EMPLOYMENT TRIBUNALS

Claimant: Ms V Hadfield

Respondent: Manchester City Council

Heard at: Manchester **On:** 19 October 2018
24 January 2019

Before: Employment Judge Porter (sitting alone)

Representation

Claimant: Mr P Walsh, friend of the claimant

Respondent: Ms A Del Priore of counsel

JUDGMENT having been sent to the parties on 29 January 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Written reasons are provided pursuant to the written request of the claimant by letter dated 10 February 2019.

Issues to be determined

2. This is a claim of unfair dismissal. At the outset it was confirmed that the issues were:

   2.1. what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's conduct;

2.2. if so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular:

2.2.1. did the respondent have in mind reasonable grounds upon which to sustain the belief that the claimant was guilty of the conduct as alleged;

2.2.2. at the stage at which the respondent formed that belief on those grounds, had the respondent carried out as much investigation into the matter as was reasonable in the circumstances;

2.2.3. did the respondent in all respects act within the so-called ‘band of reasonable responses’ bearing in mind in particular the assertions raised by the claimant including:

2.2.3.1. allegations of bias and prejudice;

2.2.3.2. inconsistency in sanction;

2.2.3.3. failure to take into account mitigating factors such as the claimant’s clean disciplinary record and previous work as interpreter and assisting refugees;

2.2.3.4. dismissal was too harsh a penalty;

2.2.3.5. failure to consider redeployment after diversity training;

2.2.3.6. failure to give to the claimant at the time of writing the letter setting out the outcome of the investigation;

2.2.3.7. failure to give the claimant sufficient time to prepare for the disciplinary hearing;

2.2.3.8. considerable delay in the appeal procedure;

2.2.3.9. the lack of training given to the claimant in relevant policies including Social Media Policy

2.3. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed? See: <u>Polkey v AE Dayton Services Ltd</u> [1987] UKHL 8; paragraph 54 of <u>Software 2000 Ltd v Andrews</u> [2007] ICR 825; <u>[W Devis & Sons Ltd v Atkins</u> [1977] 3 All ER 40; <u>Crédit Agricole Corporate and Investment Bank v Wardle</u> [2011] IRLR 604];

2.4. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

2.5. did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

Orders

3. A number of orders were made for the conduct and good management of the proceedings during the course of the Hearing. In making the orders the tribunal considered the overriding objective and the Employment Tribunals Rules of Procedure 2013. Orders included the following.

4. At the outset of the hearing counsel for the respondent said that the outcome of the final appeal to members had only been heard the day before and it was not clear if the claimant had had the opportunity to consider it. The appeal had been dismissed and the reasoning was set out in the outcome letter. The claimant said she had not had the opportunity to read it. It was agreed and ordered that the claimant would read the appeal outcome letter while the employment judge read the documents and witness statements. The claimant would then be given the opportunity to consider whether she wished to make application to adjourn this hearing.

5. When the parties returned to the tribunal after the employment judge's reading, the claimant confirmed that she had read the appeal outcome and did not wish to make an application to adjourn the hearing. She was ready to proceed.

Submissions

6. The claimant's representative provided written submissions and made a number of further submissions which the tribunal has considered with care but does not rehearse in full here. In essence, it was asserted that: -

6.1. the claimant has been wrongly portrayed as a racist when the opposite is true. The claimant has volunteered her linguist skills free of charge to the Council's social services, she has supported and assisted immigrants into society. She has not shared or posted a racist comment. She has never accessed Britain First's website – she does not even know who these people are;

6.2. it was clear from the investigation and disciplinary process that the actual post which the claimant had commented on was different to the post

which showed a lady wearing a nijab. It was clear that the claimant was addressing her comment at more than one person, to a group of people;

6.3. the respondent did not carry out a reasonable investigation of the alleged conduct. They put the claimant to proof that she had commented on a different post. The claimant is not IT knowledgeable and was not able to do this. The claimant had deleted the comment on the instruction of her line manager and could not later open it to investigate which post she actually attached the comment "Go home";

6.4. the respondent has considerable resources and could reasonably be expected to carry out a full investigation of the claimant's Facebook account to determine which post she had in fact commented on;

6.5. the claimant was raised in Berlin and did not understand that the comment was discriminatory;

6.6. the union rep on first contact with the claimant said "shame on you" without even looking at the case. The union rep was allowed to work on the case up to and including the appeal. There was a conflict of interest as the union rep's salary is paid by the respondent and the hearing panel are also Unison members;

6.7. the claimant has never received any support during this ordeal. The respondent is supposed to hold mandatory job consultations every six weeks. This never happened and the claimant was hung out to dry while completing the six month alternative role;

6.8. Nick Whittingham did not give to the claimant the outcome of the investigation. The claimant was unaware that the investigation had been completed. This caused undue stress and anxiety and hampered her ability to defend her case;

6.9. Nicola Owen made the decision to dismiss based on the information she had retained in her head, while she was at home. This was unacceptable as she could not access the appropriate documentation in reaching the decision to dismiss. At the appeal hearing Nicola Owen indicated that she had considered all the evidence, having taken it home with her. That is a sackable offence, a breach of the data protection act and a breach of confidentiality;

6.10. there was a considerable delay because Nicola Owen had forgotten to follow the relevant procedures. This was clearly in breach of the respondent's disciplinary policy. The whole process dragged on for over 19 months. The council member hearing should have taken place three months after the dismissal not nine months later;

6.11. There was considerable bias at the appeal hearing when Nicola Owen shouted out that she wanted the same outcome as the decision to dismiss;

6.12. the respondent refused to hear relevant evidence from Mr Walsh;

6.13. the respondent refused to take into account the mitigating circumstances. The claimant had been employed for more than 11 years without any disciplinary action taken against her. She had an unblemished work record. She had worked for over six months in the alternative role in a different Department prior to dismissal. She had full access to the Council's computer infrastructure and she showed that she could be trusted and that the respondent trusted her. Dismissal was therefore outside of the band of reasonable responses. The respondent did not consider the union representative's statement that if there were a breach of policy it was at the lower end and a warning and mandatory training was the correct sanction;

6.14. the respondent did not consider any alternative to dismissal. That is inconsistent with the decision to allow the claimant to work in the alternative role pending the outcome of the disciplinary process;

6.15. there was inconsistency in treatment: a manager who performed a similar act to the claimant was demoted and moved to a different Department;

6.16. the claimant never intended to upset anyone. She cannot show remorse for something she has not done;

6.17. the claimant was dismissed because of her age, because of a desire to get rid of higher paid staff, a decision to target certain employees due to age, and/or white English groups nearing retirement age.

7. Counsel for the respondent made a number of detailed submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that: -

7.1. the investigation began because a member of the public sent to the respondent a screenshot of material he found on the claimant's public Facebook, by which he was offended;

7.2. the claimant identified herself as an employee of the respondent on her Facebook account;

7.3. on her own admission the claimant shared this post from Britain First but now denies that she had any knowledge of that organisation or the quality of the information which she shared. The claimant added her comment “Go home” to other comments which displayed hostility to Muslims;

7.4. the claimant was suspended and invited to an investigatory meeting, on 8 August 2017, when the claimant was given full opportunity to state her case. The claimant admitted that she had shared this story with others but denied making the comment “go home” on that particular post, asserting that she had made the comment in relation to a different post. She said she could not remember the post to which she had in fact added the comment. She did not say that her close friend was there and could give relevant evidence about the actual post she had commented on. She had full opportunity after this meeting to go back to her Facebook account and investigate which post she had attributed the comment “go home”. She did not do so. She deleted the account;

7.5. The tribunal is invited to accept the evidence of Mr Whittingham that he handed to the claimant the outcome of the investigation on 25 November 2017. In any event, on 3 January 2018 the claimant was invited to a disciplinary hearing on 18 January 2018 and was provided with 15 days to prepare her defence. The claimant had ample time to martial her defence and witnesses;

7.6. The claimant was advised of her right of representation, was provided with all relevant documentation and given the right to call witnesses and any additional documentary evidence. She was advised of the possible sanction and the identity of the disciplining officer;

7.7. At the disciplinary hearing the claimant was represented by a trade union representative, who conceded that the investigation was fair. He confirmed that he was not going to defend the fact that the story had been shared by the claimant, and he accepted that Britain First was a racist organisation. The claimant did not mention that her friend Mr Walsh had relevant evidence, did not ask for more time to prepare her case;

7.8. Following the disciplinary hearing the dismissing officer formed the honest and genuine belief that the claimant was guilty of the conduct as alleged. She set out her reasoning in the dismissal letter. It was reasonable to conclude that the claimant had intended to publish a post endorsing a racist stance on a public forum, knowing it to be wrong and against the respondent’s standards. The claimant’s job involves supporting vulnerable people in their cultural and religious activities. The respondent could not be confident about leaving the claimant in her position which involves contact with vulnerable people, some of them Muslim;

7.9. The dismissing officer did consider the mitigating factors, did consider redeployment to a different post. However, dismissal did fall within the band of reasonable responses;

7.10. The claimant was advised of and exercised her right of appeal. The appeal was handled fairly. The respondent is not responsible for the actions of the claimant's trade union representative;

7.11. The claimant has raised no truly comparable case in her argument of inconsistency of treatment;

7.12. The delay in the appeal process did not affect the fairness of the decision;

7.13. If there were any breaches of procedure then following the **Polkey** principle the tribunal is invited to find that following a fair procedure would have made no difference to the outcome: the claimant would still have been dismissed;

7.14. The claimant was guilty of culpable and blameworthy conduct. At no point has the claimant apologised for her behaviour, she has shown no remorse. 100% reduction in any compensation would be appropriate

Evidence

8. The claimant gave evidence. In addition, she relied upon the evidence of her friend, Mr Philip Walsh.

9. The respondent relied upon the evidence of: -

9.1. Mr Nick Whittingham, short-term intervention manager;

9.2. Ms Nicola Owen, Registered Manager;

9.3. Ms Nicola Thompson, Service Manager

10. The witnesses provided their evidence from written witness statements. They were subject to cross-examination, questioning by the tribunal and, where appropriate, re-examination.

11. An agreed bundle of documents was presented. References to page numbers in these Reasons are references to the page numbers in the agreed Bundle.

Facts

12. Having considered all the evidence, the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

13. The claimant was employed by the respondent from 14 August 2014 as a support worker. Prior to her employment the claimant had been engaged in work with the respondent as a subcontractor, having been subcontracted by the NHS to the respondent in the period from 11 June 2007 to the start of her employment.

14. The claimant's role as a support worker required her to work with vulnerable adults of all ethnicities who had learning disabilities. Her role was to support clients in the community and in their homes. The claimant's job description (page 9) includes the following:

    14.1. The role holder will provide practical and emotional support to customers that will promote independence and will assist and support other involved parties, to ensure positive outcomes for all customers;

    Key role accountabilities:

    14.2. provide person centred high-quality support to individuals who may have complex needs and may display behaviours that challenge the service to maintain and develop daily living skills, enable full participation in a range of activities and assist and support customers to access appropriate community services. To ensure all physical, emotional, social, cultural and religious needs are met;

    14.3. promote equal opportunities in the workplace and deliver services which are accessible and appropriate to the diverse needs of customers in line with the Social Model of Disability

    14.4. Through personal example, open commitment and clear action ensure diversity is positively valued, resulting in equal access and treatment in employment, service delivery and communications.

15. The claimant was provided with a Statement of written particulars of employment (page 11A). This indicated that the claimant's terms and conditions of employment would be in accordance with national and local collective agreements. Specific reference was made to the applicable agreements, including the disciplinary procedure and employee Code of Conduct. The claimant was advised that information in relation to these policies/agreements were available on the intranet or through the personnel shared service.

16. The City Council's Employee Code of Conduct states:

3.4 Employees will not, either in an official capacity or in any other circumstance, conduct themselves in a manner which could reasonably be regarded as bringing the Council into disrepute.

4.1 Employees must ensure that Council policy relating to equality and equal opportunity is followed. All members of the local community, customers and colleagues have a right to be treated with fairness and equity irrespective of their race, ethnicity, age, gender, religion or belief and sexuality. Employees need to make sure that they are aware of the factors which result in inequality and oppression for the above groups

17. The claimant was not provided with any training in relation to either equal opportunities or the Social Network policy, which was formulated after the claimant commenced employment.

18. The City Council's Social Media policy includes:

6. Principles of use – personal social media accounts

6.1 The council respects the rights of all employees to a private life. However, staff must be aware that where they are identified as a council employee, they are expected to behave appropriately and in line with the council's policies and employee Code of conduct;

6.2 All employees are reminded of their responsibilities as set out in the employee Code of conduct, and they should conduct their personal social media activity with this in mind;

6.3 All council employees are responsible for any content on their personal social media accounts, including tags and comments. The content should not breach the council's policies and employee Code of conduct. If an employee breaches Council policies and the employee Code of conduct, the Councils agreed disciplinary procedure may be invoked, depending on the circumstances

19. The claimant had a clean disciplinary record. No complaint or concern had been raised about the conduct of the claimant in the performance of her duties.

20. On 28 June 2017 the respondent received a complaint from a member of the public about the activities of the claimant on Facebook, where the claimant had a public account and identified herself as an employee of the respondent.

21. Mr Nick Whittingham was appointed as investigating officer in relation to this complaint.

22. The claimant was advised of the complaint and she was given alternate duties with another service at an office not regularly used by her direct colleagues during the course of the investigation. There was no complaint

about the conduct of the claimant during this time, when the claimant has access to the respondent's IT systems. The claimant did not perform her normal duties and was office based. Mr Whittingham was based in the same office.

23. By letter dated 3 August 2017 (page 63) Mr Whittingham invited the claimant to an investigatory interview on 8 August 2017. The letter informed the claimant that:

23.1. the reason for the investigatory interview was to investigate the post made by her on Facebook on 28 June 2017 in response to a Britain First article entitled "Islamisation: Muslim teacher awarded 7K (euros) compensation for hijab job rejection!"

23.2. the allegation potentially constituted gross misconduct which, if proven, could result in her summary dismissal;

23.3. the purpose of the interview was to establish the facts and to provide an opportunity for the claimant to supply answers;

23.4. as a result of the investigation disciplinary action may or may not be invoked;

23.5. she may have a friend or trade union representative present at the hearing.

24. The investigatory interview took place on 8 August 2017, when the claimant was accompanied by her trade union representative, Carl Greatbatch. Notes were made at that interview (page 64). At that interview:

24.1. the claimant was advised that the allegation was that she had on 25 June 2017 made what was perceived by a member of the public as a racist comment in response to a Facebook post by Britain First;

24.2. the complaint from the member of the public was noted as:

> I have discovered some very disturbing activity that involves an individual who claims to be an employee of Manchester City Council. I fear that with their radical views they pose a real danger to the public.

24.3. The claimant was shown the screen grabs of her Facebook page which had been provided by the member of the public as part of the complaint;

24.4. the claimant confirmed that the Facebook account was hers and used by her;

24.5. the claimant was asked whether she had posted the comment “Go home” in response to the story posted by Britain First;

24.6. The claimant stated that she shared the story with others but did not make the comment “Go home” in relation to that post. The claimant said that she had made that comment “Go home” in relation to another article but that she could not remember which one. Her explanation for the comment “Go home” was for people to go home to their homes;

24.7. The claimant did not say that her friend Mr Walsh could give evidence about the actual post on which she had added the “Go home” comment. The claimant did not ask the respondent to investigate her Facebook account to find the actual post on which she had made the comment;

24.8. It was pointed out to the claimant that her comment was in a string of other comments with racist connotations in relation to the post. The claimant stated that she was not responsible for other people’s comments;

24.9. The claimant accepted that the phrase “Go home” can be used as a derogatory and racist comment to insinuate that people of ethnic origin do not have the same right as others due to their ethnic background and should not live in this country. However, the claimant said that she did not mean it in that way;

24.10. The claimant accepted that by identifying herself as an employee of the respondent on her Facebook page, and that given the nature of her role supporting all members of Manchester’s diverse community, the expression of such a view on Facebook could put her position at risk;

24.11. The claimant stated that she had asked a family member to delete her Facebook totally and permanently;

24.12. The claimant did not say that she had deleted her Facebook account on direction of her line manager.

25. Following the interview the claimant asked to speak to Mr Whittingham to tell him that between the ages of 8 and 34 she had lived in both France and Germany and did not understand some language phrases properly.

26. Mr Whittingham decided that there was a case to answer and that the matter should proceed to a disciplinary hearing because:

26.1. This was a serious allegation by a member of the public;

26.2. The comment "Go home" has racist connotations implying that people of different ethnic origins do not deserve the same rights and protections as other fellow nationals;

26.3. the "Go home" comment had been made in relation to an article posted by Britain First, a far right political group and as part of a string of other comments that could be seen as racist such as "in Islam it's always Halloween";

26.4. the claimant's explanation about the comment being made on a different article was very vague;

26.5. the claimant had clearly identified herself as an employee of MCC in her Facebook profile.

27. By letter dated 25 November 2017 (page 61) Mr Whittingham advised the claimant that he intended to refer these matters to a formal disciplinary hearing. He handed that letter in person to the claimant.

[On this the tribunal accepts the evidence of Mr Whittingham, who gave his evidence in a clear, consistent and straightforward manner.]

28. By letter dated 3 January 2018 (page 70) the claimant was invited to attend a disciplinary hearing on 18 January 2018. That letter:

28.1. set out the allegation as:

> Making an inappropriate and offensive comment on social media (Facebook) which is a breach of the City Council's Employee Code of Conduct (paragraphs 3.4 and 4.1) and the City Council's Social Media policy (section 6);

28.2. advised the claimant that the allegation constitutes gross misconduct and if proven could lead to summary dismissal;

28.3. enclosed a copy of the evidence bundle, the evidence which would be considered by the dismissing officer, which included copies of:

28.3.1. the screenshots provided by the member of the public as part of the complaint;

28.3.2. screenshots of the relevant Britain First post and the claimant's comment attributed to that post, taken by the respondent's communication team;

28.3.3. the role profile for the claimant's position of support worker (page 9);

28.3.4. The respondent's disciplinary policy, Social media policy and employee Code of conduct;

28.3.5. Notes of the investigatory interview ((pages 64-5);

28.4. advised the claimant that if she was intending to present documentary evidence or call witnesses then she should provide details in advance of the disciplinary hearing;

28.5. advised the claimant of her right of representation at the hearing by a friend or trade union representative;

28.6. acknowledged that the claimant would be represented by Mr Greatbatch, confirming that he had been provided with a copy of the evidence.

29. The respondent's disciplinary policy (page 14 – 32) provides a framework for dealing with incidents of improper behaviour and misconduct. It does not set out any specific time limit for the conduct of the investigatory disciplinary and appeal hearings. It does include the following:

> Timeliness in application of this process is crucial, procrastination or delay caused by any party involved needs to be addressed in the interests of a fair outcome which is in everyone's interests.

30. The disciplinary hearing took place on 18 January 2018. The claimant was represented by her trade union representative, Mr Greatbatch. Mr Whittingham attended as presenting officer. Notes were made of the hearing (pages 75 – 78). Nicola Owen was the disciplinary hearing officer. At the hearing:

30.1. neither the claimant nor her representative asked for an adjournment or indicated that they needed more time to prepare;

30.2. the claimant did not call any witnesses;

30.3. Mr Whittingham attended as presenting officer and made his presentation adding to his presentation notes (pages 72 and 73);

30.4. Mr Whittingham confirmed that during his investigation he could not find evidence that the claimant had had training in equality and diversity nor could he find any evidence that she had seen a copy of the Social Media policy or a copy of the Employee Code of conduct;

30.5. The claimant and her representative were given the opportunity to question Mr Whittingham and to present their case;

30.6. The claimant said that:

30.6.1. her ICT ability was very poor;

30.6.2. she did not know how the article from Britain First came to be on her newsfeed;

30.6.3. she did not know what her security settings were at the time;

30.6.4. she did not understand the difference between public and private settings;

30.6.5. she did not know what Britain First was;

30.6.6. she did share the post but she did not make the comment "Go home". She made the comment on a different story but could not remember which;

30.6.7. she lived in Germany from the age of eight and lived in France for 18 years and did not know the connotation of the phrase "Go home";

30.6.8. she did not intend to upset anyone and the comment had been misunderstood. She confirmed that she would not do it again.

30.7. the claimant's trade union representative stated that:

30.7.1. there was no dispute with the evidence;

30.7.2. the investigation had been undertaken fairly;

30.7.3. he acknowledged that the story from Britain First had been shared by the claimant, that Britain First is a racist organisation;

30.7.4. the claimant had no ICT ability and, although she had shared something that she should not have done while identifying as a Manchester City Council employee, the claimant would not necessarily have understood this;

30.7.5. this was at the lower end of breaking the policy, the claimant had an unblemished record, and a warning and mandatory training would be sufficient penalty;

30.8. The claimant and her representative did not:

30.8.1. object to Nicola Owen acting as disciplining officer. Did not make any allegations of bias against her;

30.8.2. bring any evidence about the posts/story on which the claimant had commented “Go home”;

30.8.3. say that her friend Mr Walsh could attest to the actual story on which she had commented “Go home”;

30.8.4. assert that the claimant’s line manager had ordered her to delete the Facebook account and/or that the deletion of the Facebook account had hampered her ability to answer the allegation;

30.8.5. invite the disciplinary officer to investigate the claimant’s Facebook account to find the other posts/story;

30.8.6. refer to other disciplinary action for the same offence in which dismissal was not the sanction;

30.8.7. assert that the claimant was being targeted for disciplinary action because of her age, because of a desire to get rid of higher paid staff, a decision to target certain employees due to age, and/or white English groups nearing retirement age;

30.8.8. assert that the claimant had received no mandatory 6 weeks Joint communication meetings during the period of investigation or that she had been left without support in the alternative role which she performed during the investigation.

30.9. The claimant did not complain that her trade union representative was not representing her fairly, did not assert that her trade union representative was biased in favour of the respondent because the respondent paid his wages.

31. During the disciplinary hearing Ms Owen tabled a short adjournment to enable her to obtain a copy of, and consider, the claimant’s statement of particulars of employment. When the meeting was reconvened the Statement of Particulars was tabled with the consent of the claimant and her representative.

32. The hearing was adjourned and the claimant was advised that she would be told of the outcome both verbally and in writing.

33. Following the disciplinary hearing Ms Owen considered her decision. She carried out no further investigation. She considered the documentary

evidence the same day and then spent some time considering her decision and the appropriate sanction.

[On this the tribunal accepts the evidence of Ms Owen. Whether or not Ms Owen made her decision at work or at home is irrelevant. Whether Ms Owen took documents home is irrelevant to the fairness of the decision. The tribunal is satisfied that Ms Owen gave due consideration to all the evidence and submissions made before reaching her decision.]

34. Having considered all the evidence presented at the disciplinary hearing and the representations made by and on behalf of the claimant Ms Owen formed the honest and genuine belief that the claimant was guilty of the conduct as charged because:

34.1. The claimant had confirmed that she operated the Facebook account which showed that she was employed by the respondent;

34.2. Ms Owen decided, on the balance of probabilities, that the claimant had put the comment “Go Home” on the Britain First article. Ms Owen was not satisfied that the claimant had put that comment on a different post because the claimant had failed to adduce satisfactory evidence about the other post;

34.3. The claimant had shared the article from Britain First, a far right party, known for being anti-Muslim and anti-immigrant, and the article contained anti-Muslim sentiment which was at odds with the values of the respondent;

34.4. Ms Owen did not accept the assertion that the claimant was unware of what she was doing, was unable to defend the allegation, because of her professed ignorance of ICT and/or social media. In reaching this decision Ms Owen considered that the claimant’s work-related ICT skills were not necessarily relevant to her use of social media accounts;

34.5. Ms Owen was satisfied that the claimant understood that her comment on Britain First’s article and sharing of the article could be perceived to be racist and was contrary to the respondent’s policies, even though the claimant had not received any formal training, even though the claimant had not received a copy of the Social Media Policy and there was no record that the claimant had received a copy of the respondent’s policies. Ms Owen noted that the Statement of Particulars of employment made it clear to the claimant that she was bound by the policies, which she was free to access. Further, Ms Owen noted that the claimant’s own job description, her key responsibilities made the respondent’s values clear. Ms Owen held the view that the ability to afford everybody equal and fair status is something that an employer should not have to train on

or instruct somebody to be. People's right to be seen as equals should not be something that individuals should have to be trained on. Ms Owen did not accept that the claimant did not understand that her comment was racist and offensive because the claimant had spent many years living and working in this country and English was her first language. Further, she had acknowledged that the comment was racist at the investigatory hearing.

35. Ms Owen then decided the appropriate penalty. Ms Owen noted that the claimant had continued working in a different office-based position and Ms Owen did consider alternatives to dismissal. She decided that dismissal was the appropriate penalty because;

35.1. the claimant was guilty of gross misconduct. Ms Owen found that the claimant had intended to make the comment "Go Home" about the Britain First article and had shared the post. She decided that this was a serious act of discrimination and conduct likely to bring the respondent into serious disrepute;

35.2. The claimant had not shown any genuine remorse and Ms Owen was not able to accept the claimant's reassurance that this would not happen again – Ms Owen took this to mean that the claimant would ensure that any of her comments were not published on a public Facebook or other social media account;

35.3. The mitigating factors put forward by the claimant, length of service and clean disciplinary record, did not reduce the gravity of the charge and/or its effect on the respondent. There had been a complaint from a member of the public and the public posting potentially affected the way the respondent was perceived by a wider range of people. The actions of the claimant had brought the respondent into disrepute. The respondent has a diverse workforce, the claimant was required to work amongst a diverse population. The chance of similar incidents occurring in the future were possible and therefore dismissal was the appropriate sanction.

36. In reaching her decision to dismiss Ms Owen did not look at other similar cases to compare the sanctions applied.

37. On 19 January 2018 Ms Owen telephoned the claimant and informed her of her decision to summarily dismiss her, confirming that an outcome letter would be sent to the claimant which would set out the right of appeal.

38. By letter dated 22 January 2018 (page 80) Ms Owen confirmed to the claimant the decision to summarily dismiss her with effect on 19 January 2018. The letter set out the reasons for dismissal in a clear manner and advised the claimant of the right of appeal.

39. The claimant exercised that right of appeal by letter dated 31 January 2018 (page 84).

40. Immediate action was not taken on that appeal because Ms Owen did not take steps to arrange the appeal hearing as she was required to do under the terms of the respondent's disciplinary policy. Ms Owen accepted that the considerable delay was her responsibility and she apologised for the delay at the appeal hearing.

41. By letter dated 28 April 2018 Ms Owen invited the claimant to an appeal hearing on 17 May 2018. That letter advised the claimant that:

    41.1. the appeal hearing officer was Nicola Thompson and the presenting officer was Nicola Owen. The presenting officer would present no witnesses. The appeal officer would use the same bundle of evidence as for the original disciplinary hearing together with a copy of the notes of that hearing and the claimant's appeal submission. The claimant was provided with a copy of the notes of disciplinary hearing;

    41.2. if the claimant wished to present documentary evidence or call witnesses she should advise Ms Owen in advance of the appeal hearing;

    41.3. she was entitled to be accompanied by a friend or trade union representative

42. The appeal hearing took place on 17 May 2018. Ms Owen attended as presenting officer. Notes were taken (pages 87-92). The claimant was represented by her union representative, Carl Greatbatch and Mr Phil Walsh attended as the claimant's witness. At the appeal hearing:

    42.1. Ms Owen presented the management case, explaining why she thought that her decision to dismiss was the correct decision, addressing the points of appeal and inviting the appeal officer to approve of the decision;

    42.2. the claimant and her representative were given full opportunity to state their case and to question Ms Owen;

    42.3. Mr Walsh gave evidence to support the claimant's assertion that her IT skills were not very good. He did not give evidence that he had witnessed the claimant posting the comment "Go home" on a different post/story. He was not stopped from giving such evidence: he never offered it;

[On this the tribunal accepts the evidence of Ms Thompson. The claimant was represented by Mr Greatbatch, an experienced trade union representative, at the hearing. It is highly unlikely that there would be any restriction on the evidence presented by the claimant when she was so represented. The claimant has not called Mr Greatbatch to support her evidence that the evidence of Mr Walsh was restricted to IT matters]

42.4. the claimant denied posting the comment and denied making any racist comment;

42.5. the claimant denied that she was racist and asserted that she had done a lot of work assisting immigrants at work and in the community. She did not provide any evidence to support this assertion;

42.6. the claimant asserted that a work colleague, JW, had done something similar but had been demoted not dismissed.

43. At the appeal hearing the claimant and her representative did not:

43.1. bring any evidence about the posts/story on which the claimant had commented “Go home”;

43.2. say that her friend Mr Walsh could attest to the actual story on which she had commented “Go home”;

43.3. assert that the claimant’s line manager had ordered her to delete the Facebook account and/or that the deletion of the Facebook account had hampered her ability to answer the allegation;

43.4. invite the appeal officer to investigate the claimant’s Facebook account to find the other posts/story;

43.5. assert that the claimant was being targeted for disciplinary action because of her age, because of a desire to get rid of higher paid staff, a decision to target certain employees due to age, and/or white English groups nearing retirement age;

43.6. assert that the claimant had received no mandatory 6 weeks Joint communication meetings during the period of investigation or that she had been left without support in the alternative role which she performed during the investigation.

44. Following the appeal hearing Ms Thompson carried out a further investigation by:

44.1. checking with Human Resources (HR) about the work circumstances of the colleague JW, who was line managed by Ms Thompson. Investigation confirmed that:

44.1.1. the circumstances of the claimant's case were not similar as JW had not shared or posted a comment on an article and her husband had access to her Facebook account. JW was not responsible for her Facebook account which showed that she had liked a racist comment. Investigation had shown that it was JW's husband who had liked the racist comment on JW's Facebook account;

[On this the tribunal accepts the evidence of Mrs Thompson. There is no documentary or other satisfactory evidence to challenge that evidence]

44.1.2. in other cases where racism had been alleged and proven the employee had been dismissed;

44.2. interviewing Mr Whittingham to obtain his evidence on the claimant's assertion that she had not received a copy of the letter dated 25 November 2017. Mrs Thompson accepted his evidence that he had handed a copy of the letter to the claimant. Ms Thompson met Mr Whittingham for the first time in the course of this appeal. She had had no earlier interaction with him

45. Following the further investigation, and having considered the evidence and submissions made at the Appeal hearing Ms Thompson decided to uphold the decision to dismiss summarily because:

45.1. she believed that the evidence proved that the claimant had made a racist comment about a racist post and that the claimant knew it was racist. She rejected the claimant's assertion that because she had lived in France and Germany she did not understand the meaning of the phrase "Go Home";

45.2. she rejected the claimant's assertion that the claimant had posted the comment "Go Home" on a different article. She did not accept that there was evidence to show that there had been a time delay of 20 minutes between the claimant sharing the post and making the alleged comment, did not accept that this supported the claimant's assertion that the comment "Go home" had been made on a different article;

45.3. although the claimant had not been shown the relevant policies Ms Thompson noted that the claimant's statement of particulars set out the contractual policies, which the claimant could and should have read. Ms Thompson was satisfied that the claimant was aware of the respondent's

values as set out in her job role, which confirmed that it was the claimant's role to promote equal opportunities in the workplace and by personal example ensure that diversity is positively valued resulting in equal access and treatment in employment, service delivery and communications;

45.4. she was satisfied that a fair procedure had been followed and that the claimant had been given adequate time to prepare for the disciplinary hearing;

45.5. although the claimant had three years' service as an employee with the respondent and had a clean disciplinary record, dismissal was the appropriate penalty. Redeployment to a different role was not appropriate because the conduct amounted to gross misconduct and had resulted in an irrevocable breach of trust and confidence.

46. By letter dated 23 May 2018 (page 96), posted on 25 May 2018, Ms Thompson advised the claimant of her decision and her reasons, together with a reply to each of the points of appeal. The claimant was advised of her right of one further right of appeal to elected members. By email dated 31 May 2018 the claimant complained that she had not received notification of the appeal outcome. Ms Thompson, with the agreement of the claimant forwarded a copy of the letter dated 23 May 2018 by way of email.

47. The claimant exercised that further right of appeal to elected members by the document dated 6 June 2018 (pages 103 -106).

48. An appeal hearing was held on 9 October 2018. Ms Thompson attended to present the management case. The claimant was represented by Mr Phil Walsh. During that second appeal hearing:

48.1. the claimant was given full opportunity to state her case;

48.2. Mr Walsh gave evidence that he saw the claimant share the Britain First post and then later comment "Go home" on an unrelated post. He could not recall the precise nature of the particular unrelated post;

48.3. the claimant provided no evidence as to alleged animosity displayed by the other staff against the claimant;

48.4. the claimant provided no evidence to support her assertion that she was being targeted for disciplinary action because of her age, because of a desire to get rid of higher paid staff, a decision to target certain employees due to age, and/or white English groups nearing retirement age

49. The Committee of Elected members reached the decision to uphold the decision to dismiss. The reasons for that decision were explained by letter dated 18 October 2018 (pages 140-144). That letter shows that the Committee of Elected members considered each point of appeal and considered the claimant's representations at the hearing before reaching their decision.

Additional Facts relating to Contributory Conduct

50. The claimant did, on her public Facebook account in which she identified herself as an employee of the respondent, share a post by Britain First and add the comment "Go Home" on that article. The claimant understood that comment to be a negative racist comment towards Muslims and/or immigrants. Having worked for the respondent for many years the claimant knew that the expression of such comments was unacceptable behaviour and contrary to the respondent's policies and values. The tribunal does not accept that the claimant did not understand the comment to be racist, does not accept that the lack of training in equality and diversity and the social media policy meant that the claimant did not understand that her comment was unacceptable behaviour and contrary to the respondent's policies and values. The claimant's first language is English and she has lived and worked in England for many years.

The Law

51. An employer must show the reason for dismissal, or if more than one, the principal reason, and that the reason fell within one of the categories of a potentially fair reason set out in Section 98(1) and (2) Employment Rights Act 1996 ("ERA 1996"). It is for the employer to show the reason for dismissal and that it was a potentially fair one, that is, that it was capable of justifying the dismissal. The employer does not have to prove that it did justify the dismissal because that is a matter for the tribunal to assess when considering the question of reasonableness.

52. Misconduct is a potentially fair reason for dismissal. **British Home Stores Ltd v Burchell [1980] ICR 303** provides useful guidelines in determining this question. It sets out a three-fold test stating that the employer must show that:

    52.1. he genuinely believed that the conduct complained of had taken place;

    52.2. he had in mind reasonable grounds upon which to sustain that belief; and

52.3. at the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

The Tribunal notes and takes regard of the fact that the guidelines set out in **Burchell** are guidelines only and that the burden of proof on the question of reasonableness does not fall upon the employer under this head, and is a question for the Tribunal to decide, when appropriate, in determining the question of reasonableness under Section 98(4) ERA 1996, under which the burden of proof is neutral. **Boys and Girls Welfare Society v McDonald [1997] ICR 693**. as confirmed in **West London Mental Health Trust v Sarkar [2009] IRLR 512.**

53. Once the employer has shown a potentially fair reason for dismissing, the Tribunal must decide whether that employer acted reasonably or unreasonably in dismissing for that reason. The burden of proof is neutral. It is for the Tribunal to decide. Section 98(4) ERA 1996 states:-

"The determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case".

54. The test of whether or not the employer acted reasonably is an objective one, that is, Tribunals must as industrial juries determine the way in which a reasonable employer in those circumstances in that line of business would have behaved. There is a band of reasonable responses. The Tribunal must determine whether the employer's action fell within a band of reasonable responses. **Iceland Frozen Foods Limited v Jones [1983] ICR 17**. (Approved by the Court of Appeal in **Post Office v Foley**, **HSBC Bank plc (formerly Midland Bank plc) v Madden [2000] IRLR 827**. The range of reasonable responses test (the need for the tribunal to apply the objective standards of the reasonable employer) must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed**. Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23.** The tribunal bears that in mind and applies that test in considering all questions concerning the fairness of the dismissal. In determining the reasonableness of an employer's decision to dismiss, the tribunal may only take account of those facts (or beliefs) which were known to the employer at the time of the dismissal.

55. The reasonable investigation stage has been subjected to refinement in two judgments, which are relevant here. First, **A v B** [2003] IRLR 405, a judgment of Elias J (President) and members, indicates that there is to be a standard of investigation which befits the gravity of the matter charged. If

what is sought to be sanctioned is a warning, the standard of investigation will be lower than where dismissal is concerned. Elias LJ, now in the Court of Appeal, reinforced that position in **Salford v Roldan** [2010] EWCA Civ 522, indicating that where the circumstances of a dismissal would create serious consequences for the future of an employee, such as deportation, particular care must be given to the investigation.

56. Whether or not the employer acts fairly depends on whether in all the circumstances a fair procedure, falling within the range of reasonable responses, was adopted. The form and adequacy of a disciplinary enquiry depends on the circumstances of the case. What is important is that, in the interests of natural justice, the employee can be given a chance to state his or her case in detail with sufficient knowledge of what is being said against him or her to be able to do so properly. **Bentley Engineering Co Limited Mistry [1979] ICR 2000**.

57. In deciding whether the dismissal is fair the Tribunal must consider whether summary dismissal falls within the band of reasonable responses, taking into account all the surrounding circumstances, the employer's practice, the contract of employment and any definitions of gross misconduct contained therein, the knowledge of the employee, the seriousness of the offence. What conduct amounts to gross misconduct will depend on the facts of the individual case. Generally gross misconduct is conduct which fundamentally undermines the employment contract, is a deliberate and wilful contradiction of the contractual terms or amounts to gross negligence. The current ACAS code gives examples of gross misconduct which includes theft or fraud/physical violence or bullying/deliberate and serious damage to property/serious insubordination/serious misuse of an organisation's property or name/deliberately accessing internet sites containing pornographic, offensive or obscene material/unlawful discrimination or harassment/bringing the organisation into serious disrepute/serious incapability at work brought upon by alcohol or illegal drugs/causing loss, damage or injury through serious negligence/a serious breach of health and safety rules/a serious breach of confidence.

58. The tribunal has considered the current ACAS Code of Practice and the six steps which an employer should normally follow when handling disciplinary issues, namely:

- Establish the facts of each case;
- Inform the employee of the problem;
- Hold a meeting with the employee to discuss the problem;
- Allow the employee to be accompanied at the meeting
- Decide on appropriate action

- Provide employees with an opportunity to appeal.

The tribunal notes that the Code states that it is important to deal with issues fairly including dealing with issues promptly and without unreasonable delay, acting consistently carrying out any necessary investigations, and giving the employee the opportunity to state their case before any decisions are made.

59. Section 98 (4) Employment Rights Act 1996 requires Tribunals to determine the reasonableness of the dismissal in accordance with equity. Inconsistency of punishment for misconduct may give rise to a finding of unfair dismissal. Guidance was given in a Court of Appeal case of **Post Office v Fennell [1981] IRLR 221** where Brandon L J said:-

> "It seems to me that the expression "equity" as so used comprehends the concept that employees who misbehave in much the same way should have meted out to them much the same punishment, and it seems to me that an Industrial Tribunal is entitled to say that, where that is not done, and one man is penalised much more heavily than others who have committed similar offences in the past, the employer has not acted reasonably in treating whatever the offence is as a sufficient reason for dismissal".

60. In **Hadjioannou v Coral Casinos Ltd 1981 IRLR 352** the EAT deprecated the idea of a "tariff" approach to misconduct cases, observing that s98(4) requires the tribunal to consider the individual circumstances of each case. The EAT held that a complaint of unreasonableness based on inconsistency of treatment would only be relevant where:

- employees have been led by an employer to believe that certain conduct will not lead to dismissal;
- evidence of other cases being dealt with more leniently supports a complaint that the reason for dismissal stated by the employer was not the real reason;
- decisions made by an employer in truly parallel circumstances indicate that it was not reasonable for the employer to dismiss.

61. The tribunal has considered and applied Sections 118-124 Employment Rights Act 1996. The tribunal notes in particular:-

    61.1. Section 122(2) under which a tribunal may reduce a basic award where the employee's conduct before dismissal makes a reduction just and equitable;

    61.2. Section 123(1) whereby the tribunal is directed to make a compensatory award in such an amount as it considers just and equitable in all the circumstances;

61.3. Section 123(6) whereby a tribunal should reduce the compensatory award by such proportion as it considers just and equitable where the dismissal was to any extent caused or contributed to by any action of the claimant.

62. In **Nelson v BBC (No2) [1979] IRLR 346** the Court of Appeal said that three factors must be satisfied if the tribunal are to find contributory conduct:-

- the relevant action must be culpable and blameworthy
- it must have actually caused or contributed to the dismissal
- it must be just and equitable to reduce the award by the proportion specified

63. In **Gibson v British Transport Docks Board [1982] IRLR 228** Browne-Wilkinson stated that what has to be shown is that the conduct of the claimant contributed to the dismissal. If the claimant has been guilty of improper conduct which gave rise to a situation in which he was dismissed and that conduct was blameworthy, then it is open to the tribunal to find that the conduct contributed to the dismissal.

64. The tribunal has considered and where appropriate applied the authorities referred to in submissions.

Determination of the Issues

(including, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence)

65. The claimant was dismissed and the effective date of termination was 19 January 2018.

66. The tribunal has considered the reason for dismissal. The tribunal has considered all the circumstances and in particular the following:

66.1. an investigation began after the respondent received a complaint from a member of the public about a comment on the claimant's Facebook account;

66.2. an investigation was carried out when the claimant was given the opportunity to explain;

66.3. Nicola Owen was appointed as disciplining officer to consider the

allegation of misconduct, namely “making an inappropriate and offensive comment on social media (Facebook)”;

66.4. the claimant did not object to Nicola Owen acting as disciplining officer, did not make any allegations of bias against her at the beginning of the disciplinary hearing;

66.5. the claimant has failed to provide any satisfactory evidence to support the assertion that Nicola Owen, or indeed any other manager, was biased against the claimant. The fact that Ms Owen, at the first appeal hearing, asked Ms Thompson to confirm the decision to dismiss, does not show bias in Ms Owen’s decision to dismiss at the time she reached that decision. Ms Owen attended the appeal hearing as dismissing officer and put forward the management case, made comment on the grounds of appeal and provided further explanation for the decision to dismiss;

66.6. there is no satisfactory evidence to support the assertion that during the investigation the claimant was left without support in her alternate role, that she was “hung out to dry”. These allegations were not made during the disciplinary process;

66.7. the assertion that the claimant’s trade union representative was biased against the claimant and in some way contributed to the decision to dismiss is unsupported by the evidence and is without merit;

66.8. there is no satisfactory evidence to support the assertion that the claimant was dismissed because of her age, because of a desire to get rid of higher paid staff, a decision to target certain employees due to age, and/or white English groups nearing retirement age. These assertions were not made during the disciplinary process until the appeal to elected members. No evidence was provided at that second appeal hearing to support that assertion. No satisfactory evidence has been adduced before this tribunal to support that assertion;

66.9. Ms Owen reached her decision after the claimant was called to attend a disciplinary hearing, when the claimant was represented by her trade union representative and was given the opportunity to answer the allegations;

66.10. Ms Owen gave due consideration to all the evidence and submissions made before reaching her decision;

66.11. there was clear evidence before the dismissing officer that the claimant had shared the Britain First article (that was accepted by the claimant) and that the claimant was recorded on her Facebook account

as having commented "Go home" on that article, referring to a Muslim lady wearing a jihab (that was denied by the claimant);

On balance, having considered all the evidence, the tribunal finds that the dismissing officer, Nicola Owen, dismissed the claimant because after the disciplinary hearing, and hearing the claimant's explanation/submissions, Ms Owen had formed the honest and genuine belief that the claimant had shared the Britain First article, had added the comment "Go home", and was guilty of the conduct complained of, namely, making an inappropriate and offensive comment on social media.

67. The reason for the dismissal was the claimant's conduct. Conduct is a potentially fair reason for dismissal within s98 (1) and (2) Employment Rights Act 1996.

68. The tribunal has considered all the circumstances of this case, including those matters referred to in s98(4) Employment Rights Act 1996, to determine whether, in all those circumstances, the dismissal of the claimant for the reason stated was fair or unfair. In deciding whether the decision to dismiss was fair or unfair the tribunal reminds itself that it is not for the tribunal to substitute its view for that of the employer. The question is whether the respondent act fairly within the band of reasonable responses of a reasonable employer in concluding that this employee was guilty of gross misconduct and dismissing her.

69. Having considered whether the respondent carried out a reasonable investigation of the alleged misconduct, the tribunal notes in particular as follows:

69.1. the investigation began following a complaint from a member of the public that the claimant had posted an offensive comment on her Facebook account;

69.2. screenshots of the claimant's Facebook account were obtained;

69.3. the claimant was asked whether this was her Facebook account and asked for an explanation of the entries on that account;

69.4. the claimant did not dispute that this was her Facebook account, that it was public, that she did identify herself in that account as an employee of the respondent. The claimant accepted that she had shared a story, posted by Britain First, entitled "Islamisation: Muslim teacher awarded 7k (euros) compensation for hijab job rejection" but denied that she had placed the comment "Go home" on that story in her Facebook account. The claimant asserted that she had placed that

comment on a different story on her Facebook account. The claimant was unable to provide details of that story or explain why the comment appeared in relation to the wrong post;

69.5. the claimant did not say that her Facebook account had been hacked, did not assert that a third person was responsible for the posting and comments;

69.6. the investigation was commensurate with the seriousness of the charge, which was clearly identified as a possible act of gross misconduct from the outset. The claimant has failed to identify any further investigation which the respondent could reasonably have carried out. The failure of the respondent to investigate the claimant's Facebook account to find another story against which the claimant said she had added the comment "Go home" does not make this an unfair investigation. The claimant did not, at the time, request the respondent to carry out any such investigation, or to provide her with assistance to carry out a more detailed investigation herself. Further, it is difficult to understand how the respondent could have carried out any investigation of the claimant's personal account when the claimant had deleted the account when she was first made aware of the complaint. There is no satisfactory evidence to support the assertion that the claimant's line manager directed her to delete her Facebook account. That assertion was not made by the claimant during the disciplinary process;

In all the circumstances the tribunal finds that the respondent did conduct a reasonable investigation of the alleged misconduct

70. Having considered whether, having conducted that investigation, the respondent had reasonable grounds to support its belief, the tribunal notes in particular as follows:

70.1. the claimant accepted that she had a public Facebook account;

70.2. the evidence was clear that the claimant had shared the Britain First article, that was not in dispute;

70.3. the evidence was clear that the claimant's public Facebook account recorded that she had posted the comment "Go home" on the Britain First article;

70.4. there was no satisfactory evidence to support the claimant's assertion that she had not placed the comment "Go home" in relation to the Britain First story

Having considered all the circumstances the tribunal finds that the respondent did have reasonable grounds to support its belief.

71. Having considered the procedure adopted by the respondent the tribunal notes and finds that:

71.1. the specific allegation of misconduct was put to the claimant who was given full opportunity to state her case both during the investigation and at the disciplinary hearing;

71.2. there was a considerable delay in the conduct of the investigatory procedure. The tribunal accepts the evidence of Mr Whittingham and finds that he did in November 2017 hand to the claimant the letter dated 25 November 2017 setting out the outcome of his investigation. The delay in the investigation, and the delay in holding the disciplinary hearing, did not prejudice the claimant's right to a fair hearing. The claimant had been interviewed shortly after the complaint was received from a member of the public, when the claimant's recollection of her activity on Facebook was reasonably fresh, when she could begin to collect any relevant evidence and arrange for relevant witnesses to attend. The claimant received a copy of all the documentary evidence by letter dated 3 January 2018 in advance of the disciplinary hearing on 18 January 2018. She had adequate time to prepare. The claimant did not request a postponement of the hearing, did not require more time to prepare;

71.3. the respondent followed a fair disciplinary procedure in that the claimant was advised of her right to be represented at the disciplinary hearing, the right to introduce evidence and call witnesses. The claimant was not denied the right to call witnesses at the disciplinary hearing, where she was represented by her trade union. The claimant and her representative were given full opportunity to state her case and the matters put forward on behalf of the claimant were considered by the dismissing officer, before reaching her decision;

71.4. Ms Owen gave due consideration to all the evidence and submissions made before reaching her decision. Whether or not Ms Owen made her decision at work or at home, whether or not Ms Owen took documents home with her is irrelevant to the fairness of the decision;

71.5. the claimant was advised of her rights of appeal and exercised those rights;

71.6. the claimant was given the opportunity to call witnesses and did so at both appeal hearings. The tribunal does not accept the assertion that the claimant's witness, Mr Walsh, was prevented from giving relevant

evidence to the first appeal hearing or at any other time. The claimant was represented by her trade union throughout the disciplinary process. The claimant and her representative were given full opportunity to state her case and the matters put forward on behalf of the claimant were considered by the appeal officer, and Elected Members, before reaching their decisions;

71.7. the claimant now expresses dissatisfaction with the representation she received from her trade union representative. She did not express such dissatisfaction at the time. In any event, the respondent is not responsible for the actions of the trade union representative. If the claimant was dissatisfied with his services then it was open to her to seek alternative representation, as she did at the second appeal. The assertion that Mr Greatbatch in some way affected or contributed to the decision to dismiss is unsupported by the evidence and is without merit;

71.8. there was a considerable delay in the appeal process. However, this did not affect the fairness of the procedure. The claimant was provided with all relevant documentary evidence, including notes of the disciplinary hearing. There is no satisfactory evidence to support the claimant's assertion that she was prevented from calling relevant witnesses by reason of the delay;

71.9. the six steps recommended in the ACAS code were followed;

In all the circumstances the tribunal finds that, viewed overall, the procedure adopted was fair.

72. In deciding whether, in reaching the decision to dismiss, the respondent acted within the band of reasonable responses of a reasonable employer faced with similar circumstances the tribunal notes in particular that:

72.1. the respondent was reasonable in rejecting the claimant's assertion that she did not understand the phrase "Go home" as being racist and/or offensive because she had lived in Germany as a child. The dismissing and appeal officers were reasonable in concluding that as English was the claimant's first language and she had lived in the UK for the last 18 Years that the claimant did understand the meaning of the phrase "Go home";

72.2. the respondent was reasonable in concluding that the fact that the claimant had not received training on the Social Media policy and/or Equal opportunities policy did not support a finding that the claimant did not understand that she had posted a racist comment;

72.3. the respondent did take into account the claimant's length of service and clean disciplinary record. However, the respondent was reasonable in deciding that the posting of a racist comment on a public social media account did amount to gross misconduct. The claimant's role as a support worker required her to work with vulnerable adults of all ethnicities who had learning disabilities. The actions of the claimant did fundamentally undermine the employment contract, and the respondent was reasonable in finding that this was a deliberate and wilful act. Any reasonable employee would understand that this could amount to gross misconduct and that dismissal was a likely consequence, whether or not they had received specific training on the point. The claimant's role profile clearly indicates the need to ensure that all the physical emotional social cultural and religious needs of the customers, to whom the claimant gave support, were met. An express requirement was to promote equal opportunities in the workplace. The claimant's Statement of terms and conditions informed the claimant that the disciplinary rules and procedures and the Employee Code of Conduct applied to her, and she was informed that these were available on the Intranet or through the Personal Shared service;

72.4. the respondent did consider alternatives to dismissal, did consider redeployment to a different role. Ms Owen considered and rejected this possible sanction for the reasons set out at paragraph 35 above. Ms Thompson also considered and rejected this possible sanction for the reason set out at paragraph 45 above. It fell within the band of reasonable responses to dismiss rather than to redeploy her, to place the claimant in a permanent non-public role. The claimant had been suspended from her normal duties pending the investigation and had, for some months, performed an office based role without incident and/or complaint. However, a high degree of trust was placed in the claimant, and the respondent was reasonable in deciding that the posting of a racist comment on a public Facebook account, which identified the claimant as an employee of the respondent, had breached that trust, that there was a chance of similar incidents occurring in the future and that dismissal was the appropriate penalty;

72.5. The case of the work colleague JW does not support the argument of inconsistency in treatment. The circumstances of the disciplinary charge against JW were not truly parallel to the circumstances of the charge against the claimant. There is no satisfactory evidence of any decisions made by this employer in truly parallel circumstances which indicate that it was not reasonable for the respondent to dismiss in these circumstances;

In all the circumstances, the tribunal finds that dismissal did fall within the band of reasonable responses.

73. Taking into account all the circumstances the tribunal finds that the dismissal was fair.

Contributory Conduct

74. Further, and in any event, if the tribunal is wrong on that, if the dismissal was unfair, the tribunal finds that the claimant was guilty of gross misconduct which caused her dismissal. The tribunal is satisfied that the claimant did share the story from Britain First and posted the comment “Go home” on that story. It was the claimant’s job to assist individuals in the community, to enable full participation in a range of activities, and to assist and support those individuals, to ensure all physical, emotional, social, cultural and religious needs were met. She was required to work with vulnerable adults of all ethnicities who had learning disabilities. Some of those individuals may have been Muslim, may have been immigrants, may have come from an ethnic minority background. The sharing of the article and posting the comment demonstrated that the claimant held negative views towards Muslims, immigrants, some of the people she was required to support in the community. The tribunal is satisfied that this was a deliberate and intentional act by the claimant which amounted to culpable and blameworthy conduct. It is clear that this conduct caused her dismissal. The investigation began only because of the public complaint about the Facebook entry. If the claimant was unfairly dismissed then it would be appropriate to reduce the basic and compensatory award by 100%.

Employment Judge Porter

Date:7 March 2019

REASONS SENT TO THE PARTIES ON

8 March 2019

FOR THE TRIBUNAL OFFICE