contacted a colleague called Emma Langham, who agreed to conduct the appeal hearing on a date earlier than Mr Abbott could have arranged, 8 July.
- 14.51 The claimant attended her appeal hearing, before Ms Langham. She did not have the support of a union representative. If she had wanted to have such support, it would have delayed the hearing of her appeal. She was willing to go ahead without such support. The claimant was satisfied that Ms Langham had everything she had submitted in connection with the appeal. Minutes of the appeal hearing are at pages 677-685. Ms Langham sought to agree with the claimant a number of points of common ground. Although the minutes do not record that the claimant agreed with those points, the claimant confirmed in evidence before me that she had agreed with them.
- 14.52 They were as follows: that the claimant has an unblemished employment record lasting 35 years; that she only used the name LC in her website; that she is recognisable from the pictures on the Internet; that she has received payment for sexual services advertised; that she did not seek the permission of the MoJ before undertaking this activity and that she has been involved with adult websites, posting explicit images and offering sexual services since 2007.
- 14.53 The claimant accepted, contrary to her earlier position, that the taking of photographs in a public place amounted to a public issue. She also accepted that, although she had made comparisons with other cases, each case had to be determined on its own facts. The claimant confirmed that, in the future, she would not put herself in a position where she was vulnerable to arrest.

14.54 After a break of about 15 minutes, the claimant confirmed that most of the matters she wished to raise had been covered and Ms Langham then went on to consider the procedural matters the claimant wanted to raise. The claimant had been shocked at the initial meeting on 2 February, and it was only later that she realised that she did not know the exact wording of the disciplinary charge being considered. Otherwise, the claimant discussed with Ms Langham the procedural history of the disciplinary proceedings against her, much as it has been set out above.

14.55 The decision by Ms Langham was contained in a letter to the claimant sent on 14 July 2016, pages 700-703. The claimant confirmed to me that she was satisfied that Ms Langham took into account all her appeal grounds. Ms Langham said that she agreed with Ms Nickless' findings that the claimant's activities amounted to a breach of the Civil Service Code. There was a real risk of the claimant being caught or seen in public whilst having sexually explicit photographs taken. There was a risk of arrest for a criminal offence. She thought that Ms Nickless' conclusion was a reasonable one. She also thought that Ms Nickless had reasonably concluded that the claimant's behaviour could have caused offence and that there was a risk of arrest, prosecution and serious reputational damage to the MoJ. Ms Langham also concluded that Ms Nickless had been right to find that the claimant's behaviour amounted to displaying literature etc that could offend, and that her behaviour was therefore in conflict with the conduct policy. Her view was that dismissal was the only appropriate sanction in the particular circumstances. In this respect she agreed with Ms Nickless. She did not think that there had been any procedural failure. In particular, she thought that Ms Nickless would have had in mind the facts of the similar Employment Tribunal case the claimant mentioned at the disciplinary hearing, even though that was not reflected in the notes of the hearing. For those reasons, she upheld the decision to dismiss the claimant from her employment.

14.56 As mentioned at the start of these reasons, the claimant approached ACAS about her intended claim on 21 August, 2016, and the claim itself was issued on 2 October.

Conclusions

15. I now give my conclusions. I do so by applying to the facts that I have found the principles of law set out above in relation to the issues that I had to decide.

Reason for Dismissal

16. The first question I had to consider was the reason for the claimant's dismissal. The burden is on the respondent to establish that there was a potentially fair reason for the dismissal. My responsibility is to look into the

mind of the decision-maker and determine what were the facts and/or the beliefs which caused her to take the decision to dismiss the claimant.

17. In her closing submissions, the claimant did not suggest that there was a reason for her dismissal which was different from that which the respondent apparently relied upon. This was not a case where it was a part of the claimant's argument that the real reason for the dismissal was something completely different. What the claimant said in her submissions was that the reason for the dismissal was not clearly established because the allegations put to her changed on each occasion that a letter was issued in the internal process, that the allegations were not supported by the evidence and that the officers could not answer what part of the conduct policy or Civil Service Code the claimant had breached. The claimant went on to submit that having regard to a precedent, the reason for the dismissal was not fair.
18. In my judgment, these submissions miss the point of the question that I have to determine at this stage, which is simply the reason for the dismissal. The submissions may be relevant in relation to other questions I have to decide. Even if it is true that the nature and wording of the allegations changed during the course of the disciplinary process, that is not strictly relevant to the first question so long as the allegations were in the end about something, usually it is conduct, which amounts to a potentially fair reason for the dismissal of an employee.
19. I have to focus on the reason adopted by the respondent's dismissing officer. It will be clear from my findings of fact above that Ms Nickless put to the claimant allegations which were concerned with her conduct away from work, in particular the creation of images of the claimant and the posting of those images on the Internet: see paragraph 14.36 above. Turning to her conclusions, which I have summarised at paragraph 14.46 above, it is clear that her conclusions relate to two separate elements of the claimant's conduct: the posting of images and the undertaking of a paid activity which the claimant had not discussed with her manager. There was never a suggestion by the claimant that Ms Nickless had a different motivation and that the disciplinary charges were a cloak for a dismissal for an entirely different reason. I find that the claimant's dismissal was for the reasons given by Ms Nickless, summarised at paragraph 14.46 above.
20. It follows from that conclusion that the reason established by the employer for the claimant's dismissal is a potentially fair reason, because section 98 Employment Rights Act 1996 states that a reason that relates to the conduct of an employee is a potentially fair reason. It is not necessary that the conduct is conduct at work. I am therefore satisfied that the respondent has established that they had a potentially fair reason for the claimant's dismissal.

Belief as to Misconduct

21. The next question is whether the respondent's dismissing and appeal officers believed the claimant to be responsible for the misconduct alleged against her. Here, it is necessary to review the wording of the charges in the end preferred against the claimant before her dismissal. Again, I summarised these at paragraph 14.36 above. The question for me in relation to the first disciplinary charge is therefore whether I believe that those officers thought that the claimant had participated in the creation of images showing her in a variety of poses of an overtly sexual nature, some in private premises and others in outdoor locations potentially accessible or visible to the public, which were then uploaded to the internet, and whether they thought that in so doing, the claimant had fallen below the standards of the Civil Service Code and the MoJ Conduct Policy. In relation to the second charge, the question is whether they believed the claimant to have undertaken a paid activity away from work without her manager's permission.

22. The claimant's submissions are unfortunately not addressed to that question. In relation to this matter, the claimant submits that the dismissing officer and appeal officer freely admitted they did not review any current images for an understanding of the up-to-date position in relation to what the websites were showing at the time of the meetings and did not consider any of the claimant's mitigation. As to the first of these points, the respondent is entitled to consider what the claimant had done in the past. What the claimant was doing at the time of the hearings in relation to her websites might be relevant to questions of mitigation, but questions of mitigation are not relevant to this particular issue. This question is concerned with what the dismissing and appeal officers believed to be the position as regards the matters alleged against the claimant. In her cross examination by the claimant, Kerry Nickless said that what the claimant told her about not any longer offering escort services did not prevent her referring to the offer of such services in the past. She agreed that she did not look at the images currently displayed on the website. That is not relevant to a determination of Ms Nickless' belief in relation to whether or not the disciplinary charges were established. It would be relevant to the appropriate sanction for any misconduct established.

23. The claimant did not dispute what she had done in the past in terms of the creation and then uploading of images to the Internet. There is no reason for me to think that Ms Nickless and, after her, Ms Langham, did not believe the claimant to have been responsible for that activity. An element of the first disciplinary charge is that the claimant fell below the standards of behaviour required by the Civil Service Code and the MoJ Conduct Policy. In her decision letter [557-559], Ms Nickless discussed the photographs taken in public. She said this compromised the provisions of the Civil Service Code in that the activities in public might have caused offence, or, worse, led to her arrest for outraging public decency. I infer from her letter that she took the same view about the use of the terms "flashing" and "dogging" in labels attached by the websites to some of the images of the claimant. She thought that the same matters showed a breach of Conduct Policy 2.3 "displaying literature etc that could offend",

and of policy 3.11. In this respect she referred to “be[ing] careful in your private life so you do not do anything which might conflict with your duties”, and to the possibility that the claimant’s actions could risk the reputation of the Ministry of Justice. Ms Langham agreed with these findings at the appeal stage; her discussion of these matters is at [701]

24. The claimant did not dispute that she did not discuss the paid elements of her hobby with her manager before undertaking them. She had accepted, before Ms Shepherd, that she had earned small amounts of money from some of these activities: see in particular my finding at paragraph 14.19. Ms Nickless thought that this amounted to a breach of provision 3.12 of the Conduct Policy: see paragraph 14.7 above.
25. Apart from questions of mitigation, the claimant's submissions in relation to this question were concerned with the infringement of the claimant's human rights, in particular the right to a private life. She also submitted that the dismissing and appeal officers were not open to any other outcome, apart from dismissal. Again, regrettably, these submissions are not relevant to the question that I have to consider here. What the dismissing and appeal officers believed is a question of fact. It is only in relation to action taken against the claimant that there is potential for her human rights to be infringed and I will therefore come to this question later. As to outcomes other than dismissal, again that will arise in relation to the last of the issues that I had to decide.
26. I am therefore satisfied that both Ms Nickless and Ms Langham believed that the claimant had uploaded provocative images of herself to Internet websites, and that in so doing the claimant had breached the provisions of the Civil Service Code and the MoJ Conduct Policy. There is no reason for them not to have believed that the claimant had undertaken a paid activity separate from her work without discussing the matter with her manager, since the claimant agreed that this was the case, and that that amounted to a breach of conduct policy 3.12.

Reasonable Grounds

27. The next question I had to decide was whether there were reasonable grounds for their respective beliefs. My findings of fact about the evidence that was available to the employer in this respect was summarised in paragraphs 14.19 and 14.30 above. There were pictures of the claimant wearing only underwear in both private and public locations and in some images she was shown performing sexual acts, not in public. Some of the material on the Internet suggested that the claimant was charging fees for services. The images show her in provocative poses. There was one image in which claimant is shown on her own in a public place performing a sexual act. All of those images had been downloaded from the Internet by the claimant's employer, and the claimant did not dispute that any of them related to her or that they were not available on the Internet. It follows that the respondent had reasonable grounds for thinking that the claimant had committed the first alleged conduct, namely that she had participated in the creation of images showing her in a variety of poses of

an overtly sexual nature, some in private places and others in outdoor locations potentially accessible or visible to the public and that those images had been uploaded to the Internet.

28. It is necessary that I consider also whether there are reasonable grounds for the respondent thinking that the claimant's activities led her into breaches of the Civil Service Code and the MoJ Conduct Policy.
29. The claimant's submission included that Kerry Nickless did not consider matters put forward by the claimant as mitigation. This is not relevant to the question I have to decide at this point in the process. Her next submission was concerned with whether it could reasonably be said that the claimant had committed a criminal offence in relation to activities in public places. It is not part of the disciplinary charge that the claimant engaged in activity which amounted to a criminal offence, (although the possibility of a criminal charge is part of the element of the charge concerned with breach of the Civil Service Code or the MoJ Conduct Policy: see a discussion below). The claimant then submitted six examples of other cases in support of a broad submission that her employers should take a different view about the nature of the claimant's conduct from the view that was taken in reaching the decision to dismiss the claimant. Again, these are irrelevant submissions. All that has to be established in relation to this question is whether there were reasonable grounds for a belief as to the matters contained in the disciplinary charges. The claimant did not address the question whether or not it was reasonable for the respondent to think that breaches of the Code and the Policy had occurred. I nevertheless must do so.
30. It seems to me that reliance on section 2.3 of the Conduct Policy is misplaced. I noted at paragraph 14.3 above that section 2.3 does not purport to control the activities of employees away from work, but displaying literature, pictures, films videos or CDs or other items that could offend appears to be an activity at work which fellow employees might find offensive and which they cannot avoid because the employee is displaying those things such that fellow employees might see them. Displaying images on the Internet, which can only be accessed by someone who is determined to access such images, does not seem to fall into the category of activity covered by section 2.3.
31. Otherwise, I agree that the other provisions of the Civil Service Code and the MoJ Conduct Policy are engaged. It is self-evident that by the claimant taking part in the activities in which she participated, the claimant was running the risk, "a real risk" as it was put by Ms Nickless in the dismissal letter, that there could be a conflict between the claimant's duty and her private interests. Ms Nickless did not explicitly say why she reached that conclusion. The question for me is whether or not she had grounds to come to that conclusion. The claimant was involved in recovery of fines on behalf of her employers. It is obvious that, if a debtor became aware of the claimant's activities on the Internet, her position in relation to that debtor could be compromised.

32. Ms Nickless and Ms Langham were also entitled in my judgment to think that the claimant's activity in relation to the taking of photographs in public places breached the Civil Service Code. It is quite obvious that activity of that kind is not acting in a professional way deserving of confidence on the part of those with whom the claimant had dealt in her employment. The claimant herself accepted that if she had not been careful in the way in which the photographs in public were taken, there was a risk of arrest. The code requires that civil servants comply with the law.
33. The second disciplinary charge was that the claimant had failed to comply with the respondent's conduct policy by not informing management of pursuing secondary employment, namely seeking to provide escort services. This was not in dispute by the claimant, even though she told her employers that she no longer offered that service. She had done so in the past. There was no reason for her employers to think that the claimant had not engaged in that activity in the past. The respondent was entitled to think that this breached the Conduct Policy paragraph 3.12, which is clear and explicit about what is not permitted. The claimant insisted that it was a hobby, albeit one that generated a small income, but that it was not employment or even a job. But the provision about unpaid employment suggests that the provision is wide enough to embrace activity of the kind undertaken by the claimant. I am not prepared to hold, as I did in relation to paragraph 2.3, that the provision does not entitle the respondent to hold the belief that it did.
34. The fact that I do not think that the claimant's conduct amounted to a breach of Conduct Policy paragraph 2.3 does not mean that the respondent was not entitled to think that her conduct breached the Code and Conduct Policy in other ways. For those reasons, there were in my judgment reasonable grounds for the respondent to come to the conclusions that they reached.

Reasonable Investigation

35. The next question is whether I think that the respondent reached its conclusions after conducting an investigation which, at least, meets the standard of the reasonable employer. In this respect, the claimant made a large number of submissions on pages 8-11 of her submissions. I have read them. I do not agree with them. I have set out in my findings of fact above in detail the steps which the employer took in relation to the disciplinary investigation. I have noted that, when the decision was taken to broaden the investigation, the respondent appointed a new investigating officer and a new decision-maker. My view is that this investigation met the standards of the reasonable employer. It is not necessary that the investigation is carried out to the highest standards, although I consider that in this case, the investigation was conducted to a very high standard.
36. I agree that there was no audit trail in relation to the images. It is however clear from the documentation presented what images were considered at each stage. It does not matter that there may be a lack of evidence of an audit trail in relation to images as between different officers engaged in the

process. What is important is that the images which the respondent considered were discussed with the claimant at the disciplinary and appeal meetings and that she had an opportunity to put her case. I am satisfied that she did. Whether the images were updated later does not matter for the purpose of the disciplinary charges, which were concerned with the claimant's activity in the past. Reviewing the websites to see whether those images still existed is only relevant to the question of dismissal as a sanction.

37. It is not evidence of an inadequate investigation that officers of the respondent sought advice from the HR Department. Any inadequacies in the investigation at the early stages are irrelevant. I have focused on the investigation and dismissal process undertaken at the second stage. The process does not have to be considered at all stages. The disciplinary investigation can evolve with the nature of disciplinary charges changing over the course of the process. What is important is that the various tests set out above are satisfied in relation to the matters eventually relied upon as disciplinary charges. I am satisfied that there were some delays in the process but that those delays were so as to ensure fairness, not otherwise.

Dismissal within the Range of Reasonable Responses

38. This is not a case where the employer first concluded that the employee was responsible for gross misconduct, and then concluded, because of that first conclusion, that dismissal was the only option. That was Ms Nickless' conclusion, but she gave reasons. She took account of the claimant's promise to modify the content in her websites, and of the examples of public behaviour cited by the claimant. Her view, as expressed in the decision letter was that dismissal was the only option because the claimant's conduct had in her view destroyed the necessary trust and confidence that must exist for a viable employment relationship, that there had been a risk of damage to the reputation of the MoJ, and that the breaches of the Civil Service Code were serious. This analysis shows that Ms Nickless went beyond thinking that gross misconduct must lead to dismissal without further consideration.
39. I must not substitute my own view. It is sufficient if such a decision is one that a reasonable employer could make in similar circumstances. The claimant's submissions contained evidence that she had not given, about the extent to which her role was a public-facing one. It was accepted in evidence before me that the claimant did not work in a public-facing role, but that she was nevertheless in a team leader role, and she had responsibility for other staff. To that extent only, I can accept the submission, but it does not overcome the substantial arguments in favour of dismissal referred to above. In her senior role, the respondent was entitled to expect high standards of the claimant in accordance with the Code of Conduct and its Conduct Policy.
40. The claimant's offer to modify content did not remove the possibility of reputational risk.

- 41. For those reasons, I cannot say that the decision to dismiss the claimant was one that no reasonable employer would take in those circumstances.

Human Rights

- 42. The submission that the claimant's dismissal infringes her right to a private life is in my judgment doomed to failure. The activity was a public activity. Inhibiting a public activity by dismissal from employment is not a matter to which article 8 extends.
- 43. As regards article 10, the employer's restrictions, as interpreted by them in the disciplinary proceedings, did inhibit the claimant's freedom of expression, but it was justified for all the reasons save one, that the employer gave. The claimant is still entitled to undertake her hobby if she wishes to do so.

Decision

- 44. For all of the above reasons, the claimant's dismissal was not unfair and the claim must be dismissed.

Employment Judge Southam

Date: 02 March 2017

JUDGMENT SENT TO THE PARTIES ON:

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FOR THE TRIBUNAL OFFICE