EMPLOYMENT TRIBUNALS

Claimant:	**Ms K Marshall**
Respondent:	**Tesco Stores Limited**

Heard at: Birmingham	**On: 6th December 2018**
Before:	**Employment Judge Dawson**

Representation

Claimant:	**Mr Ratan (Counsel)**
Respondent:	**Mr Gorasia (Counsel)**

REASONS

1 This is the written version of the reasons delivered orally at the hearing of this matter.

2 The claimant brings a claim of unfair dismissal.

Issues

3 The issues were identified at the outset of the Hearing and to some extent summarised by Mr Ratan in the Speaking Note prepared for his closing submissions. I will set out the issues as identified at the start of the hearing; they were articulated slightly differently by Mr Ratan, but they come to the same point.

4 The first issue is whether the claimant was dismissed or not. Her primary case is that she was summarily dismissed on 18 January 2018 and a subsequent appeal did not alter that position; alternatively, however, she contends that if the appeal did overturn the original decision and,

therefore her dismissal vanished, the respondent was then in repudiatory breach of contract, such that she was entitled to resign and therefore she was constructively dismissed. The respondent argues that the effect of the appeal hearing was to extinguish the dismissal and that it was not in repudiatory breach of contract.

5 If there was a dismissal, the next issue is whether the respondent had a potentially fair reason for the dismissal. The respondent says that the reason was conduct (which was not disputed by the claimant) and the next issue therefore, subject to arguments Mr Ratan makes about the Human Rights Act 1998, is whether the dismissal was fair within the meaning of section 98(4) Employment Rights Act 1996 including the tests laid down in British Home Stores v Burchell [1980] ICR 303;

5.1 whether the dismissing officer had a genuine belief in the alleged misconduct,

5.2 whether that belief was on reasonable grounds and

5.3 whether there was a reasonable and sufficient investigation.

6 At the outset of the Hearing, Mr Ratan, on behalf of the claimant, stated that the only issue in relation to procedural fairness was that it was alleged that the dismissing officer had pre-determined the outcome of the process and, therefore, the Hearing itself was not fair. The claimant made some additional complaints about the investigation in her witness statement, but they were not put into the list of issues and were not pursued in cross examination by Mr Ratan. I have therefore not considered them further. As a result of evidence given by the dismissing officer in cross examination, Mr Ratan sought to amend the list of issues and to put in issue the question of whether allegations which formed the basis of the dismissing officer's decision to dismiss were put to the claimant and she was allowed to comment on them. Mr Gorasia fairly and properly did not object to the widening of the issues to that extent and, therefore, I have considered that issue in my judgment.

7 Depending on the answer to the questions posed by British Home Stores v Burchell, the next issue is whether the decision to dismiss was within the band of reasonable responses open to an employer (which is technically a question also falling within section 98(4) Employment Rights Act 1996).

8 Finally, if I were to find that the claimant was unfairly dismissed it will be necessary for me to go on to consider questions of reduction of the basic or compensatory award pursuant to the decision in *Polkey v Dayton* [1998] AC 344 or sections 122 or 123 Employment Rights Act 1996..

9 Mr Ratan has impressed upon me that running through at least some of the issues is the importance of the right that the claimant has under the Human Rights Act 1998, and in particular Article 10 within Schedule 1, to freedom of expression. He says that impacts, particularly, on the question of whether there was a potentially fair reason for the dismissal of the Claimant (and in particular whether any conduct can be sufficient for the purposes of s98(2)(b) Employment Rights Act 1996 or only

misconduct amounting to a breach of contract) and whether the decision to dismiss her was within the band of reasonable responses.

10 I limit the findings of fact which I am about to make to those issues as determined.

Conduct of the Hearing

11 The claimant gave evidence on her own behalf and in addition provided me with 3 witness statements; one from Rob Hampton; one from Stephen Rudge and one from Stephen Yates. I have read those statements but have given them little weight since the makers of those statements did not attend for the purposes of cross examination.

12 The respondent called evidence from Mr Clayton, the investigatory manager, Ms McKay the dismissing officer and Ms Goodall who heard the appeal.

13 I was also provided with a bundle of documents.

14 In terms of the way the Hearing ran, following agreement of the issues I invited the parties to agree a timetable for the cross examination of witnesses and provision of submissions to enable me to give an oral judgment to be given on the second day of the hearing. I am grateful to both counsel for the constructive way in which they both gave a timetable and then stuck to it.

15 I make the following findings of fact,

Findings of Fact

16 The claimant was employed from 19 September 1989 by the respondent. At the date of her dismissal she was employed as a team manager.

17 In July 2016, the claimant was given a final warning for breach of the respondent's social media policy. That warning expired on 7 January 2017. The parties before me agreed that the fact of the written warning was relevant to the extent that the claimant would have a heightened awareness of the social media policy and the need to conform to it. The warning appears at page 55 of the bundle of documents and states that the improvement required of the claimant was to follow the company social networking policy and to be mindful of the impact versus the intent of messages.

18 The respondent has a social media policy which appears at page 37 of the bundle. It includes the following statements:

> "Do not post things or send messages that could damage our reputation, bring the Company in to disrepute or cause actual or likely harm to the Company or colleagues. Don't use statements, photos, videos, audio or send messages that reasonably could be viewed as malicious, abusive,

> offensive, obscene, threatening, intimidating or contain nudity or images of a sexual nature or that could be seen, as bullying, harassment or discrimination.

19 The respondent also has a disciplinary policy which includes a list of non-exhaustive examples of gross misconduct including posting offensive and/or inappropriate material on a social networking site and, separately, "any other action which on a common-sense basis is considered a serious breach of acceptable behaviour." (page 47C of the bundle)

20 The claimant has a Facebook account which at the date that we are concerned with, I was told, included 450 to 500 friends who could see her posts.

21 On 24 November 2017, the claimant made a post on facebook which appears at page 57 of the bundle. It states:

"Don't go anywhere near Tesco, Lichfield! Car park grid locked …"

22 She was off work on the day that she wrote that post.

23 On 10 December 2017, the claimant was off work and it had been snowing. She posted the message which appears at page 64 of the bundle which states:

"I really need to bite my tongue …. But you know me!!! You CAN get to work people … Its really not that bad!! Makes my blood boil … Its snow …. Just a bit of … Learn to drive properly …. You can do it!!"

24 Two people who worked at the same Tesco Store as the claimant responded to those messages. One was Hayley Preston who the claimant was not responsible for but who was at the level of a customer assistant (and so junior to the Claimant). She posted:

"Are you taking the piss Karen, people have crashed their cars trying to get to work? Joker."

25 Kate Atkinson also responded. She was a customer assistant who reported the claimant. She wrote (quoting from the posting at page 73 of the bundle which is not redacted).

"This status is clearly about me text me if you have got a problem mate, cracked! You've got some fucking cheek. Come get me mate and I'll happily work for you ."

26 At some point in the exchange (it is not entirely possible to tell when from the documents but after the initial post from the claimant) the claimant then posted:

"I've got back from B'ham … our lead manager has got to work from Solihull … I've had to dig my car out too … its not hard … just saying … its used as an excuse when people cant be bothered"

27 In response to Kate Atkinson's post, the claimant then sent a personal message to her by What'sApp stating

> *"status was not about you at all!!!!! Are you one of those then … that's called in, because you can get there?? Thought you were sick again!!! I'll gladly give you a lift … No need for the middle finger … Don't cross that line honey ."*

28 Ms Atkinson replied:

> *"If you say so, matey, keep your opinions to yourself. I was poorly yesterday and was back in today. I've crashed my car because "I need to learn to drive properly" just because you can get in doesn't mean everyone else can?*
>
> *Cross what line Kaz get a grip."*

29 As a result of reports being made to management at the respondent, the clamant was subjected to an investigation in relation to those posts. Given the issues set out above, I will not recount the investigation carried out.

30 The claimant, as a result of that investigation, was invited to a disciplinary meeting, the letter inviting her is at page 167 of the bundle. The disciplinary meeting was to take place on 17 January 2018 and the letter stated: "The purpose of the Hearing is to discuss allegations of inappropriate use of social media."

31 The meeting was conducted by Ms McKay and she listened to the claimant's version of events. The claimant put forward various points of mitigation, including her length of service and the impact that dismissal would have on her. Ms McKay wrote a narrative statement which appears at page 192 of the bundle and, according to the minutes of the meeting, that statement was read out in the meeting. I set it out for the purposes of this judgment.

> *"My rationale is based on, despite you having heightened awareness of the impact of posting comments on social media can have due to previous expired warning, this has happened on 2 more occasions. My reasonable belief is that you have not taken sound judgment and a common sense approach when posting on social media and by mentioning work in one comment and Tesco in the other, it is also reasonable for me to believe, that colleagues would then associate these comments within there place of work. This type of comment is inappropriate and has had a detrimental effect. As a team manager you have fundamentally breached the trust and confidence between yourself and the Company with something you have already spoken about. I still felt that you have not understood or taken responsibility for what you have posted and the impact that this has had on others"* (sic).

She then goes on to deal with procedural matters.

32 Before Ms McKay wrote that statement, she went through a check list which starts at page 185 of the bundle. Within that check list, at page 190, she was asked the question by the document; "*does the colleague have significant length of service with a clean disciplinary record*", and she has

ticked to say "Yes". She was then subsequently asked the question by the document "*did the colleague put forward any mitigating circumstances?*" and in that box she has written "*Yes*". She was adamant in her evidence, and I accepted her evidence in this respect, that she had considered those points on behalf of the claimant. I do not believe that the ticking of one box and writing yes in another box was simply a "tick box exercise" as alleged by Mr Ratan. In those circumstances, I accept that in reaching her decision she did look at the claimant's disciplinary record and her length of service and the mitigating circumstances that the claimant put forward.

33 However, there was a point in her evidence, where Ms McKay's evidence departed both from her witness statement and from the written statement I have referred to. She was asked in cross examination about the claimant's statement in the disciplinary hearing that she did not know that "Kate" had crashed her car. Ms McKay said "*I disagree that this was an observation about people in general; I believe this is about work. I believe that Karen knew that someone had had an accident as she had spoken to the phone shop manager that day, and when Mr Clayton investigated the phone shop manager and asked to look at the phone to see the messages Karen had sent, they had all been deleted*". She went on "*I don't believe she didn't know about the accident. I thought she had been untruthful and did know about colleagues not attending work*."

34 The question of whether the claimant was aware of the accident or not was discussed in the disciplinary meeting in the section which is minuted at page 172 to 173 of the bundle. The claimant said "*It wasn't about Tesco, I didn't send it as a Tesco manager, nothing to do with Tesco*," again, talking about the initial posting. She went on, "*I did not know she had crashed her car on the way to work. I didn't know any of these people should have been at work until Matt messaged me on and saying LOL Karen, your status on Facebook.*

35 It was not put to the claimant in the disciplinary meeting that the dismissing officer believed that her statement was untrue, nor was it put to the claimant, that she had known someone had had an accident prior to writing the post.

36 In re-examination, the respondent's counsel asked Ms McKay to re-read paragraphs 73 to 75 of her Witness Statement and she was then asked whether the alleged dishonesty was material to her decision to dismiss. She answered that it was not. I regret that I do not feel able to accept that evidence. The definite way in which Ms McKay dealt with the point in her cross examination and the voluntary statements that she made about what she believed that the claimant knew strongly suggested to me that this was not something that she had heard and disregarded. It had clearly stayed with her until her evidence yesterday and I conclude, on the balance of probabilities, that the fact that Ms Mckay felt that the Claimant was not telling her the truth in the disciplnary hearing was a factor which influenced her in making the decision to dismiss.

37 The claimant was then dismissed by Ms McKay; the letter of dismissal is at page 196 of the bundle. Part of that letter of dismissal, at paragraph 3, refers to the Claimant taking no responsibility for her own comments and not understanding the impact on other Tesco employees or the distress that

this may have caused. I find that was a reasonable conclusion for Ms McKay to reach. The claimant told me in her evidence that she did not say anything wrong in her post which was why she did not say sorry. She put that in the context of saying that she was "emotionally all over the place and was irrational", but also said "why should showing remorse have any impact on the decision, its what I did". In those circumstances, notwithstanding that the claimant also said that she had deleted all of her work colleagues from her Facebook account, it was reasonable for Ms McKay to conclude that the Claimant was taking no responsibility for her own comments and not understanding the impact on other Tesco employees or the distress that the posts may have caused.

38 I do not find that Ms McKay had pre-judged the outcome of the process. Whilst there were flaws in the process she carried out I find that she acted in good faith and without a pre-determined view of what the outcome of the process would be.

39 The claimant then appealed. The parties agree that there was no express contractual right to appeal in this case. The disciplinary policy appears at page 42 of the bundle. It was accepted by all parties that the disciplinary policy was not contractual. At page 47A, internal page 7 of the policy, there is a section headed "Demotion" which states "as an alternative to your dismissal and if the situation is appropriate (and a suitable vacancy is available) you may be offered a demotion...". However, there is another section, at p47B, which deals with appeals and sets out the powers of the appeal manager. They are in 4 bullet points and include that the appeal manager can uphold an appeal and reduce the level of disciplinary warning or uphold an appeal and reinstate someone if they were dismissed, giving a lower level of warning. I note, although it is not critical for the purpose of my decision, that there is no reference to reinstating but demoting an employee.

40 In the appeal hearing the claimant was asked twice what she wanted out of the appeal or what she considered a fair outcome would be and she referred to the possibility of demotion or moving store (pages 243 to 255 of the bundle). It was the evidence of both the respondent's witness Miss Goodall and the claimant that the claimant showed remorse at the appeal hearing and I therefore accept that evidence.

41 The outcome of the appeal appears in the minutes at page 256. Towards the end of the meeting, it is recorded that Ms Goodall said, "You've shown remorse today, but not in previous meetings, demonstrated you've learnt from this, so I will give you the option to be disciplinary, demoted into a colleague position in a neighbouring store, have 5 days and can consider now." She went on "You could have and should have learned from your previous final, which is why you were dismissed. You have a responsibility as a manager, going on a private chat was not appropriate ... demotion is an outcome for you. Would you like some time?"and the claimant replied "Yes." Ms Goodall said "I will give you my e mail address and please inform me of your decision."

42 I find that at that point the claimant was given a choice. Ms Goodall stated in her evidence that she accepted that, contrary to what she had said in her

witness statement, the claimant did not actually accept the offer of demotion at that time.

43 Ms Goodall also told me that the claimant was never reinstated to a role on the respondent's systems; she was only set up on the system for administrative purposes.

44 I find that the appeal process was not, in fact, concluded on the day in question. It was left open for the claimant to decide what to do. If the claimant had refused reinstatement with demotion, the clear indication is that she would have remained as dismissed; that is to say the original decision stood. To that extent, I find that the third paragraph of the letter sent after the meeting, is wrong in that I do not accept that in that meeting, Ms Goodall overturned the summary dismissal and demoted the Claimant; she simply left the Claimant with an option.

45 Against those findings of fact, I now turn to the relevant law and my conclusions on the issues.

The Law and Conclusions

46 I was taken by the parties to section 98 of the Employment Rights Act 1996, and I was taken by the claimant's counsel to Article 10 of the Schedule 1 to the Human Rights Act 1998. I was provided with a bundle of 17 authorities by the claimant although not referred to all of them and by the respondent to one additional further authority. For the sake of clarity, I will set out the relevant law as I deal with the issues and limit my review of the law to that necessary to resolve the issues.

47 Turning then to the first issue of whether the claimant was dismissed.

48 I conclude that following the express dismissal at the end of the first disciplinary hearing there was no contractual right of the claimant to an appeal, but the claimant was given an opportunity to appeal. There was no express contractual power to reinstate an employee and impose a demotion on appeal.

49 Mr Gorasia submitted that there would be an implied contractual term allowing the respondent to demote an employee on appeal. I am not able to reach that conclusion in this case. I do not think it is necessary to imply any such term to the contract to give it business efficacy, nor is it so obvious that a person could be demoted on an appeal that an officious bystander would say that of course such a term should be implied. To demote somebody is to vary the terms of their employment as was pointed out in Hogg v Dover College [1990] ICR 39 quoted in Saminaden v Barnett, Enfield and Harringate Trust UKEAT/0018/08/DM; "You can vary by consent terms of a contract, but you simply cannot hold a pistol to somebody's head and say henceforth you are to be employed on wholly different terms, which are in fact less than 50 per cent of your previous contract". It seems to me that that quote encapsulates the reason why it is not an obvious term to imply into a contract. I am to some extent fortified in that view by the fact that the disciplinary policy in this case does not refer to that being a power which the appeal officer has and that at the dismissal stage, it simply refers to being offered a demotion, rather than, a demotion being imposed.

50 Moreover, even if there was such an express or implied power to reinstate and impose a demotion in this case, I do not find that such a power was ever exercised. The claimant, as a matter of fact, never was reinstated. The dismissal was not overturned. The appeal was simply left with the question hanging, for the claimant to come back and state whether she would accept reinstatement and demotion or not. In those circumstances, it seems to me the case is different to Salmon v Castlebeck Care [2015] IRLR 189 provided by the respondent's counsel, because at paragraph 38 of that judgment, Mr Justice Langstaff stated that what he had set out was predicated upon a conclusion that there was there a successful appeal. In this case, the appeal had not been concluded and it could not be said whether it was successful or not. If the Claimant did not accept a demotion then the result of the appeal would not be that the dismissal was overturned, the dismissal would stand. Thus the case is not the same as that in Salmon.

51 In those circumstances I find that there was a dismissal in this case, it was an express dismissal and it was not overturned or caused to vanish by the appeal.

52 The next issue is what the reason for the dismissal was. The respondent says that it was conduct. I accept that, as matter of fact it, was the conduct of the claimant which had caused the dismissal. I need, now, to deal with Mr Ratan's argument that conduct cannot be a reason falling within section 98(2) of the Employment Rights Act, unless it is conduct which amounts to a breach of an express term of the contract or at least a breach the implied term of trust and confidence. In relation to that submission Mr Ratan relies upon the case of Reilly v Sandwell [2018] ICR 705 and in particular the judgment of Baroness Hale at paragraph 32, where she leaves open the question of whether a dismissal based on an employee's conduct can ever be fair if that conduct is not in breach of the employee's contract of employment.

53 The way he puts his submission is that the question of freedom of speech under Article 10 is so important that I am bound to find that where it is engaged, as he says it is here, there must be a breach of contract by the claimant before section 98(2)(b) Employment Rights Act 1996 can be said to be satisfied**.** Because of the importance of Article 10, he says, I should read section 98(2)(b) as if it reads misconduct amounting to a breach of contract.

54 I do not agree that it is necessary for me to do that to protect the claimant's rights under Article 10. Section 98(2) of the Employment Rights Act is only part of the statutory test as to whether a dismissal is fair or not. It has to be read in the context of the whole of section 98 including section 98(1) and section 98(4). When the Employment Tribunal makes a determination, under section 98(4) of the Employment Rights Act it decides whether the employer acted reasonably or unreasonably taking into account the circumstances, equity and the substantial merits of the case. In my judgment, it is at that stage when full effect is given to Article 10. Whilst I fully accept Mr Ratan's submission that Article 10 is important, not least because of the decision of the Court of Appeal in X v Y [2004] ICR 1634, section 98, as drafted, allows the court to give full effect to the claimant's Article 10 rights and I do not need read or imply or insert words into it for

that purpose. Since that is the only argument advanced by Mr Ratan as to whether conduct should be read as meaning conduct amounting to a breach of contract, I do not need to address the point raised by Baroness Hale further.

55 I therefore move on to the question of whether the decision was fair within section 98(1) and (4) and the test laid down in British Home Stores v Burchell.

56 The first question for me is whether, Ms McKay had a genuine belief in the claimant's misconduct; I find that she did. The posts were there to be seen and I find that she had a genuine belief that;

56.1 the claimant had posted them,

56.2 the claimant's colleagues were offended by them

56.3 the claimant had posted them at a time when she was aware of the accident by one of her colleagues and

56.4 the claimant was not being forthright in the disciplinary meeting.

57 I also find that was a view which was based upon reasonable grounds given the evidence which I have set out above and subject to the next paragraph.

58 However, I do not find that the test in British Home Stores v Burchell is satisfied in that I do not find there was a sufficient or reasonable investigation. Ms McKay never canvassed with the claimant her belief that the claimant was aware of the accident when she wrote the words "learn to drive properly" or that she was of that view because of what had happened in relation to the investigation of the "phone shop" manager's phone and, that she therefore believed, in the disciplinary meeting, that the claimant was not telling the truth. In my view, that was a significant failure of process sufficient to render this decision unfair. It was not a failure which was corrected on appeal because the claimant was unaware that matter had been taken into account in making the decision to dismiss her and therefore she was not able to address them.

59 That defect renders the dismissal unfair.

60 I then must consider what would have happened in the event that the procedural defects had not been present (i.e. whether a reduction should be made on Polkey grounds). I go back to the claimant's posts. I take the view that the posts were of a serious nature. The characterisation by the claimant through her counsel that these were every day messages about car parking and the weather, in my view, is wrong and diminishes the significance of them. The Facebook posting about Tesco's car park being grid locked has to be seen as a posting, albeit in a private capacity, by a manager from the Tesco store named, actively telling 450 to 500 of her friends that they should avoid the store, (not only avoid it, but not go anywhere near it). It is likely that that post would cause a financial loss to the store, even in a small amount, and in my view it was properly regarded by the respondent as being a serious lack of judgment.

61 I move, then, to the initial post on 10 December. It starts with "*I really needed to bite my tongue"* and goes on to refer to "*learn to drive properly*". I am not willing to conclude that a fair investigation, had one been carried out, would have led to the decision that the claimant's post was targeted at particular staff or that the claimant knew of the accident at the time that she wrote the post. The claimant has given an explanation as to how she became aware of the accident of paragraphs 10 and 11 in her statement. It seems to me that she is an honest witness and I anticipate that, had she been given the opportunity to comment on those matters by the respondent, her evidence would have been accepted on that point. Nevertheless, I consider that it is still likely that the dismissing officer, even following a fair investigation and disciplinary process, would have taken the view that it was reasonable for the claimant's colleagues to conclude that that post was aimed at them. Again, I think that the claimant is overly dismissive of the impact that her message would have had. An employee reading that message is being told in capital letters that they can go to work followed by the statement "makes my blood boil." For an employee who has not gone to work because of the snow, that message could reasonably be viewed as offensive and threatening, coming as it does from a manager within the store. That feeling would be compounded by the message that the claimant posted at page 68 of the bundle saying "It's not hard, just saying, it's a bit of an excuse when people can't be bothered." Again, this is a manager messaging to at least one of her subordinates and another junior member of staff, that the snow is used as an excuse when people can't be bothered. The claimant may not have had those employees in mind, but nevertheless, they read it. It is clear that Kate Atkinson took offence at both of the messages. The response from Kate Atkinson was inappropriate but it is not for me to decide what, if any, disciplinary sanction was appropriate for her. In response to her message the claimant then wrote to her "thought you were sick again!!!"; then she wrote "Don't cross that line honey." I find that post could reasonably be seen as a threatening or intimidating statement and falls within the provisions of the social media policy, but also falls within the definition of gross misconduct- posting offensive and/or inappropriate material in any social network and sites.

62 So, the question for me is would this manager, behaving reasonably, having followed a fair procedure, have dismissed the claimant. At this stage of the analysis, again, I have to consider Article 10. I agree with Mr Ratan that a reasonable manager would consider the right of an employee to freedom of speech (and if the manager did not do so then, when a tribunal came to consider whether the dismissal was within the band of reasonable responses, it would have had to do so).

63 Therefore, it is appropriate at this stage for me to consider the Article 10 argument advanced by Mr Ratan. I do so by reference to the case of X v Y. I refer to paragraph 64 where Lord Justice Mummery set out a 5 stage test for tribunals to apply.

63.1 Firstly, do the circumstances of the dismissal fall within the ambit of one or more articles of the convention? I find that they do, Article 10.

63.2 Secondly, does the state have a positive obligation to secure enjoyment of the relevant convention right between private persons. Again I find that that question is to be answered in the affirmative.

63.3 Thirdly, if it does, is the interference with the employee's convention right by dismissal justified? In my view the interference with the employee's convention right would be justifiable in this case; a manager cannot simply say whatever they wish to about employees. Article 10(2) expressly refers to the duties and responsibilities carried with the exercise of the freedom of speech and refers to the protection of the reputation and the rights of others which, it seems, to me must include those who the claimant managed.

63.4 It is, therefore, necessary for me to move to the fifth criteria; whether the dismissal would be fair, tested by the provisions of section 98 of the Employment Rights Act, reading and giving effect to them under section 3 of the Human Rights Act, so as to be compatible with Convention Rights.

64 It is therefore important, when I am considering what this dismissing officer would have done and the question of the chance that a dismissal would have resulted in any event, for me to take the view that Ms McKay would have given due weight to the importance of the claimant being able to express her opinions on her own social media platforms, but that does not mean that the claimant should be allowed to say anything that she wants to. Ms McKay would have been entitled to have regard to the duties and responsibilities that come with being a manager who has allowed employees to become friends on Facebook and the need to protect the reputation of those employees. Even taking into account the Article 10 rights of the claimant, a reasonable dismissing officer would have been likely to conclude that the messages that were posted were unacceptable in that they would be reasonably viewed by colleagues and subordinates of the claimant as directed at them, offensive and upsetting. The messages were likely to undermine the trust and confidence that the claimant's subordinate employee was entitled to have in her manager. The claimant was undoubtedly aware of the media policy given the previous, expired warning and she clearly knew that posting at least one of the messages was undesirable since she started it with the words *"I really need to bite my tongue"*.

65 In considering the question of what Ms McKay would have decided if there had been a fair process, I attach little weight to her evidence, given in re-examination, that the decision would definitely have been the same even if she had not taken into account her belief in the truth of what the claimant said in the disciplinary meeting. It seems to me that was an answer given with the benefit of hindsight, but she would still have taken into account of the lack of remorse from the claimant, even if she had taken account of the fact that the claimant's colleagues were now removed from her Facebook page.

66 Taking account of all of the above matters, in my view, there is a 70 per cent chance that the claimant would still have been and such a dismissal would have been within the band of reasonable response.

67 That leaves the question of contributory fault. I am view that the claimant was wrong when she posted the messages; I do not need to repeat what I have already said above. As I have already said, it is clear that she knew her posts were likely to offend since she started one of them with the statement that "I really need to bite my tongue" and yet then chose to ignore her own advice. I am of the view that the claimant contributed to her dismissal to the extent of 70 per cent.

68 However, having regard to the case of Rao vCivil Aviation [1994] ICR 495 when I take a step back and look at the totality of the reductions in this case, it seems to me that the justice of the case is met by reducing both the basic award and the compensatory award by 70 per cent in total and that is the judgment which I shall enter.

Signed by Employment Judge Dawson

Date: 18 March 2019