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EMPLOYMENT TRIBUNALS

Claimant: **Mrs A Zysk-Lobo**

Respondent: **Edge Hotel School Ltd**

Heard at: **East London Hearing Centre**

On: **Wednesday-Friday 28-30 November, Wednesday 5 December 2018 & 14 January 2019 (tribunal only)**

Before: **Employment Judge Prichard**
Members: **Ms L Conwell-Tillotson**
Ms J Owen

Representation

Claimant: Mr R Golin (counsel, instructed by Truth Legal, Harrogate)

Respondent: Ms N Owen (counsel, instructed by Peopletime Ltd, Buckingham)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that: -

1. **The complaint of unfair dismissal is dismissed**
2. **The complaints of gender, pregnancy, and race discrimination, are all dismissed.**
3. **The claimant was not wrongfully dismissed and is not entitled to notice pay.**

REASONS

1 The claimant, Mrs Aleksandra Zysk-Lobo, is currently 40 years old. She worked at the Edge Hotel School from 1 April 2014 until 4 October 2017 when she was summarily dismissed without notice pay on the grounds that she had posted confidential information about the salaries of all the staff of the respondent on her Facebook page on July 10, 2017. The claimant completely denied and still denies that

this was her responsibility. She stated that in her belief someone had hacked her Facebook account and posted it there as if it was her doing. It was later part of the respondent's charge against her that during this investigation process the claimant had tried to cover up what they believed she had done.

2 The Edge Hotel School Ltd in Wivenhoe Park in Colchester is attached to the University of Essex but is funded by the Edge Trust (head office in Millbank) for learning for people from the ages of 17 to 19. It is a catering the school for students wishing to enter the hospitality business. It incorporates a live hotel; the Edge Hotel is part of the whole learning experience. The claimant has a background in hospitality, she has been a housekeeper on cruise ships.

3 The claimant is of Polish origin. The Lobo part of her surname is from her husband, who is Indian. She brings claims of: -

3.1 unfair dismissal;
3.2 race discrimination;
3.3 pregnancy discrimination;
3.4 sex (gender) discrimination;
3.5 wrongful dismissal (notice pay).

4 Her original claim for alleged arrears of pay appears not to be pursued and does not feature in the parties' list of issues.

5 The tribunal finds as a fact that the respondent valued the claimant. She got on well with the students. They valued the fact that she had hands-on hospitality experience, and also had some HR experience. We also find as a fact that the respondent had invested more in training for the claimant than for any other member of their staff. She was employed as their Academic Learning and Development tutor.

Pregnancy

6 By way of background to the pregnancy / sex discrimination claim, the claimant had had difficulty in conceiving and wanted to start a family. In the end she tried IVF. However, the pregnancy which is the subject of the present complaint followed from a natural conception. She did not realise she was pregnant until over 3 months into the pregnancy. Her expected date of delivery was 6 October. In fact, she gave birth to a son on 11 October. The timing would have been unfortunate whichever way it had happened as her effective date of termination was on 4 October.

7 At the school, the claimant's line manager was Adrian Martin who was the Academic Vice-Principal. Mr Martin joined in April 2015. Above him, was Andrew Boer the Principal. Mr Boer started at the beginning of the academic year 2014. He had in fact worked previously in Bournemouth where Mr Martin had also worked. Mr Boer was in Bournemouth University; Mr Martin was in Bournemouth College. They had worked together on a foundation course that Mr Martin was running.

8 The narrative leading to the dismissal of the claimant started suddenly on 10 July 2017. Angela Crosby was at home. A member of her team who is Jemma Baker, had spotted a posting on the claimant's Facebook page and promptly sent a WhatsApp

to Ms Crosby at home at 6:42pm. At 6:56 Jemma Baker added: "Thanks … she's now removed it but have taken a screenshot" and at 6:57 Ms Crosby said that she had just screenshot it too. The properties of the screenshot of Angela Crosby record the screenshot as having been created at 6:59.

9 Submissions made by Ms Owen on the basis that a later log-in might have been altered are not as cogent as she would have the tribunal believe. It may well be that Mr Golin is correct in submissions that as long as a picture is live on the screen of the person looking at it, it will not disappear if the person who posted the page takes it down. The later log of Facebook activity which the claimant produced to the respondent shows that devices were logged off at 6:51pm. Mr Golin's point was that if a picture is on your screen still you can take a screenshot of it. If the page is refreshed the picture will disappear because the post has been taken down. It appears that the post had been on the Facebook page for 2 hours. That is the time of the posting stated on the Facebook page, it says 2 hours. We are not sure how reliable these figures are. There was some evidence that the Facebook system can round up hours.

10 Ms Crosby decided to deal with this at once and get the claimant in to a meeting to explain. The following day, Tuesday 11 July at 2:30 pm they met. Present at that meeting were Ms Crosby, the claimant and Jemma Baker (Academic Operations Manager). The claimant declined to have any colleague present.

11 Ms Crosby showed her the screenshot of the Facebook page and the photo of a list of 14 academic staff salaries in the Edge Hotel School.

12 That paper list had been physically sitting in a full lever arch file in an unlocked room at the college. Apparently, responsibility for personal information being left in an unlocked room lay with the auditors who had not yet finished their audit. They had left the information there, not under lock and key, apparently contrary to the instructions of the college administrator Kathryn McIntyre.

13 At the investigatory meeting the claimant said she had never seen the document or the post and was unsure as to how it had been posted on the account. She said she would never post such a document, which included her own salary. She said that someone must be trying to get her into trouble, or even sacked, by publishing such information on her Facebook account. She acknowledged it was her Facebook account.

14 It would have been hard not to do so. It was very clearly her account as we saw from the page. She said it was possible that someone had used her phone. She also said she noted she had been locked out of her Facebook account and that she had to reset her password that morning i.e. the morning of 11 July to regain access to her account and that potentially therefore someone else had accessed her account the previous evening.

15 Ms Crosby asked the claimant to check her personal emails to confirm if she had received any communication from Facebook which told her how to reset her password. The claimant confirmed, having looked at her emails, that she had not had any communication from Facebook.

16 The respondent does not have a dedicated employed HR function. They use the service of the Peopletime consultancy. Ms Owen who appears here was instructed by them. The respondent consulted the HR consultant and it was resolved that the claimant should be suspended pending further investigation. She was given the suspension letter on the same date. It was signed by Mr Boer, Principal. It was a standard letter of suspension.

17 Following that, Ms Crosby typed up the report concluding:

> "Based on these findings I conclude there is sufficient evidence to progress the matter to a disciplinary hearing".

She concluded:

> "If a Facebook account is blocked and a new password required then the account holder would receive some form of email notification from Facebook which could be evidenced. AZL was unable to produce this email when asked to do so which means there is a contradiction between the statement given by AZL and the evidence I would reasonably be expect to be provided."

18 She accepted some of the claimant's explanations. For instance, she accepted that the claimant found it very hard to get in touch with Facebook. We can well believe that Facebook may be completely inaccessible. It is probably impossible to speak to a human being.

19 On 17 July there was a disciplinary meeting on notice. Present were the claimant, Mr Martin conducting the hearing, Ms Crosby as the investigator, and Gina Jaballah an academic and the claimant's companion. Ms Crosby was taking the notes.

20 At that meeting the claimant informed them that during the initial investigation hearing she had been flustered and when looking up her emails had looked, (wrongly), at her gmail account. In fact, she had Facebook emails sent to her hotmail account. That is why she had not previously shown them to the respondent. This seems true. We have seen the emails and they were timed at 09:57 on 11 July and that password change was confirmed by a download of the claimant's Facebook activity which she provided to them on a memory stick later. The Facebook email reads: "Your Facebook password has been reset using email address olazysk@hotmail.com. The email provided in the bundle at page 104 shows that the originating email from Facebook was dated and timed 18:51 on 10 July 2017. It reads:

> "Hi Aleksandra
>
> Your Facebook account was recently logged into from a computer mobile device or other location you've never used before. For your protection we've temporarily locked your account until you can review this activity and make sure no one is using your account without your permission … If this was not you please log into Facebook from your computer and follow the instructions provided to help you control your account information. If this was you there is no need to worry simply log into Facebook again to get back into your account."

21 As one would expect that email to her came from an email address called security@Facebookmail.com. She used that address to reply to Facebook. We strongly suspect that this was a "no reply" email address (even though not so

described). The claimant sent several emails and chasing emails and received nothing back in return. That is the likely explanation. There was also evidence of a Facebook UK 0800 helpline number. There were several instances on her recent calls on her iPhone of her having called that number. She said she never got through to speak to anybody with an enquiry about her Facebook account.

22 GT14 was the name of the room where the file had been left with the staff salary list. The key to GT14, rather than being left with Kathryn McIntyre, had been left on the table within GT14, together with the lever arch file. The claimant had needed to use the table in that room and had moved it aside, she said. She confirmed that her phone had been left on the table in the room while she was going to the toilet. She told them (this is unusual) her phone is not PIN-locked. Anybody could get into it just by swiping it.

23 The claimant's telephone, or at least one of them, is an iPhone SE (which is between iPhone 5 and 6). The claimant confirmed that she would have been at work until 5pm that day after an academic meeting. This was the time the academic meeting usually finished on Mondays. Ms Crosby had been there too and had left before the end of the meeting.

24 The respondent was quite puzzled as to why the Facebook post had been removed at all, as, and when, it was. The claimant stated she did not put it there and she had no idea who removed it either. The respondent was clearly keen for the claimant to get in touch with Facebook to find out what had happened and whether they could name the device that had apparently logged into her Facebook account.

25 At that stage, we find that the respondent thought it likely that the claimant would be exonerated and the whole matter could be cleared up with a piece of technical evidence. That evidence probably had to come from Facebook, to give a detailed log of her Facebook activity.

26 There was a tension later in the evidence, the claimant was saying the whole process was stressing her out. We remind ourselves at this stage the claimant was approximately 6 months pregnant. Against that, we must set Mr Martin's apparently genuine optimism. He believed the claimant would explain everything and allay all their suspicions, and soon.

27 After the meeting Mr Martin asked the claimant for some detailed evidence. First, he asked if the Facebook emails the claimant presented in hard copy could please be forwarded by email to him. Second, he wanted evidence from an attempt to gain more information concerning the unusual device or location that triggered the Facebook emails. He suggested meeting on 20 July, but if the claimant needed more time to deal with Facebook, to let him know. In the event she did need more time. He chased her up on the 23rd. It was agreed they would reconvene on the 27 July.

28 Mr Martin's correspondence made 2 points which the claimant subsequently took exception to and which caused her to raise a grievance about the process. First:

> "Unless you have a line of enquiry here I don't see the need to interview all staff".

Second:

> "Our HR are very clear that it is in fact up to you to prove your case. I am happy to assist but the evidence of the allegation is already there so I am urging you to provide as much evidence as you can to defend yourself."

29 The first point he made we have a good deal of sympathy with. Unless there is a definite line of enquiry, why involve more people and inform them of this allegation? It seems the majority of potentially interviewable people would have had no idea about the whole incident and it was not in the respondent's interest to advertise it to a wider group. The second point we can understand. Mr Martin's statement was unfortunately phrased. He should have concentrated on the fact that the evidence they wished to see was evidence that only the claimant could procure. This was all secure password-protected information which it would have been wrong for them to attempt to recover. It was up to the claimant to recover it.

30 This entire incident raised a real concern about confidentiality. One of the claimant's witnesses here (an ex *alumnus*) understandably said that he found the information being up there on Facebook scary because it led him to wonder what the respondent might do with <u>his</u> confidential information.

31 Mr Martin gave further help to the claimant. He and Angela Crosby did some research of their own and found out how you could download your own Facebook activity log. He wrote a practical and helpful email to the claimant on 24 July. He explained she had to get to her Facebook account on a computer (not a mobile phone or an iPad), log in, click on "Settings" and then on general account settings and "download a copy of your Facebook data" page. He said it takes an hour but will give you a copy of all your activity. He had done it for himself. He is a Facebook user but not such a frequent user as the claimant. He said his file was not too big. The claimant's was significantly larger, so large that it turned out not to be a emailable quantity. She ultimately gave it to the respondent on a USB memory stick but rather later than they were hoping to receive it.

32 The claimant said that she needed legal advice over this, particularly considering the amount of personal Facebook data there would be in the activity page. So, on 25 July the claimant had instructed solicitors to send a letter of grievance to the respondent. She had gone off sick on 21 July for 7 days with a diagnosis of: "Stress at work (pregnant employee)".

33 Depressingly, the solicitor took a legalistic, pompous, and unconstructive point about the apparent reversal of the burden of proof by Mr Martin, and also the restriction on interviewing witnesses. This was totally unhelpful to either party. Also, legally misconceived. Perhaps they were bluffing, and attempting to intimidate the respondent.

34 The claimant's grievance additionally brought up old complaints of the claimant concerning Mr Martin's attitude towards her pregnancy. When she had announced it on 13 May she said Mr Martin had been "unenthusiastic".

35 The grievance made it clear that this was a discrimination complaint and the claimant linked it somehow with the disciplinary process, and her state of health. Describing the unfortunate hacking of her Facebook account. She said:

> "The subsequent unsupportive and unreasonable approach taken by the company that she is guilty of misconduct until she proves her innocence".

They followed-up with a letter the same day to ensure that the hearing would not go ahead the following day on 27 July, stating that the claimant was 29 weeks pregnant.

36 The solicitor also brought to their attention that the same Facebook page had been forwarded to a Facebook group, albeit a closed Facebook group, called "Edge Madness" of whom a central figure is Sunny Basra who was described by Mr Boer and Mr Martin as a: "disaffected alumnus". We were shown that re-posting of the page which obviously the school found embarrassing. We shall say more of this below.

37 The following day on 27 July, Mr Boer responded, surprisingly, acceding to all requests, that Mr Martin be taken off the disciplinary case and that he (Mr Boer) himself would step in and hear the disciplinary, and he also stated that they would widen the pool of employees interviewed, and he also mentioned the use of an external HR consultant to act as a note-taker and witness to the hearing. This was Julia Terry from Peopletime.

38 The claimant had 1 month off work from 27 July until 24 August with the same diagnosis "stress and anxiety - patient is pregnant". This explains some of the slippage in the disciplinary timetable as the claimant drifted towards her due date.

39 Subsequently, several witnesses were asked to complete witness statements. It was in the form of a questionnaire about access to room GT14. It asked also if they had ever used the claimant's mobile, or seen anyone else using it, or if they had her Facebook log on details. They interviewed Heather Leathley; Katie Morrison; Claire Govia; Gina Jaballah; Jack Williams, Vetting and Recruitment Officer, Jemma Baker, Emma Powell, Operations Manager; Kathryn McIntyre, Financial Accountant; Andrew Boer; Angela Crosby; Adrian Martin, and Philip Berners, the majority of whom said no to all questions.

40 Meanwhile, on 8 August, the claimant was still off sick. She sent in a USB stick with her Facebook data on it. It was unfortunate that they had not stipulated that they wanted the security file only, which would not contain such a volume of information, particularly information of a personal nature.

41 The claimant was reassured by letter of 8 August from Angela Crosby who acknowledged receipt of the memory stick. She also stated:

> "Being able to access the files in totality allowed assurance that the information on security was available. I would like to confirm that the school will be able to use the security HTML file for purposes of viewing log in and password change activity including IP addresses and devices that have accessed your Facebook account. I have the memory stick in my office and nothing other than information on the security HTML file will be shared for any reason. Only those involved in the investigation/disciplinary process will access the security.HTML file."

42 It later came to the respondent's attention, after it was sent to them, that the whole HTML Facebook activity file was editable - a fact which later took on much more significance.

43 The excerpt that the tribunal has been shown starts on 8 July. It reveals a log-in on Monday 10 July which follows at 16:30 by a Samsung G935F and it also shows log-offs / 3 terminations for what were apparently an iPhone and possibly a Samsung. They were all at 18:51 (which we previously mentioned). The next entry after that is 11 July at 9:57 which was the password change. That web session finished on 11 July, 3 minutes later at 10.00am. That is the only excerpt we have seen.

44 From a different page from the USB stick, we were able to read some IP (Internet Protocol) addresses, i.e unique numbers for each separate device. We saw a search related to an IP address which starts 46, it gave the address as London EC4N, but that means nothing because that would only be for the provider Telephonica 02 UK. You do not get a geographical fixing on a mobile device, but only on a desktop or other device which is hardwired to the internet.

45 Following this examination Ms Crosby wrote as follows:

> "I would like to share my finding so far. I have been able to ascertain that photos have been uploaded and subsequently deleted do not appear in archive data. I can also see in the security document a session is recorded whereby a Samsung device logged into your account at 4:30 on Monday 10 July although it doesn't tell me what activity took place if indeed any at all. I can also see that 3 active sessions were terminated at 6:51 on the same day. I've also been able to ascertain that the data in the HTML file can easily be altered, amended and deleted. I am in the position whereby I cannot draw a conclusion based on the file you sent. You have maintained your innocence throughout the investigation and I feel that the only way to do this is to review the file from source. This would entail you downloading the file in my presence and letting me view it straightaway. If we do this together we can both be satisfied that data integrity is maintained. This course of action is a request and I cannot compel you to agree. If you don't agree then I will draw conclusions based on the information available to me. You may also suggest alternative methods of data retrieval if you are not able to attend in person. Please inform me of your decision by 12 noon Friday 18 August."

46 She also asked subsequent questions centering round their puzzlement as to why it had taken the claimant so long to download this information from being informed how to do it. At the time the claimant would have had plenty of time because she was off sick from work. She also asked the claimant about how she had heard about the "Edge Madness" post.

47 Subsequently, the claimant sent in another sicknote. This certified her as unfit for work from 23 August to 23 October 2017 which would have taken her past her due date. The diagnosis was "Stress/anxiety related illness".

48 The claimant then sent another grievance and this time to Alice Bernard who is the Chief Executive Officer of the Edge Foundation in Millbank, inviting her to become involved in the whole process, and describing her pregnancy and how her treatment was less favourable compared to Angela Crosby, and Zoe Perreira, both Vice Principals at Edge Hotel School, compared to her pregnancy. She also made general complaints about victimisation, arising from colleague Gavin Bridges' grievance against Andy Boer for homophobic comments against him (not her). It was a wide-ranging grievance.

49 The claimant was weary of the questions that Angela Crosby was asking her

stating:

> "I feel the questions you've asked in your email of 16 August are intrusive and after consultation with legal advisors as well as union representative. Can I ask you to explain the relevance of each question to the case before I provide you with the response, please?"

50 This was not easy for the respondent. So far from exonerating herself the claimant's actions increased suspicion. To address the impasse and to address the continuing delay in provision of information from the claimant, Mr Boer stated that he would rearrange the disciplinary hearing to 5 September at 12 noon and gave the claimant various options of how to handle it if she was not going to attend:

> (1) "Appoint a trusted individual to act on your behalf.
>
> (2) Submit a written statement of events and noting that specific questions that we require answering, those which were sent on 16 August.
>
> (3) You may nominate the trusted individual work colleague or union representative to read out the written statement of events in answering any questions.
>
> (4) You may telephone either in advance or on the day itself instead of attending to respond to my questions over the phone."

51 The investigation report was completed by Ms Crosby planning her investigations from 11 July to 30 August. Her conclusion was:

> "I have no viable way to conclude that someone other than Aleks made the post online. The file she shared with us indicated someone other than her accessed her account but does not show either way whether the upload was done by this third party. Unwillingness to answer my supplementary questions could be because she is feeling overwhelmed by the situation she is in. However, our request for information have been borne out of the wish to help her corroborate her own account of events, namely her innocence, and it is reasonable for us to assume that if she were innocent she would strive to share this information with us promptly in order to truncate the period of limbo she has found herself in. The unwillingness to cooperate casts doubt over the veracity of her claims and, indeed, the authenticity of the Facebook file she sent to me."

Mr Boer recommended reconvening the meeting as soon as possible.

52 Similarly, with the claimant's grievance Julia Terry contacted the claimant on 31 August to say she had been appointed to investigate the claimant's grievance and she wanted to meet the claimant personally.

53 The claimant, by letter of 31 August, responded to the questions on 16 August. The drift of the claimant's response was to deny everything suggested. Apparently, she knew nobody with a Samsung phone. She had explained the delay in providing the memory stick, partly as getting legal advice, and the problem of the amount of personal data she was supplying to them, despite the earlier assurance by Angela Crosby that they would only be looking at the security file, which is not intrinsically confidential. That was the focus of the respondent's investigation.

54 The investigation report was sent to the claimant on 1 September but the meeting did not go ahead then on 5 September. Instead, the claimant suggested that

they use an IT consultant. Ms Crosby suggested that the claimant should find an IT specialist and a trusted person to log into her Facebook account and download the Facebook archive in company with Angela Crosby.

55 She refused a further adjournment for another 3 weeks and wanted the claimant to nominate a specialist quickly. The claimant also said:

> "As you are well aware the stress and anxiety I suffer is caused by the EHS proceedings and bullying character of investigation. This impacts enormously on my health and my pregnancy".

This has been the claimant's point at the time, and throughout this hearing.

56 We have found it hard to accept. We have seen some patient and forbearing emails from management which the claimant described as "pressure". That was her subjective view of them.

57 Eventually, the claimant found a trusted IT expert. This was Alfonso Torrejon, an IT specialist. He has been a witness here at the tribunal. She had met him in the past when he did work for the University of Essex. He is Spanish. He had spent some time overhauling Edge Hotel School's systems. Apparently, somebody recommended Mr Torrejon but she realised that she knew him anyway from his time at Edge Hotel School so it seemed ideal. Ms Crosby knew him as well.

58 They met on 28 September 2017. The meeting consisted of Ms Crosby, Mr Torrejon, and Jemma Baker. Mr Torrejon logged on as the claimant and completed a download at 8:21am. It was clear from that download that the only dates visible within the timeframe were the 8 and 11 July and not the 10th. There was no entry on the 10th. The only reference to a Samsung device was on 18 July 2017. They took the IP number of the Samsung device which began 82. The evidence has been inconclusive because it is hard to see to which date the IP number in the list relates. It is not clear whether it is the date above or the date below that number. Mr Torrejon, as often, was cautious and tentative on committing himself as to how to read that list.

59 However, the bottom line was that the USB memory stick file which the claimant had previously sent them on 8 August showed 3 entries on 10 July. The actual file downloaded from source showed no entry between the 8 and 11 July. This strongly suggested that the memory stick file had been tampered with and did not correspond to the source of file.

60 In the meantime, Julia Terry wrote again to the claimant following her earlier mail of 31 August to ask her when she was going to respond to the question she needed to respond to in order for Ms Terry to investigate the claimant's grievance. The respondent, as they were entitled to, did not stop the disciplinary from going ahead, despite the grievance, even though the solicitor's letter had demanded that they do so. There is no legal warrant for the claimant's stand on this. It is not mandated by any of the ACAS codes, or even ACAS Guidance.

61 The respondent was in a difficult position here. They were drifting towards the claimant's due date. They considered that it would probably be worse if the disciplinary happened after the birth, when the claimant had given birth to her first child. We find

that such a need to progress it at a good pace was reasonable and probably correct, also because the incident was serious. Throughout the investigation it had become more and more serious because of an apparent cover-up, and falsification of evidence.

62 The final disciplinary took place on 3 October 2017. As expected the claimant was absent. The respondent had assumed that she would not be attending. She had submitted a statement on 28 September but all the statement contained was complaints about the respondent being "unhelpful and unreasonable". The claimant had general complaints about the process on the facts, that she was characterised as being uncooperative when she was heavily pregnant.

63 She also referred to her letter of grievance from John Foster's solicitors of 25 July 2017. None of this got to the heart of the matter to be considered which was the Facebook posting, and the claimant's conduct during the investigation into that posting.

64 Mr Boer mentioned the history of the claimant being slow to respond to the request for the Facebook download. She had been specifically told how to obtain that. He stated:

> "When your designated person Alfonso Torrejon attended EHS to download this file from source in order for us to be prepared, it was very clear the relevant data did not match the data you supplied. Although the file did not confirm without a doubt you posted the image. It was clear that it was different from the version you sent us in August leading me to conclude that the earlier files supplied by you were falsified."

65 He continued:

> "I considered that you have 4 years' service and a clean disciplinary record. I also considered whether the disciplinary process was in any way discriminatory. You've raised a grievance which we are trying to investigate, but you are not responding. I appreciate that your baby is due imminently however, EHS has been trying to investigate these matters for over 5 weeks … [from start to finish it was nearly 3 months]
>
> … the information contained in your solicitor's letter dated 25 July 2017 when Adrian Martin was concerned that you would not be able to work during our busiest period, and also, that you were asked when you will be returning to work full or part-time, the answer is there is no evidence to support this… even if those two allegations are true I don't believe they are relevant to posting highly sensitive information on Facebook. I also considered you only raised this issue until after the disciplinary meeting was adjourned. I conclude that if you had a genuine complaint you would have raised it contemporaneously …
>
> I find that on the balance of probability you deliberately retrieved the image containing highly sensitive, confidential information and posted it on your Facebook page. I also find that you deliberately falsified your Facebook archive file in an attempt to cover this up.
>
> ….your actions constitute gross misconduct under the school's disciplinary procedure and as such I have no other option but to summarily dismiss you for a serious breach of confidence. Your termination is effective from 4 October and you will be paid up to and including that date".

He dealt with the Occupational and Statutory Maternity Pay and gave the claimant a right of appeal.

66 On 6 October the claimant appealed against her dismissal though she had not yet given birth, although past the EDD. There was very little of substance in the claimant's appeal on 6 October:

> "I do not agree there are reasonable and fair investigation was conducted nor your belief that I was guilty of gross misconduct was based on reasonable grounds. I believe your decision to dismiss me was unfair unreasonable and discriminatory on the grounds of sex and race. You have made this whole process extremely difficult and exacerbated the stress that I have been under as a result this has in turn damaged my health…."

She asked for the return of her USB stick. The claimant was given the same choice as to how she would like the appeal to be dealt with given that the birth was either imminent or had happened. As far as they knew it was on 11 October.

67 The appeal was allocated to Mr David Tournay. It was a matter of controversy here that she contacted him directly. Later, the claimant had contacted him at his home address. Because he is a trustee, his name and address was publicly available on Companies House.

68 The claimant's point of view was that she wanted absolutely nothing at all to do with Andy Boer whom she regarded as a discriminatory bully and generally as anathema to her.

69 On 3 November the claimant had raised a grievance (for a second time) to Alice Bernard, the Chief Executive of the Edge Foundation making an extravagant claim that Mr Boer had told a colleague of hers that he took the dismissal decision not wanting to, but being advised to do so. This is just a reference to discussing the case with Peopletime Consultancy. The claimant has put a strange spin on this.

70 Once again John Fowlers Solicitors wrote to Mr Boer on 7 November 2017 asking for the imminent appeal hearing on 9 November to be postponed as the claimant would like to attend in person with her trade union representative and that the representative was not available on that day suggesting 16 or 17 November in the middle of the day to accommodate the claimant's childcare requirements. Once again, they objected to the fact that the claimant could not correspond directly with Mr Tournay.

71 The appeal hearing did not finally take place until 28 November. This time the claimant provided a substantial amount of material at the appeal hearing. She was accompanied by Alex Eastwood at the start. It was established that he was unable to provide proof of his identity and credentials, but it was agreed to proceed on the basis that he was an accredited UCU representative.

72 Mr Tournay subsequently wrote to the claimant after a delay on 15 January 2018. The reason for the delay was that Mr Tournay wished to wait for the outcome of the grievance process which we shall describe below.

73 The outcome from that process was sent to the claimant on 19 December 2017. Then there were the Christmas holidays. He helpfully summarised the claimant's quite discursive grounds of appeal. In fact, the claimant's disciplinary appeal was mainly a reiteration of her grievance.

74 Point one was related to race discrimination on account of her Polish nationality. What it seemed to be more than that is comments that made about the standard of her written English language. These were comments which Mr Tournay found to be perfectly justifiable (as does the tribunal).

75 The other aspect of this is that "English language" is actually the speaking of a foreign language. It is not in itself a protected characteristic under the Equality Act 2010. Your protected characteristic is your nationality rather than what your first language happens to be.

76 Sex discrimination was the second ground of the claimant's appeal. Mr Tournay found that it was clear from colleagues that Mr Martin was supportive of the claimant's impending childbirth. (Mr Martin had some experience as he is a father of 3. Mr Martin also incidentally mentioned to the tribunal that his grandfather was black African Caribbean). Mr Tournay could find no evidence that pregnancy influenced the outcome of this and we remind ourselves this part of the process was only the disciplinary appeal, not a grievance. The central point of the appeal was the reliability of the evidence associated with who had posted the salary information. That was where Mr Torrejon came into it. As Mr Tournay said in the outcome letter:

> "Mr Torrejon himself agreed that the information he gave as to how Facebook actually worked was based on his own judgment as opposed to knowing with any certainty as to whether the Facebook site would retain/amend time stamps on items uploaded onto the accounts of individuals. In fact, the evidence submitted as part of the management case is convincing as there are screen shots of the confidential data appearing on your Facebook account and it is clear from the JPEG file that it was taken at a time when the image was public on your account what was also convincing was the difference in data from the file supplied by yourself and the version downloaded from source clearly showing a difference and enough to convince me that the file you supplied had been altered"

He continued:

> "I am satisfied that the decision taken by EHS to investigate and subsequently dismiss you was the correct one."

77 There was a grievance report compiled by Julia Terry from Peopletime. It included several appendices and documentation she had reviewed. Through the grievance process she had interviewed the claimant, Adrian Martin, Jemma Baker, Kathryn McIntyre, Gina Jaballah, and Angela Crosby. It was clear and well-structured.

78 She had firm conclusions on the claimant's pregnancy discrimination claim, and then on the disciplinary process as an act of pregnancy discrimination. This focus was mainly on a conversation between the claimant and her line manager, Adrian Martin in the presence of Jemma Baker. She also reviewed email correspondence from that period (30 May 2017) when the claimant was 4 months pregnant. Their meeting had been friendly. The tone of Adrian Martin, as the email indicated, simply showed that he would like an indication of whether the claimant would be returning full-time or part-time, for planning purposes. The respondent would remain flexible whatever she said at that time.

79 Mr Martin had a reasoned disagreement with the claimant's stance that the period of her maternity would be the most inconvenient period in the academic year for the respondent. He said that was not so. He said it depended on which cohort you were looking at.

80 Ms Terry also observed that no formal flexible working application had ever been made by the claimant. She also confirmed that, to the extent the claimant was missed off group emails on occasions, this was completely accidental and that other

people had been left off too. Apparently, there was no group address and Mr Martin would usually type the names individually.

81 Ms Terry found that where the claimant had invoked the support of witnesses they did not in fact support the claimant's pregnancy discrimination claim.

82 On the subject of the disciplinary investigation, she said:

> "AZL claims that the way the disciplinary investigation was conducted was unsupportive and unreasonable and that this is connected to her pregnancy and is indicative of the school's desire to force her out of employment."

She then described the history of the disciplinary from the Facebook post on 10 July 2017. She commented:

> "AM attempted to help AZL out by providing instruction on how to get the information via the download from Facebook as it could be done quickly. AZL takes a significant amount of time in providing downloading file which became a cause for concern whilst the disciplinary process delay caused AZL when went off sick and began to communicate via a solicitor".

83 She noted that, as a result of the solicitor's letter, Mr Boer became the disciplinary officer and also the investigation process was widened to other staff.

84 The claimant contended that allegation she posted the information was "never proved". However, in these unfair dismissal tribunal proceedings, it does not have to be "proved". The employer needs to prove a reasonable belief that, on the balance of probability, the claimant did commit a repudiatory breach of her contract of employment. So it is a value judgment on "reasonable".

85 Ms Terry continued:

> "EHS went to extraordinary lengths to ascertain as much information as possible. However, AZL's delay in providing her file and subsequent discovery that the original file she provided did not match the file downloaded from source contributed to the school's reasonable conclusion that AZL did post this information to her Facebook page"

She continued:

> "EHS acquiesced to all AZL's requests despite her significantly delaying the process. This indicates the school was supportive and mindful of her pregnancy".

86 She had obtained witness evidence from Angela Crosby that Adrian Martin was not behaving in a discriminatory or bullying manner. The tribunal consider Ms Crosby would have said if she had had misgivings about the way Mr Martin was behaving because she had the seniority, and would not have shied from criticism, if it had been due. There was not a hint of it.

87 There was a grievance hearing on 19 December. The claimant had written to the respondent on 14 December advising she would not be attending. Further to the report she made written comments in response, instead of attending. In more detail, the claimant seemed to be taking points on procedure rather than substance. By contrast, Ms Terry gave a reasonable explanation for accepting the witness evidence from the witnesses she spoke to, Adrian Martin, Kathryn McIntyre, Jemma Baker, Gina Jaballah, and Angela Crosby. She did not interview Mr Boer as there was no need. He

was not involved in the investigation of the disciplinary charge.

88 She stated that she had to consider documents related to disciplinary investigation, because that was the content of the claimant's grievance. It was the act of discrimination of which she complained. It is hard to see how Ms Terry could have avoided considering it.

89 Ms Terry concluded:

> "In summary I can find no evidence to support AZL's grievance"

Credibility

90 Of all the evidence the tribunal had to consider at this hearing, there was something which only came to light subsequently. The cross-examination of the claimant started with a point going to the claimant's credibility and that of her husband. It was legitimate and relevant questioning in these tribunal proceedings. It involved Glyn Adams at the Edge Hotel school. He had been an academic lecturer according to Mr Boer. Jewels Recruitment Agency wrote to Glyn Adams in March 2016 requesting a reference for Ravi Lobo. As may be recalled, he is the claimant's husband. Mr Adams provided these references. Mr Adams has since left the respondent, under a settlement agreement. The respondent stated that had he not already been given notice by the time they were aware of this, this could have been a sole sufficient reason for his departure.

91 The fact was that Mr Lobo worked as a night porter at Edge Hotel. Just that. Glyn Adams reference for him to the recruitment agency portrayed him as being in the position of "Sales and Events Supervisor" - period employed 2012 – 2015. It gave some description "… daily communication re data provision and training of our hotel management students in sales functions planning and to deliver via customer service". The man was a night porter. He was given top rank of "Very Good" for attitude, accuracy, flexibility, team work, attendance and timekeeping.

92 The claimant responded inadequately to these questions. She failed to acknowledge that these references, in response to her requests, were false, and that the content was lies. When pressed on this she put the responsibility onto Mr Adams. The most the claimant would say was that the information was "incorrect". She came across as evasive and unable to acknowledge the fact of dishonesty. It was fair cross-examination. This has influenced the way in which we regarded the claimant's testimony at this hearing, and her explanations during the respondent's disciplinary process.

93 The claimant argued that the information was not acquired lawfully. However, it was sent from the respondent's internal email, which they have a legal right to monitor and inspect. As chance would have it Mr Adams' termination was on the first day of this hearing at the tribunal.

94 As a result of the claimant's Facebook post, Mr Adams' salary was now public knowledge. He had been well paid. The Edge Madness Facebook group commented "It seems Glyn should not be the only one to be accused of theft". Out of curiosity we asked Mr Boer and Mr Martin why The Edge Madness group still has this post on it. Their

answer gave a complete explanation. If one thinks about it, they would probably have caused more harm to the school, and drawn more attention to the post. There would have been protest on Facebook that the college was trying censor sensitive information they needed to cover up. It would have drawn extra attention to the very thing that the respondent wanted to be forgotten. The tribunal entirely understand that logic.

95 There was another false reference. Mr Adams described himself as the Marketing Director at Club Quarters, London SW1. Apparently from the Marketing Directorate at the University of Essex he stated:

> "I have been working with Ravi at Club Quarters for over three years … and I found him extremely professional, reliable and highly skilled and always had great contact with his team and other hotel departments. He was nominated for employee of the month twice and the housekeeping department has never had such a high team spirit and morale, before his arrival, nor after his departure. I remember during his time at Club Quarters his department had one of the highest cleanness ratings and gets satisfaction with housekeeping reports. I am sure he will be a great asset to any business".

This was a reference for a position as Assistant Head Housekeeper at the Hilton Stansted. It was a complete lie.

96 Ravi Lobo was a night porter at the Edge Hotel. 2 of the references referred to him as "Sales and Events Supervisor". 1 as an "Executive Housekeeper".

Unfair dismissal

97 In the tribunal's view, the evidence against the claimant was overwhelming. There is technical evidence pointing directly to her guilt. Both the dismissal letter and the appeal make it clear that it was not only posting confidential information online but the cover-up afterwards, and the falsification of the Facebook file memory stick that was held against her as a major aggravating feature. (Perhaps that was why the claimant was so keen to retrieve her USB memory stick from the respondent, as they are worth almost nothing, but their history can be analysed).

98 The respondent also took the view, on circumstantial evidence, that the claimant had a real interest in disparity of salaries this had come up in the case of Gavin Bridges. She thought it was inequitable that he should have been paid less than her.

99 That was a reasonable finding. The Facebook page was a major serious error of judgment. The subsequent alteration/falsification of the Facebook file was dishonest conduct which will usually lead to summary dismissal. Summary dismissal is described in legal terms as a fundamental breach of contract, but more helpfully described as a loss of trust. A breach of the implied term of trust and confidence is best seen as risk assessment. The employer will consider before imposing the sanction, whether it is viable to continue to employ this person given that confidence has been so seriously undermined. That was the respondent's belief and we hold it was a reasonable belief. It was well within the range of reasonable responses.

100 Further, objectively, we consider it was a correct belief that the claimant was guilty of behaviour that undermined their trust in her and therefore a claim for wrongful dismissal (notice pay) also fails.

101 There are two aspects of summary dismissal. The first is that it will usually

mean a dismissal for a first offence i.e. dismissal of someone who has a hitherto clean disciplinary record with no warning. It then also means losing the entitlement to notice pay.

Gender / Pregnancy Discrimination

102 We cannot see any suggestion that the claimant was discriminated against because of her gender. Although it was said that there was a gender discrimination claim in the list of issues it has not been pursued in evidence at the tribunal hearing. That was a waste of our time.

103 As far as the pregnancy discrimination is concerned the respondent was in a difficult position here. The claimant was pregnant at the time of all this. They felt they could not simply stay the disciplinary process to await her return from work after childbirth. That would have been unreasonable for the claimant to expect. It could have been more than a year.

104 It should not have been expected of the respondent to wait a year before tackling this. On the other side, it was implicit in what the claimant was asking that they should have done so. Waiting that long would have played havoc with the planning and administration of the respondent, holding a post open for someone whom the respondent considered that it would have been bound to dismiss after a year's maternity leave.

105 The claimant made a complaint that when she first told Adrian Martin about her pregnancy that he did not congratulate her. She compared this to Angela Crosby and Zoe Pereira, the 2 Vice-Principals, who had both been pregnant at the same time as each other, and previously to this. The evidence on this was extraordinarily muddled. We also go back to our assessment of the claimant's credibility. The tribunal considers on balance that Mr Martin did congratulate the claimant, as he described to the tribunal, especially as he knew about her problems with conception. He has children himself.

106 It would not be a good use of the tribunal's time to make a point by point analysis on each of the separated issues identified in the "list of issues". We have found, without any doubt, that the claimant was given a lot of help in contacting Facebook to obtain the evidence that might have exonerated her. When she eventually obtained the records, she falsified them.

107 The reasons given for the dismissal utterly displaced any suggestion the dismissal had anything whatsoever to do with the claimant's pregnancy. The claimant's argument that the respondent, in general, and Mr Martin in particular, regarded her pregnancy as a nuisance and something which merited dismissing her for something which she would not otherwise had been dismissed for, is utterly fanciful.

Race Discrimination

108 The claimant is Polish. It was of interest to the tribunal that Mr Martin, one of the accused, has a black African Caribbean grandfather. This affected him and also his mother. He is therefore more than averagely aware of race discrimination.

109 Mr Boer is of Austrian/Czech heritage and his father was German. The remark he made about "jobs for the British" following the referendum result in 2016 is as he explained. He saw it as his duty, as an educator, to promote intelligent discussion around what is, and remains, a highly polarised debate.

110 The race discrimination complaint is also undermined, as Ms Crosby had remarked, because the claimant did not raise any of her race complaints at the time while she was still employed. It is a valid criticism.

111 The suggestion that the claimant was being asked to attend the course on written English was an act of discrimination is nonsense. Such a course would have been paid for by the respondent in work time. She appeared to be someone with ambitions to teach in the UK. There were examples which we were shown in her appraisals (muddling "gig" with "geek"), where the respondent's concern was legitimate. The claimant was not ultimately sent on such a course. Mr Martin was concerned that the only readily available courses were evening classes and he did not feel happy asking her to attend something in her own time in the evenings. He left it that if she wished to identify a day-time class that she could undertake during normal working hours. As already stated the respondent invested a lot of money in training the claimant.

112 There were various allegedly discriminatory comments made by Mr Boer. That was the reason why Mr Gavin Bridges was called to the tribunal on a witness order, as a witness. Mr Bridges' grievance in respect of such comments which he took to be homophobic was upheld to some extent and he was paid a sum of money by the respondent. The claimant was just attempting to add weight to her own insubstantial claim of race discrimination. This was not discrimination against herself, and not race discrimination either. We do not have to express any views on Mr Bridge's complaint.

113 The claimant's accusation of imposing unrealistic deadlines for the disciplinary process is unarguable. Deadline after deadline was extended. The claimant took a long time. She herself caused major delay to the process by electing to run a formal grievance through solicitors, which could have been seen as a diversionary tactic.

114 The claimant made a criticism of the respondent for not referring disciplinary process to occupational health. However, as a matter of discrimination there were no actual comparators mentioned, nor, as a matter of fairness, under Section 98(4) of the Employment Rights Act 1996.

115 The respondent acknowledges that it could have consulted occupational health. They also mentioned they use the University of Essex Occupational Department with great reluctance because it was an extraordinarily bad service. They also said they believed that the whole matter was about to come to a conclusion favourable to the claimant. We accept that the respondent was genuine in this belief and was reluctant to have to accept that their original suspicions were true.

116 The dismissal process ended just 2 days before the claimant's EDD. Ms Terry took account of an email sent by Mr Martin dated 28 June 2017 after a meeting they had had on 23 June stating:

> "Hi Alex that is fine if you could have a think about whether you want to come back FT or PT that

would be useful for planning, we will stay flexible with this of course"

117 He confirmed in oral evidence in response to the claimant's suggestion that the time of her EDD would cause maximum inconvenience that there was enough flex in the team to cover one unit whether the claimant came back full-time or part-time. The cohorts and the semesters gave a complex structure which would mean that one time was more or less the same as another, for maternity leave purposes.

118 In addition, the respondent had a considerable number of women staff. Work varied. Maternity was a well-trodden path.

119 For the above reasons, the claimant's complaints of gender, pregnancy, and race discrimination, and unfair dismissal are all dismissed.

Employment Judge Prichard

18 February 2019