EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102657/2020 (V)

Held via Cloud Video Platform (CVP) on 4 & 5 November 2020

Employment Judge M Sangster

Ms S Pearson	**Claimant**
McCurrach UK Limited	**Respondent** **Represented by:** **Mr Howson - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claims of unfair dismissal, wrongful dismissal and breach of contract do not succeed and are dismissed.

REASONS

Introduction

1. This was a final hearing which took place remotely. This was not objected to by the parties. The form of remote hearing was video. A face to face hearing was not held because it was not practicable due to the Covid-19 pandemic and all issues could be determined in a remote hearing.

2. The claimant presented a complaint of unfair dismissal, wrongful dismissal and breach of contract. The respondent admitted the claimant was dismissed, but stated that the reason for dismissal was conduct, which is a potentially fair reason. The respondent maintained that they acted fairly and reasonably in treating misconduct as sufficient reason for dismissal. They denied that they

had wrongfully dismissed the claimant or acted in breach of contract by failing to pay a bonus.

3. The respondent led evidence from three witnesses: Patrick Feechan (**PF**), former Finance Manager for the respondent, Mark Docherty (**MD**), Group Risk Manager for the respondent and Wendy McKechnie (**WM**), Sales Operation Controller for the respondent.

4. The claimant gave evidence on her own behalf and called Samantha Murray (**SM**), who was formerly employed by the respondent.

5. A joint set of productions was lodged, extending to 244 pages.

Issues to be determined

6. Was the reason for the claimant's dismissal a potentially fair reason, within the meaning of s98(1) or (2) of the Employment Rights Act 1996 (the **ERA**)?

7. Was the claimant's dismissal for that reason fair in all the circumstances, in terms of s98(4) ERA?

8. If the claimant's dismissal was unfair, what compensation should be awarded?

9. Was the claimant entitled to additional payments from the respondent in respect either of the following:

    a. Notice pay; and/or

    b. Bonus.

10. If so, what sums were due to the claimant?

Findings in Fact

11. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

12. The claimant's employment with the respondent commenced on 27 June 2016. She was employed as a Telephone Account Manager, assigned to the respondent's Canada Life contract. She worked Monday to Friday each week. Her salary, latterly, was £24,750.

13. The claimant signed a Statement of Terms and Conditions of Employment with the respondent on 27 June 2016. That referred to the disciplinary procedure, which was contained in the respondent's Colleague Handbook. The disciplinary procedure provided examples of gross misconduct, including:

    a. Deliberate acts of harassment, victimisation or discrimination, on the grounds of age, disability, marriage and civil partnership, pregnancy and maternity, race, religion or belief, gender reassignment, sex, sexual orientation or otherwise.

    b. Posting comments on any social network sites which could damage the reputation of McCurrach and its customers/clients/principals and/or impact on the relationship between McCurrach and its customers/clients/ principals.

14. In/around 2016 one of the respondent's employees (referred to in this Judgment as **E1**) was disciplined for making a racist comment in the workplace. She admitted doing so and apologised, providing assurances that such behaviour would not occur again in the future. She was given a final written warning and forfeited her bonus for that year.

15. In addition to her salary, the claimant was entitled to participate in annual sales incentive scheme. In 2019, the relevant scheme was the Canada Life Sales Incentive Scheme 2019 (the **SIS**). The SIS ran from 1 January to 31 December 2019, with any payments due under the SIS being payable on 28 March 2020.

16. The terms of the SIS included a statement that *'to be eligible for a bonus payment Participants must be employed and not under notice on the date the bonus payment is made'.*

17. As a result of her performance in 2019, the claimant was informed that she would, subject to the rules of the SIS, be paid a bonus on 28 March 2020 of £9,375.

18. In February 2020, during the course of a conduct investigation in relation to another member of staff, the content of a WhatsApp discussion, involving comments of a racist nature, were brought to the respondent's attention. It was

determined that a formal investigation should be conducted in relation to this. PF was appointed to conduct that investigation.

19. In the course of his investigation, PF took the following steps:

a. He reviewed a print-out of the WhatsApp discussion within a group entitled *'1 2 dam crew brrap'*. The group icon appeared to be a picture of claimant and three of her colleagues. The date of the discussion was stated to be Saturday 6 July 2019. The discussion consisted of the following;

i. A photograph entitled *'Dream team'* which was of 9 individuals sitting around a table. The photo was posted by *'Suzie Polly Pedro'* at 11.15 with the caption *'See when use look at whos left its only the pakis weve got rid of'* followed by four laughing emojis.

ii. SM responds at 11.16 with six laughing emojis, followed by *'omg'.*

iii. Another employee (referred to in this Judgment as **E2**) responds at 11.18 with *'Hahahaha racist card', 'Where was that?'*

iv. SM states *'Brighton'* at 11.20.

v. Suzie Polly Pedro then states *'We hate pakis hahaha' 'Mccurach hates pakis haha'* at 11.22.

b. He interviewed the claimant on 25 February 2020. He showed her a print-out of the WhatsApp messages and asked her to comment. She stated *'Suzie Polly Pedro, that's not me, there's nothing to say that is me or my number.'* Later in the meeting she stated *'Don't know where that's came from, there nothing to suggest where that's come from and that it's me'* (referring to the screenshots). The claimant was suspended at the conclusion of that meeting. A letter was sent to her confirming her suspension later that day.

c. He ascertained what the claimant's telephone number was from the respondent's records.

d. He interviewed another employee (referred to in this Judgment as **E3**) on 27 February 2020. E3 had provided the screenshots of the WhatsApp discussion. He showed PF his telephone which demonstrated that the telephone number assigned to 'Suzie Polly Pedro' was number which PF had ascertained from the respondent's records was the claimant's telephone number.

e. He held a further investigation meeting with the claimant on 28 February 2020. He provided the claimant with copies of the respondent's Equality Policy and Disciplinary Procedures, which the claimant acknowledged that she had received at the commencement of her employment. PF confirmed that he had reviewed the phone of the person who had provided the screenshots and the number assigned to the name 'Suzie Polly Pedro' was the claimant's. The claimant confirmed that she had previously been a member of the WhatsApp group, along with E2, E3 and SM. It had been set up as the individuals were all friends and were going on holiday together. She stated however that she had left the group recently, as there had been a falling out between her and E3. The claimant indicated that she had not seen the photograph before and that she had not written the WhatsApp messages in question. She stated that the conversation was fake. She showed PF print outs which stated that you could change the name and profile pictures of conversation partners. PF confirmed to the claimant that, even if that was the case, he had personally reviewed the WhatsApp messages on the phone of the individual who provided the messages and it was clear that the messages came from the claimant's number. Whilst it may be possible to change names and profile pictures, the number the messages came from could not be changed and the number was the claimant's number. The claimant then suggested that someone else may have accessed her phone and sent the messages, without her knowledge. She suggested that a family member or E3 may have done so. She indicated that the timing of the issue being raised appeared to tie in with a dispute which there was in the workplace and a breakdown of her relationship with E3. She questioned why it had taken 6 months for this to be brought to the

respondent's attention and suggested that this had been raised now as part of a vendetta against her. She suggested that the motive may be to ensure she did not receive the bonus which was due to her. She stated that she was aware that E1 had made a racist remark in front of other colleagues and had lost her bonus entitlement as a result.

f. He interviewed SM on 28 February 2020. She confirmed that she was in the photograph. SM stated that the claimant had written the comments which appeared to come from 'Suzie Polly Pedro' and confirmed that the laughing emojis, followed by 'omg' were written by her. PF asked who had taken the photograph, but SM stated she could not recall.

g. He interviewed E2 on 3 March 2020. E2 stated that Suzy Polly Pedro was the claimant. E2 agreed that he had participated in the group chat on that particular date, along with the claimant and SM.

20. Notes, reflecting what was discussed at each meeting, were taken during each discussion.

21. During the investigation interviews, a considerable amount of focus was placed by PF on ascertaining who had taken the photograph contained in the post. He expressed on a number of occasions that his view was that the claimant had done so.

22. The conclusion of PF's investigation was that there was disciplinary case to answer by each individual who had participated in the group WhatsApp chat on 6 July 2019, including the claimant.

23. By letter dated 4 March 2020, the claimant was invited to a disciplinary hearing on 10 March 2020. She was informed that the purpose of the disciplinary hearing was to discuss the following allegations:

a. It is alleged that you have used inappropriate and unacceptable language and behaviour of an offensive and discriminatory nature – specifically that on the 6 July 2019, you sent a picture of current and former colleagues to other colleagues via a work group WhatsApp and then commented that the "Pakis" in the picture had all since been "got

rid of", and that 'We hate Pakis hahaha" and 'Mccurach hates Pakis haha".

b. It is alleged that you have behaved in a highly and trustworthy manner, by denying points set out in the allegation above, namely that it was you who sent the message, stating that someone from work or a family member had doctored the WhatsApp message, or accessed your phone to post this under your name without your position permission, despite the fact it is clear this message came from your phone number. If proven, this will be considered a gross breach of trust and confidence.

24. The claimant was informed in the letter that, if substantiated, the allegations may amount to gross misconduct and could lead to the termination of her employment, without notice. She was advised of her right to be accompanied at the disciplinary hearing.

25. Appended to the letter were the notes of the investigation meeting held with claimant and the notes of the meeting held with E2, E3 and SM, as well as the WhatsApp screenshots and the google print out supplied by the claimant during the investigation meeting. Reference was made to the fact that the claimant had already been provided with the Disciplinary Procedure and Equality Policy.

26. On 6 March 2020, the claimant raised a grievance in relation to the actions of E1 and E3, stating that they were waging a personal vendetta against her. The disciplinary hearing scheduled for 10 March 2020 was postponed as a result. Instead, a grievance meeting took place on 10 March 2020. It was conducted by MD.

27. Following the grievance meeting, MD undertook a thorough investigation, by meeting with the two individuals named in the claimant's grievance, as well as a relevant witness.

28. The disciplinary hearing ultimately took place on 11 March 2020. It was also chaired by MD. The claimant was accompanied at the meeting.

29. At the disciplinary hearing, the claimant stated that her WhatsApp account could have been remotely hacked. She stated that this could be done by

someone accessing to her phone and taking a copy of the QR code from it. She provided print outs of Google searches in relation to this. She did not however provide any evidence to substantiate or suggest that this had in fact been done. MD confirmed during the disciplinary hearing that he felt that the identity of the person who had taken the photo was irrelevant, it was the comments made in relation to the photograph that he was focusing on.

30. MD adjourned the disciplinary hearing to consider the outcome.

31. A letter was sent to the claimant on 19 March 2020 confirming that her grievance had not been upheld. The letter provided a detailed rationale for this and also confirmed that, whilst it was not established that the individuals were bullying or victimising the claimant, or that they had a personal vendetta against the claimant, some examples of unprofessional behaviour by E1 were established. The claimant was informed that appropriate disciplinary action would be taken in relation to these.

32. A letter was sent to the claimant on 20 March 2020, confirming that MD found that the disciplinary allegations made against her were substantiated. The letter provided details of MD's rationale as follows *'Although you have provided theories as to how it is possible to hack WhatsApp, you have provided no evidence, and no plausible story as to how this is likely to have happened on your phone, or who is likely to have done this. Your telephone number and name are clearly visible within the screen shots provided, and clearly attribute these comments to you. You are named by two witnesses as having made these comments, and you agree the images provided appear to come from your telephone number.'* Reference was made to the grievance investigation and the fact that it was held, following investigation, that there was no evidence of a vendetta against the claimant, as she had asserted. MD found, in relation to the disciplinary allegations against the claimant, that *'there is no evidence that these allegations have been fabricated or are untrue, no matter the motivations of [E3], who provided the initial evidence...The balance of probability suggests that it would be extremely unlikely that a colleague and/or line manager would have the skill, the will and the opportunity to conspire against you in the manner suggested. There is no evidence of this. This leads to the reasonable belief that*

the only other responsible person is you. In reviewing the evidence in its entirety, the conclusion is that you are responsible for posting the comments outlined in the first allegation, and it therefore follows that you have failed to tell the truth regarding this, as set out in the second allegation.' MD found that the claimant's comments were racist in nature and could have serious and detrimental impact on the respondent's reputation if they were brought into the public domain. He found that her actions amounted to gross misconduct and, having considered and discounted alternative sanctions, that the claimant should be summarily dismissed. The letter confirmed that the claimant's actions constituted a fundamental breach of the claimant's contractual terms which had irrevocably destroyed the trust and confidence necessary to continue to the employment relationship and that the claimant should be summarily dismissed as a result. The letter also informed the claimant of her right to appeal.

33. On 24 March 2020, the claimant confirmed, by email, that she wished to appeal against the decision to terminate her employment. Her email set 21 different grounds of appeal.

34. The appeal hearing took place on 21 April 2020. It was chaired by WM. The claimant not accompanied.

35. WM did not uphold the claimant's appeal. She confirmed her findings in a letter to the claimant dated 5 May 2020.

36. SM was also summarily dismissed on 20 March 2020. The reasons for her dismissal were that: she had participated in the WhatsApp discussion which formed the basis for the claimant's dismissal; she had sent a separate, highly offensive message about a colleague and her daughter in the same WhatsApp group; and had behaved in an untrustworthy manner by initially denying the allegations and deleting some of the WhatsApp messages.

37. On 3 April 2020, E2 was given a final written warning by MD for his involvement in the WhatsApp discussion which formed the basis for the claimant's dismissal. MD determined that dismissal was not appropriate in E2's case as he had admitted the conduct, expressed extreme remorse and provided assurances (which were accepted by MD) that such conduct would never occur again.

38. On 3 April 2020, E3 was given a final written warning MD for inappropriate comments made by him in the WhatsApp group. Those comments were brought to the respondent's attention by the claimant, in the course of the investigation into her conduct. MD determined that dismissal was not appropriate in E3's case as he had admitted the conduct, expressed extreme remorse and provided assurances (which were accepted by MD) that such conduct would never occur again.

39. The claimant secured alternative employment with similar pay and benefits to that attached to her employment with the respondent at the start of September 2020. Prior to that she had earned £4,911.76 in a role in care sector, in the period May to August 2020. She did not claim or receive any benefits following the termination of her employment with the respondent.

Submissions

Respondent's submissions

40. Mr Howson, for the respondent, stated that the breach of contract claim must fail. Given that the claimant was not in employment at the date the bonus was due to be paid, she did not have any contractual entitlement to the payment.

41. In relation to the claim for unfair dismissal, he referred to the ***Burchell*** tests, which he stated were satisfied. The respondent conducted a reasonable investigation and formed a genuine belief on reasonable grounds that the claimant had committed gross misconduct as a result. It was within the range of reasonable responses for the respondent to dismiss the claimant in the circumstances and a fair procedure was followed. The content of the WhatsApp chat were clearly work related and the circumstances of E1, E2 and E3 were different to those of the claimant: they took responsibility for their actions, apologised and provided assurances that they would not be repeated. The claimant did not.

42. In the event that the dismissal was found to be unfair, there should be a 100% reduction to compensation, on the basis Polkey and/or the claimant's contribution to her dismissal. The wrongful dismissal claim should also be dismissed

Claimant's submissions

43. The claimant stated that the investigation was unfair. PF was not impartial and expressed opinions on who had taken the photograph. In addition, MD did not fully investigate the claimant's grievance. The appeal was not fully/thoroughly investigated. If she had been treated consistently with others, she would have retained her job and her bonus.

Relevant Law

Unfair dismissal

44. S94 ERA provides that an employee has the right not to be unfairly dismissed.

45. In cases where the fact of dismissal is admitted, as it is in the present case, the first task of the Tribunal is to consider whether it has been satisfied by the respondent (the burden of proof being upon them in this regard) as to the reason for the dismissal and that it is a potentially fair reason falling within s98(1) or (2) ERA.

46. If the Tribunal is so satisfied, it should proceed to determine whether the dismissal was fair or unfair, applying the test within s98(4) ERA. The determination of that question (having regard to the reason shown by the employer):-

> *"(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking), the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

47. Where an employee has been dismissed for misconduct, ***British Home Stores v Burchell*** [1978] IRLR 379, sets out the questions to be addressed by the Tribunal when considering reasonableness as follows:

i. whether the respondent genuinely believed the individual to be guilty of misconduct;

ii. whether the respondent had reasonable grounds for believing the individual was guilty of that misconduct; and

iii. whether, when it formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

48. The Tribunal will then require to consider whether the decision to dismiss fell within the range of reasonable responses available to a reasonable employer in the circumstances. In determining this, it is not for the Tribunal to decide whether it would have dismissed for that reason. That would be an error of law as the Tribunal would have 'substituted its own view' for that of the employer. Rather, the Tribunal must consider the objective standards of a reasonable employer and bear in mind that there is a range of responses to any given situation available to a reasonable employer. It is only if, applying that objective standard, the decision to dismiss (and the procedure adopted) is found to be outside that range of reasonable responses, that the dismissal should be found to be unfair (***Iceland Frozen Foods Limited v Jones*** [1982] IRLR 439).

49. Equity means that similar cases should be dealt with in a similar manner. Valid arguments in relation to inconsistency of treatment however only arise in limited circumstances, such as where employers have previously treated similar matters less seriously, leading employees to believe that such behaviour is condoned or to an inference that the asserted reason for dismissal is not the real reason, or where employees, in truly parallel circumstances arising from the same incident, are treated differently (***Hadjioannou v Coral Casinos Limited*** [1981] IRLR 32, approved by the Court of Appeal in ***Paul v East District Health Authority*** [1995] IRLR 305).

Wrongful Dismissal

50. Wrongful dismissal is a claim for breach of contract – specifically for failure to provide the proper notice provided for by statute or the contract (if more). An employer does not however have to give notice if the employee is in fundamental breach of contract. This is a breach of contract that goes to the heart of the contract so that the employer should not be bound by its obligations under the contract (including the requirement for notice).

Discussion & Decision

Unfair Dismissal

51. The Tribunal referred to s98(1) ERA. It provides that the respondent must show the reason for the dismissal, or if more than one the principal reason, and that it was for one of the potentially fair reasons set out in s98(2). At this stage the Tribunal was not considering the question of reasonableness. The Tribunal had to consider whether the respondent had established a potentially fair reason for dismissal. The Tribunal accepted that the reason for dismissal was the claimant's conduct – a potentially fair reason under s98(2)(b). No other reason has been asserted.

52. The Tribunal then considered s98(4) ERA. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reason as shown by the respondent. The answer to that question depends on whether, in the circumstances (including the size and administrative resources of the employer's undertaking) the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the employee. This should be determined in accordance with equity and the substantial merits of the case. The Tribunal was mindful of the guidance given in cases such as ***Iceland Frozen Foods Limited v Jones*** that it must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent. There is a band of reasonableness within which one employer might reasonably dismiss the employee, whereas another would quite reasonably keep the employee on. If no reasonable employer would have dismissed, then dismissal is unfair, but if a reasonable employer might reasonably have dismissed, the dismissal is fair.

53. The Tribunal referred to the case of ***British Home Stores v Burchell***. The Tribunal was mindful that it should not consider whether the claimant had in fact committed the conduct in question, as alleged, but rather whether the respondent genuinely believed he had and whether the respondent had reasonable grounds for that belief, having carried out a reasonable investigation.

Did MD have a genuine belief?

54. The Tribunal concluded that MD did have a genuine belief that the claimant had committed the gross misconduct detailed in the dismissal letter.

Did MD have reasonable grounds for his belief?

55. The Tribunal found that MD did have reasonable grounds for his conclusion that the claimant had committed gross misconduct, as a result of the following:

a. The posts on the WhatsApp group came from the claimant's telephone number;

b. The other individuals on the WhatsApp group believed that the claimant had posted the comments;

c. No evidence was provided that the claimant's WhatsApp account was hacked or that someone else sent the messages from the claimant's phone, and she had not provided any plausible story as to how that was likely to have happened;

d. MD considered the claimant's assertion that her WhatsApp account had been hacked, but discounted that assertion based on the fact that no evidence had been produced to suggest this had occurred and a reasonable belief that other employees would not have the skill, the will and the opportunity to conspire against the claimant in the manner suggested; and

e. The claimant's assertion that there was a vendetta against her was fully investigated in the context of her grievance, but found not to be substantiated.

56. It was reasonable for the respondent to rely on the terms of the WhatsApp messages, notwithstanding that they were posted outwith the claimant's normal working hours, to a private group, given the terms of the messages and the fact that there was a close connection with the workplace, as evidenced by the following:

a. The group members were all employees, or former employees of the respondent;

b. The group conversation referred to other employees of the respondent;

c. The group conversation referred to the respondent by name;

d. Had a screenshot of the conversation been placed in the public domain by any member of the group, it would have had an adverse impact on the respondent's reputation; and

e. The group conversation was brought to the respondent's attention by one of their employees, who complained about the content.

Was there a reasonable investigation?

57. The Tribunal found that PF did have an unnecessary focus on who had taken the photograph contained in the post on the group chat, and that he clearly and inappropriately expressed opinions that the claimant had done so. The Tribunal noted however that MD reached the conclusion that the identity of the person who took the photograph was entirely irrelevant to his decision. The Tribunal find therefore that PFs unnecessary focus on this did not undermine the reasonableness of the investigation, as MD did not rely on this in reaching his decision.

58. The investigation was otherwise balanced and thorough. PF interviewed all the individuals who were potentially implicated and compiled all the available evidence. Having done so, PF concluded that there was a disciplinary case to answer by everyone who was involved in the group WhatsApp chat. There were no further steps which should, reasonably, have been undertaken during the investigation.

Procedure

59. The respondent investigated the allegations against the claimant. They informed her of the allegations and the potential consequences and provided copies of the evidence compiled. The claimant was given the opportunity to respond to the allegations at the disciplinary hearing and was provided with the

opportunity to appeal. She was informed of his right to be accompanied at all stages. The respondent followed their internal procedures.

60. The Tribunal find that the procedure adopted by the respondent was fair and reasonable in the circumstances.

Did the decision to dismiss fall within the band of reasonable responses?

61. The Tribunal then moved on to consider whether the decision to dismiss the claimant as a result of the identified misconduct, fell within the range of reasonable responses available to a reasonable employer in the circumstances.

62. The Tribunal did not accept that there was an unjustified disparity in the treatment of the claimant in comparison with E2 or E3, who had also engaged in inappropriate discussions on WhatsApp, or with E1 who had made a racist remark in the workplace. The evidence demonstrated that E1, E2 and E3 admitted the conduct they were accused of, expressed extreme remorse and provided assurances (which were accepted) that such conduct would never occur again. Neither the claimant nor SM admitted the conduct they were accused of, so did not express remorse or provide assurances that their conduct would not be repeated. The Tribunal did not accept therefore that it had been established that the circumstances of E1, E2 or E3 were truly parallel with those of the claimant. The argument in relation to consistency was accordingly not relevant.

63. Having reached the conclusion that the claimant had committed gross misconduct by her actions, MD concluded that the claimant should be summarily dismissed. MD felt that the claimant's conduct constituted a breach of the respondent's disciplinary rules and that the claimant's actions undermined the trust and confidence the respondent required to have in her. It cannot be said that no reasonable employer, faced with these circumstances, would have dismissed the claimant. MD's conclusion accordingly fell within the band of reasonable responses open to the respondent in the circumstances.

Conclusions re s98(4)

64. For the reasons stated above the Tribunal conclude that the respondent acted reasonably in treating the claimant's conduct as a sufficient reason for dismissal.

65. For these reasons, the claim of unfair dismissal is dismissed.

Wrongful Dismissal

66. In considering the claim for wrongful dismissal, the Tribunal required to consider whether the claimant had actually committed gross misconduct during her employment, as opposed to whether the respondent reasonably believed that she had.

67. The evidence presented to the Tribunal indicated that the WhatsApp messages came from the claimant's telephone number. No evidence whatsoever was presented demonstrating or substantiating the claimant's various assertions that the messages had been sent by E3 directly from the claimant's phone, or that he had somehow hacked the claimant's WhatsApp account. The Tribunal also noted that the other participants in the exchange on WhatsApp, E2 and SM, believed that the comments were made by the claimant.

68. If the messages had been sent by someone else either taking her phone or hacking her WhatsApp account, the Tribunal conclude that the claimant would have seen the comments, as she was a member of the group at the point the comments were posted. There was however no reaction whatsoever by the claimant. She accepted in evidence that she did not:

    a. Make a subsequent post to state that the comments had not been made by her; or

    b. Make any report to WhatsApp or the police in relation to her account being hacked.

69. In these circumstances, the Tribunal find that the claimant did post the comments on the WhatsApp group. These comments were of a racist nature, breached the respondent's Equality Policy and had the potential to bring the

respondent into disrepute. This constituted a fundamental breach of the claimant's employment contract with the respondent.

70. As the claimant was in fundamental breach of contract, the respondent was not bound by its obligations under the employment contract. The claimant is accordingly not entitled to any further sums in respect of her notice period.

Breach of Contract

71. The rule of the SIS stated *'to be eligible for a bonus payment Participants must be employed and not under notice on the date the bonus payment is made'.*

72. The claimant's bonus was due to be paid on 28 March 2020. She was however dismissed on 20 March 2020. As she was not employed on the date the bonus was due to be paid, she had no contractual or legal entitlement to the bonus payment. The respondent did not breach the terms of the claimant's contract with them by failing to make payment of this sum.

Employment Judge: Mel Sangster
Date of Judgment: 12 November 2020
Entered in register: 03 December 2020
and copied to parties