EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106951/2019

Held via Cloud Video Platform (CVP) on Tuesday 26 and Wednesday 27 January 2021

Employment Judge R King

Ms L Henderson	**Claimant** **Represented by:** **Mr Lawson - Solicitor**
Ashgill Care Home Limited	**Respondent** **Represented by:** **Mr Logendra - Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant was unfairly dismissed, but that no basic award or compensatory award should be made.

REASONS

1. The claimant claims that she was unfairly dismissed when the respondent dismissed her for misconduct. The claimant gave evidence on her own behalf and the respondent led evidence from Rosemary Jalloh (Home Manager) and Debbie Rolland (Finance Administrator). A joint bundle of productions was lodged.

Issues

2. As the claim is for unfair dismissal, the issues to be determined by the tribunal were as follows:

I. What was the reason for the claimant's dismissal?

II. Was the reason for dismissal a potentially fair reason within the meaning of section 98 (1) and (2) of the Employment Rights Act 1996?

III. If, as asserted by the respondent, the reason for dismissal was related to the claimant's conduct and thus potentially fair, was the dismissal actually fair having regard to section 98 (4) of the Employment Rights Act 1996 and in particular the following:

IV. Did the respondent have a reasonable belief that the claimant had been guilty of misconduct?

V. Did the respondent have reasonable grounds for that belief?

VI. By the time it held that belief, had the respondent carried out as much investigation as was reasonable in the circumstances?

VII. Was the decision to dismiss fair having regard to section 98 (4) of the Employment Rights Act 1996, including whether in the circumstances the respondent acted reasonably in treating the reason for dismissal as a sufficient reason for dismissing the employee?

VIII. Did the decision to dismiss and the procedure adopted fall within the "range of reasonable responses" open to a reasonable employer"? (***Iceland Frozen Foods Limited v Jones 1983 ICR 17***).

IX. If the respondent did not adopt a fair and reasonable procedure, was there a chance the claimant would have been dismissed in any event? (***Polkey v AE Dayton Services Limited 1987 All ER 974***).

X. Did either party unreasonably fail to comply with the Acas Code of Practice and, if so, should the tribunal reduce or increase any compensatory award due to the claimant (and if so, by what factor not exceeding 25%)?

XI. By her conduct, did the claimant contribute to her dismissal and should any compensatory award be reduced accordingly (and, if so, by what factor)?

XII. Did the claimant engage in conduct that was culpable or blameworthy and, if so, should the tribunal make a reduction to any basic award to which the claimant would be entitled (and, if so, by what factor) to reflect this?

XIII. What financial loss has the claimant suffered in consequence of her dismissal and has she taken reasonable steps to mitigate her loss?

Preliminary issue

3. On the morning of the hearing, the respondent's representative sought to introduce further documents; namely (1) copy screenshots of the respondent's Twitter page; (2) extracts from the Scottish Social Services Council (SSSC) Codes of Practice and Social Media Guidance; and (3) various copy screenshots allegedly taken from the claimant's Facebook account.

4. Having heard the parties' submissions in relation to the late submission of these documents, the tribunal agreed to allow the copy screenshots of the respondent's Twitter page and the extracts from the SSSC documentation to be admitted in circumstances where Mr Lawson accepted that they were relevant to the disputed issues.

5. The tribunal however refused to admit the copy Facebook screenshots in circumstances where, following Mr Lawson having objected to their being lodged, Mr Logendra conceded that they were not directly relevant to the disputed issues.

Findings in fact

6. The claimant is Linda Henderson. The respondent operates a care home at 33 Liddlesdale Square, Glasgow, G22 7BU, providing permanent and respite care for its elderly residents, many of whom are vulnerable.

7. The claimant started work with the respondent on 23 November 2015 as an Activities Co-ordinator. In that role her principal duties involved organising activities for the residents, which were tailored to the needs and abilities of each individual. Her gross weekly pay was £240 per week.

8. The role of activities coordinator is highly important within a care home and is a demanding role. It is the activities coordinator's responsibility to design

a plan for activities, outings and events for all the residents of the care home. It is therefore essential that the activities coordinator not only knows the residents but also knows what they all like to do and are able to do. In common with the majority of the other roles within the care home, the activities coordinator role is regulated by the Care Inspectorate and the SSSC.

9. In May 2018 the claimant also took on, as part of her role, responsibility for managing the respondent's Twitter account, which was created in order to increase the social media profile of the activities carried out within the care home. At this time Rosemary Jalloh (the respondent's Home Manager) and Debbie Rolland (the respondent's Finance Administrator) both drew the claimant's attention to the respondent's social media policy and told her to familiarise herself with that policy in order to ensure compliance with it when posting on the respondent's Twitter account.

10. An awareness of the respondent's social media policy was part of the claimant's role. It was her job to understand the policy and to apply it. She therefore knew or ought to have known about the contents of that policy. In common with the remainder of its policies, the respondent's social media policy is available as a paper copy in a folder kept in the staff room and is also stored electronically on the respondent's hard drive, which can be accessed from two shared computers, which all staff are able to access and regularly use for e-mails and e-learning courses.

11. The respondent's social media policy provides, *inter alia* -

"***Safe, responsible social media use***

The rules in the section apply to:

- *Any employees using company social media accounts;*
- *Employees using personal social media accounts which reference or reflect on Ashgill*

Users must not (in the past, present or future)

- *Create or transmit material that might be defamatory or incur liability for the company*
- *Post message, status updates or links to material or content that is inappropriate.*

Inappropriate content includes: pornography, racial or religious slurs, gender-specific comments, information encouraging criminal skills or terrorism, or materials relating to cults, gambling and illegal drugs.
This definition of inappropriate content or material also covers any text, images or other media that could reasonably offend someone on the basis of race, age, sex, religious or political beliefs, national origin, disability, sexual orientation, or any other characteristic protected by law.

- *Use social media for any illegal or criminal activities.*
- *Send offensive or harassing material to others via social media.*
- *Broadcast unsolicited views on social, political, religious or other business or other non-business related matters.*
- *Send or post images or material that could damage Ashgill Care Home's image or reputation."*

The policy also provides -

"Potential sanctions

Breaching this social media policy is a serious matter. Users who do so will be subject to disciplinary action, up to and including termination of employment. Employees, contractors and other users may also be held personally liable for violating this policy. Where appropriate, the company will involve the police or other law enforcement agencies in relation to breaches of this policy."

Anonymous report

12. On 2 January 2019, Rosemary Jalloh received an anonymous text to which were attached screenshots from the claimant's Facebook account. She noted that the screenshots appeared to show two potentially offensive posts having been shared by the claimant on her personal Facebook account, on which her profile details identified her as an employee of the respondent.

13. Miss Jalloh therefore logged onto Facebook on her own computer and typed *"Ashgill Care Home"* into the search field. She soon found by that route the Facebook posts that had been screenshot and texted to her, which were present on the claimant's Facebook page.

14. The posts in question were consecutive, both dated 3 September 2014 and were in the following terms:

"Linda Henderson

3 September 2014

Alex Salmon (sic) *wants MORE IMMIGRANTS??????? We can't feed and support our own kind as it is…… get real we don't NEED more immigrants we need apprentice's and jobs with decent wages for our OWN kind"*

"Linda Henderson shared a video

3 September 2014

Please listen to the whole clip…… watch the pictures…… The radio guy is so right…. Why are the "SO CALLED DECENT MUSLIM'S" allowing their own kind to cause and create terrorism? The answer is …… there are no DECENT HONEST MUSLIM'S. They are all fanatical bigots and its time we stood up to them and tell them THIS IS OUR COUNTRY…… IF YOU DON'T LIKE OUR LAWS THEN LEAVE…….. GO BACK TO YOUR OWN COUNTRY."

15. It was evident from the personal information on the claimant's profile on her Facebook page that she was employed as "Activities Coordinator at Ashgill Care Home".

16. Miss Jalloh was unaware of who had sent the text containing the screenshots, which had appeared on her mobile phone as originating from a private number. However, she chose not to try and make contact with the individual who sent the text because she believed it was incumbent on her to respect that person's privacy in terms of the respondent's whistle-blower policy.

17. On 3 January 2019 Miss Jalloh informed the claimant about the content of the text that she had received and the result of the check that she had subsequently carried out on Facebook. She explained to the claimant that that she was investigating the matter in the interests of the respondent, its residents and of the claimant herself.

Investigation meeting – 11 January 2019

18. In due course Miss Jalloh conducted an investigation meeting with the claimant on 11 January 2019. This investigation meeting was attended by Miss Jalloh, Debbie Rolland the claimant and the claimant's friend Audrey. By this time the claimant had gone off sick from work with work related stress and the meeting therefore took place at her home.

19. During the investigation meeting, Miss Jalloh provided the claimant with a copy of the screenshots from her Facebook account and a copy of the respondent's social media policy. On being shown the social media policy, the claimant stated –

"That's the first time I've ever seen that policy. I didn't even know it existed."

In respect of the Facebook posts that were the subject of the investigation, the claimant's position was that -

"I might have posted one about Alex Salmond, but the other one I did not post. I deny it wholeheartedly."

20. Following the investigation meeting, Miss Jalloh considered the evidence available. She took account of the content of the Facebook posts in question and the claimant's position during the investigation meeting. She noted the terms of the respondent's social media policy and the guidance issued by the Scottish Social Services Council (SSSC), which regulates social service workers' conduct and fitness to practise. She also took advice from Acas.

21. While the Facebook posts had predated the claimant's employment with the respondent, Miss Jalloh felt that the respondent's social media policy, which specifically covered past social media use, had to be applied very strictly for the protection of its residents and its staff, a proportion of whom were at that time from ethnic minorities**.**

22. Although Miss Jalloh had carried out the investigation, pressure of work was such that it was not feasible for the Unit Manager, Brian Carson, her equivalent in terms of grade, to carry out the next stage of the disciplinary procedure and to hold the disciplinary meeting.

23. Miss Jalloh therefore wrote to the claimant on 16 January 2019, inviting her to a disciplinary meeting on 23 January 2019 within Ashgill Care Home. Her letter explained that:

"At this meeting, the question of disciplinary action against you, in accordance with the Company Disciplinary Policy, will be considered with regard to breaching Ashgill's Social Media Policy.

I enclose the following documents:

- *Ashgill's Disciplinary & Grievance Policy*
- *Ashgill's Social Media Policy*

The possible consequences arising from this meeting might be Dismissal."

Disciplinary meeting - 23 January 2019

24. The disciplinary meeting took place as planned on 23 January 2019. Miss Jalloh chaired the meeting and Debbie Rolland attended to take notes. The claimant was in attendance and accompanied by her friend, Kenneth Rybnysky.

25. During the meeting, Miss Jalloh suggested to the claimant that she had previously personally spoken to her about the respondent's social media policy in connection with her responsibility for the respondent's Twitter account. The claimant's position in response was –

"You never made me aware of a social media policy at that time. You just said I had to check what I was posting, which I did."

26. In respect of the post referring to Alex Salmond, the claimant admitted that she had been responsibility for this. Her position was -

"… The one about Alex Salmond, yes I could've posted that, I'm not denying that I could've. It was my opinion, I think we're all entitled to our own opinions."

27. She also explained that her reference in that post to *'our own kind'* meant –

"Our own kind of people who were born and bred in this country regardless of whether they are pink, blue or striped. That's our own kind, that's who we need to worry about at the moment. That's not a racist attack on anybody. That is me saying we need to look after what we have before bringing anyone else into the country."

28. In respect of her comment that '"we don't NEED more immigrants", she explained that –

"We don't want any more, we didn't at that particular time because we had enough people"

29. While she therefore admitted the Alex Salmond post, she strenuously denied any responsibility for the anti-Muslim post. While she accepted that it could be seen on her Facebook timeline, she maintained that she had not been responsible for sharing the video or creating the related post:–

> *"There's no way I would've shared anything like that. If I was aware of that, I would've been mortified. I would've deleted it right away."*

30. On behalf of the claimant Mr Rybnysky submitted that when viewed by anyone who was a 'friend' of the claimant on Facebook, the two posts in question would be separated by other private posts and that it was only when viewed as a public page that they were consecutive.

The decision to dismiss

31. Following the hearing, Miss Jalloh retired to consider her decision. Miss Jalloh understood that the social media policy had been developed because the respondent wanted to increase its social media profile. The claimant had been responsible for posting on the respondent's Twitter account about the activities she had arranged with its residents.

32. Both she and Miss Rolland had directed the claimant to the social media policy in order that she would have careful regard to it before posting anything on Twitter. She concluded that the claimant had been aware of the respondent's social media policy and that a copy of the policy was available in a folder in the staff room and on the respondent's hard drive, which could be accessed from the shared computers within the care home.

33. Miss Jalloh was satisfied that during her regular supervision meetings with the claimant, whenever policies were discussed, she had never mentioned that she was unaware of the policies that were relevant to her duties. As the claimant's duties included a social media element, this reinforced Miss Jalloh's view that the claimant was aware of the social media policy.

34. Miss Jalloh also took into account the claimant's obligation as a registered social care worker to undergo continuing education in relation to her role in order to maintain her registration. She considered that a feature of that obligation was for the claimant to ensure that she was aware of the respondent's social media policy, which in certain respects reflected the SSSC's own social media policy. She believed the claimant should have taken ownership by checking any of her posts that predated her employment with the respondent that could have offended the policy and deleting them.

35. While noting the claimant's admission was only in relation to the post about Alex Salmond, Miss Jalloh concluded that, because both posts were consecutive on her personal Facebook page, she had also typed the anti-Muslim post and that she had shared the associated video.

36. Miss Jalloh had located the Facebook posts relatively easily when she looked for them and she concluded that other Facebook users would also be able to find them without difficulty. Miss Jalloh believed that both posts were inappropriate having regard to the views expressed and were serious matters for the respondent. She was concerned about the reference in the Alex Salmond post to *'our kind'*, which she believed could be reasonably interpreted as discriminatory. She was particularly concerned about the anti-Muslim post because of its clear discriminatory content. She was in no doubt that both posts were in breach of the respondent's social media policy.

37. While she acknowledged that the claimant was free to hold whatever personal opinion she wished, Miss Jalloh was concerned that her Facebook account showed that she was employed by the respondent. She believed that anyone looking at her Facebook posts could associate with the care home the views expressed in those posts. She believed that the content of the posts was such that they were likely to cause harm to the respondent, as well as its staff and residents, whose protection was her key concern.

38. Following the disciplinary hearing and before she issued the letter of dismissal, Miss Jalloh also looked for evidence as to whether the views expressed by the claimant in her posts may have affected her work with any of her vulnerable residents. Having done so, she was unable to find any documentation that showed the claimant had arranged activities with residents from ethnic minorities. She was concerned about the impression this might give the Care Inspectorate if it audited the claimant's activities. While this was not a key finding in relation to Miss Jalloh's decision to dismiss the claimant, she nevertheless did not share this aspect of her investigation or her conclusion with her.

39. In all the circumstance, having regard to the seriousness of the claimant's breach of the social media policy and, recognising that there were other sanctions available to her, Miss Jalloh decided that the appropriate penalty was dismissal without notice.

40. Miss Jalloh therefore wrote to the claimant on 29 January 2019 in the following terms:

"You attended a disciplinary meeting on Wednesday 23rd January 2019 at 11am. I am writing to advise you of the outcome of the meeting.

Having considered all the evidence, I have decided that your actions have been deemed as gross misconduct under Ashgill's Social Media Policy and that your employment has been terminated with Ashgill Care Home Ltd with immediate effect.

Please return any keys or fobs belonging to Ashgill prior to 6th February 2019. Any monies owed to you will be paid on or before 10th February 2019.

You have the right of appeal against this decision.

Please write to Ian Logendra, director of Ashgill Care Home Limited, within seven days of this letter."

The claimant's appeal against dismissal

41. Following her dismissal, the claimant wrote to Mr Logendra on 4 February 2091 in the following terms:

"In line with Ashgill policy I wish to appeal against the decision on 29-1-2019 to dismiss me.
The dismissal letter does not state:

- *Which part of the social media policy I have breached*
- *These posts were not posted whilst I was employed by Ashgill Care Home*
- *I have evidence that they were in fact post by my son without my knowledge.*

Please set up a meeting at a time and date suitable for myself and a union official to attend."

42. In response, Mr Logendra wrote to the claimant on 7 February 2019. In the first place, he informed the claimant that he would be unable, due to personal circumstances, to hear her appeal but that Brian Carson would hear the appeal in his place.

43. Mr Logendra's letter also contained the following paragraph:

"If you wish to rely on any new evidence that you have not previously advised of, or disclose, please do so, in writing, no later than ***5pm on Monday 11 Feb 2019*** *to Brian Carson at Ashgill Care Home 33 Liddlesdale Square, Milton, Glasgow, G22 7BU."*

Appeal hearing – 13 February 2019

44. The appeal hearing took place on 13 February 2019. The appeal hearing was chaired by Unit manager Brian Carson who was accompanied by Debbie Rolland who acted as minute taker. The claimant was accompanied by her union representative, Linda Wilson.

45. At the outset, the claimant provided Mr Carson with a signed letter, which she informed him was from her son, Matt Gilmore. The letter was dated 9 February 2019, and in the following terms:

"I AM WRITING THIS TO INFORM YOU THAT I PUT ITEMS ON LINDA HENDERSON'S FACEBOOK, I HAVE PUT STUFF ON BEFORE DURING DRUNKEN MOMENTS. THE POST IN QUESTION WAS PUT ON ABOUT 4.5 YEARS AGO & SHE DIDN'T NOTICE AS THERE WAS NO MENTION OF IT SO I TOTALLY FORGOT TO REMOVE IT. SHE WOULD NOT PUT THINGS LIKE THIS ON HER FACEBOOK AND I WAS SILLY TO FOR DAFT HUMOUR TO MYSELF."

46. Mr Carson explained to the claimant that she had been required to produce any additional evidence by no later than Monday 11 February 2019. As a result, he could not consider this letter as it had not been provided in time.

47. Mr Carson then confirmed that he would be hearing the appeal then referring back to Mr Logendra who sent his apologies because he was not well enough to attend the meeting.

48. Miss Wilson replied that she understood that the Acas Code provided that an appeal should be heard at a higher level than the decision maker and that the Code was not being followed as Mr Carson was senior to Miss Jalloh. Mr Carson replied that he understood the guidance but that Mr Logendra was not well enough to attend.

49. The claimant submitted that she had been through the policy and she was still not clear as to what parts had been breached. Miss Wilson explained that while the claimant had previously signed to acknowledge having read certain specific policies, such as Health and Safety, Confidentiality and Data Protection, she had never signed anything to acknowledge that she had read the social media policy.

50. In fact, the claimant had no knowledge of a social media policy and had never been asked to read or sign to acknowledge she had read such a policy. The claimant maintained that she had never seen the respondent's

social media policy before 3 January 2019 when Miss Jalloh had brought it to her attention.

51. In relation to the posts themselves, the claimant's position was that –

"… I wasn't aware of these posts; I had never seen them before the 3rd of January when Rosemary brought them to my attention"

52. Her position, both in her letter of appeal and at the appeal hearing, was therefore now inconsistent with her earlier admissions to Miss Jalloh at both the investigation meeting and the disciplinary hearing that she had been responsible for the post about Alex Salmond.

53. The claimant also asserted that she was not 'tech savvy'. She would not know how to look back on her Facebook page to find older posts. In any event she referred to the letter from her son in which he had admitted he had made one of the posts and had been too embarrassed to say anything before now.

54. Miss Wilson repeated that there was no evidence to say that the claimant was aware of the social media policy. There was no date on it to say when it was issued or revised –

"This could have been written today for all we know. Linda has previously signed to say that she's read other policies so why not this one?"

Rejection of the claimant's appeal

55. Having considered all of the evidence and the claimant's submissions on appeal, Mr Carson wrote to the claimant on 21 February 2019 with his decision, which was that: -

"… Having carefully considered your appeal, taking into account your representations and all the available information and circumstances, I have decided that the decision made at the original hearing to dismiss you under

the Social media Policy was appropriate and so I do not uphold your appeal.

This decision has been taken because:

1 ***You stated that it was not yourself that posted on your Facebook.*** *However, you presented no evidence to support this assertion. As per letter dated 4 February 2019, "If you wish to rely on any new evidence that you have not previously advised of, or disclosed, please do so, in writing, no later than 5pm on Monday 11th Feb 2019 to Brian Carson at Ashgill Care Home, 33 Liddlesdale Square, Milton, Glasgow, G22 7BU." On the day of the appeal, you handed myself a hand written note which was signed by your son this was not received prior to the meeting as requested.*

2 ***These posts were not posted whilst I was employed by Ashgill Care Home.*** *The posts in question were currently displayed on your Facebook, where it also states that you work at Ashgill Care Home as an activities co-ordinator, therefore linked to Ashgill at present.*

3 ***Part of the social media policy in which you have breached.***

- *Employees should ensure it is clear that the social media account does not represent Ashgill Care Home's views or opinions.*
- *Employees using personal social media accounts which reference or reflect on Ashgill Users must not (in the past, present or future)*
- *Post message, status updates or links to material or content that is inappropriate. Inappropriate content includes: pornography, racial or religious slurs, gender-specific comments, information encouraging criminal skills or terrorism, or materials relating to cults, gambling and illegal drugs.*

This definition of inappropriate content or material also covers any texts, images or other media that could reasonably offend someone on the basis of race, age, sex, religious or political beliefs, national origin, disability, sexual orientation, or any other characteristic protected by law.

- *Broadcast unsolicited views on social, political, religious or other non-business related matters.*

4 ***For you to receive all evidence used during the investigation.*** *On letter dated 3rd January which was posted out to yourself recorded delivery and by post, included was screenshots of the posts in question, along with social media policy.*

5 ***You were unaware of Ashgill's Social Media Policy.*** *As part of your induction, you were made aware of the policy and presence of Ashgill's policy folder in the staff room, these are also available on the computer which you have access too. It is not Ashgill's policy to have staff sign off every policy within Ashgill."*

56. At all times throughout the disciplinary process, the respondent timeously provided the claimant with copies of all relevant papers, including its dismissal and appeal decision letters.

Post dismissal earnings

57. Following the claimant's dismissal, she carried out some temporary work through Search employment agency and received payments of £150.42 on 26 April 2019, £125 on 3 May 2019, £88.20 on 10 May 2019 and £214.20 on 17 May 2019. She eventually secured permanent alternative employment with Voyage Care on 3 June 2019. She did not receive any other income apart from her earnings from Search prior to that date and had to rely on savings to pay her mortgage and her bills. The claimant does not claim for wage or pension loss for the period after 3 June 2019.

58. Most of the jobs she applied for after her dismissal and before 3 June 2019 were through online sites and she did not save the information on her phone. The applications were mainly for care sector roles but she applied for some retail and domestic roles. The claimant learned of the vacancy with Voyage Care from an advertisement on Facebook.

SSSC

59. While the respondent reported the claimant's breach of its social media policy to the SSSC, as it was obliged to do, the SSSC took no action against the claimant arising from that conduct.

The respondent's attempts to replace the claimant

60. Following the claimant's dismissal, the respondent struggled to replace her with a new activities coordinator. Following her dismissal, the first applicant for activities coordinator applied for the job on 31 March 2019 despite the job having been advertised in January 2019. That applicant was successful and filled the position on 6 May 2019 but left the role after a month.

61. The respondent was thereafter unable to recruit to the activities coordinator position until September 2019 and that person also subsequently resigned shortly thereafter. Neither of the people who were recruited into the claimant's former role in 2019 following the claimant's dismissal was known to Miss Jalloh.

62. It was clear therefore that Miss Jalloh's decision to dismiss the claimant was because of her conduct and was not motivated to any extent by a desire to replace the claimant in the role of activities coordinator with her own personal friend.

Submissions

For the respondent

63. On behalf of the respondent, Mr Logendra submitted that Miss Jalloh had genuinely believed that the claimant had breached the respondent's social media policy by having on her Facebook page the offending posts dated 3 September 2014. These posts had been in breach of the respondent's policy on *"Safe, responsible social media use".*

64. Miss Jalloh had investigated the posts initially to protect the claimant from unwanted accusations. However she had discovered that the claimant might have been responsible for them and she was concerned that they were publicly available on her facebook page, which also disclosed that she worked at Ashgill Care Home.

65. Mr Logendra referred to the claimant's admission that she had written the post about Alex Salmond and that that she was simply expressing an opinion that others shared. At the disciplinary hearing, she had described what she meant by her reference to "*our own kind".* He submitted that Miss Jalloh had rightly found that this comment could have caused offence. It was also in breach of the SSSC Guidance at paragraph 1.5 which provides:- *"I will work in a way that promotes diversity and respects different cultures and values."*

66. Miss Jalloh had been entitled to have regard to the obligations placed on the respondent and its employees by the Care Inspectorate and by the SSSC. Those regulatory bodies would be directly concerned about the way in which the respondent dealt with this situation. They would expect the respondent to take steps to prevent any abuse of residents, which Miss Jalloh had reasonably interpreted the claimant's actions to have risked.

67. Miss Jalloh had found no evidence of the claimant having completed activities with anyone from ethnic minorities. This showed that her views did have an influence on her performance at work. She was concerned about how the Care inspectorate would view that.

68. Miss Jalloh had made her decision to dismiss based on the evidence and not because she sought to replace the claimant in the role of activities coordinator with a friend. Following the claimant's dismissal it had in fact taken a full year to find a permanent replacement, which countered the allegation that a replacement had been lined up.

69. With regard to the content of the Alex Salmond post, Mr Logendra noted that Miss Jalloh had accepted that the view expressed about Alex Salmond may have been a popular one and that she would have had no issue if that post had not been linked to the respondent by virtue of its name being on her profile. However the claimant would be unable to provide everyone who saw this post on her Facebook page with an explanation of what she meant by "*our own kind".* It was therefore likely that they would have a negative view in the absence of that explanation. It was most likely to be interpreted as not befitting of an individual registered with the SSSC or associated with a care home. The respondent's concern was even greater in relation to the anti-Muslim post.

70. Although he accepted there had been no evidence led in support of this this point, Mr Logendra submitted that there were 17,000 views per month on the care home's website and there was a significant risk that individuals would see these posts and form a negative view about the respondent.

71. Mr Logendra referred to the SSSC guidance on sharing information on social media, which focused on protecting those registered with the SSSC and those in their care. Miss Jalloh had indicated in evidence that a proportion of the respondent's workforce were immigrants and there were also residents from ethnic minorities. It was her job to protect them.

72. Mr Logendra submitted that the claimant's denial that she knew about the social media policy was not credible. In any event, ignorance of the policy was not an excuse because it was necessary for her to have regard to it in order that she could operate the respondent's Twitter account. She had admitted in her evidence that she was aware of the policy (which was also

apparent from her supervision records) and where it was kept but she had not read it.

73. Even if, as asserted in her evidence, the claimant had not been sanctioned by the SSSC for making the posts in question Miss Jalloh's decision had nevertheless been fair based on the evidence available to her.

74. The dismissal had been procedurally fair. The claimant had been provided with the screenshots of the offending posts, she had been afforded representation and she had been provided with copies of the minutes of the various meetings that had taken place. She had only, during the course of the Tribunal hearing, indicated that she had not received any of the papers. Mr Logendra also questioned why, if the claimant had not received the appeal outcome letter when it was issued, she had not contacted the respondent to chase it up.

75. It had not been unreasonable for Miss Jalloh to both carry out the investigation and make the decision to dismiss the claimant. The respondent was a small company and it had been unable to provide a separate investigation and disciplinary manager. Matters had been further compounded by Mr Logendra's ill health. The fact that Miss Jalloh had undertaken both roles had no bearing on the fairness of the outcome.

76. So far as loss was concerned, Mr Logendra submitted that the claimant had provided inadequate evidence of mitigation of loss as an activities coordinator. The claimant's skills would have been in high demand but that had not been in evident based on the fact that the respondent had not been approached for a reference. Within the care sector, the absence of a reference from a previous employer is prejudicial to a job applicant. Care sector employers will obtain a reference from an applicant's two previous employers and the absence of a reference from the respondent would hamper her opportunities. It therefore appeared that the claimant was applying for jobs outside the care profession and thereby failing to mitigate her loss.

77. Finally, Mr Logendra invited the tribunal to have regard to ***Polkey v AE Dayton Services Limited,*** in the event that it found that there had been any unfairness in the dismissal procedure, albeit he did not concede there had been any such unfairness that would give rise to a Polkey deduction.

For the claimant

78. On behalf of the claimant, Mr Lawson submitted that the respondent had not dismissed the claimant for the potentially fair reason of conduct, as it had asserted.

79. Alternatively, if the respondent *had* dismissed the claimant for conduct, then it had dismissed her unfairly in terms of section 98(4) of the Employment Rights Act 1996, having regard to the principles set out in ***BHS v Burchell 1978 IRLR 379*** and ***Foley v The Post Office 2000 IRLR 827***.

80. In the first place, it was the claimant's belief that she had been dismissed for reasons unrelated to her conduct in order to allow Miss Jalloh to appoint someone of her own choosing to the position of activities coordinator.

81. Alternatively, if the dismissal had been related to her conduct it had been unfair on several counts. Firstly, it had been unfair for Miss Jalloh, having received the initial complaint, to have both conducted the disciplinary investigation and subsequently taken the decision to dismiss the claimant.

82. While Mr Lawson accepted that Mr Logendra had subsequently become unwell, he was still at work at the time the decision was made that Miss Jalloh would both investigate the alleged misconduct and chair the disciplinary meeting. It should therefore have been anticipated that Mr Logendra could hear the appeal and that Mr Carson should have conducted the investigation. The only explanation given was that Brian Carson was too busy.

83. Mr Lawson referred to paragraph 6 of the ACAS Code of Practice which says:

"*6. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing"*

84. Mr Lawson submitted that in all the circumstances it had been practicable for another manager to have conducted the investigation if Miss Jalloh had been chosen to deal with the decision stage. That other manager could have been Mr Carson. The respondent had acted in breach of the Acas Code.

85. The allegations had not been adequately particularised. It had been unfair to simply characterise the alleged misconduct as *"a breach of the respondent's social media policy*". That lack of particularisation had created a complexity, particularly in light of Miss Jalloh's evidence. In the respondent's ET3, there had been an emphasis on reputational damage but that had not been spoken to in any meaningful way by Miss Jalloh who had made it clear that her decision was based on the safety of staff and residents. Her evidence had suggested that her concern was not the presence of the posts but that the claimant held the beliefs articulated in them.

86. The claimant had not at any stage denied that she had made the post about Alex Salmond. On the other hand, she strenuously denied that she had shared the video or made the accompanying anti-Muslim comments. In the knowledge that she was not responsible, she raised the possibility that her Facebook account had been hacked or alternatively that she could have shared it in error. However, subsequently her son had provided a statement that made things clear.

87. Mr Lawson submitted that the claimant's position had been consistent throughout the entire disciplinary process. That was at odds with Miss Jalloh who had had initially stated that the claimant's position in relation to the video was that she was unsure whether she had posted it but had then, in cross examination, accepted that the claimant had denied all responsibility. Miss Jalloh had demonstrated a willingness to give

evidence in a way that benefited the respondent, which showed that she was not a credible and reliable witness.

88. In finding that the claimant had been responsible for the anti-Muslim post the respondent had relied on the fact that this post was next to the Alex Salmond post that she admitted having posted on the same date the anti-Muslim post had been shared. These posts were consecutive for Miss Jalloh but not for anyone who was a private friend on Facebook with the claimant for whom the posts would not have been separated by other posts.

89. In any event, critically, the claimant provided evidence that her son was responsible. She also provided an explanation why this evidence came to light when it did. It formed a fundamental part of her appeal. Yet the respondent had adduced no evidence of its investigation into this matter or what consideration had been given to it. It was clear that the respondent had chosen not to consider it and that its rationale was simply that it was not produced in advance of the appeal hearing.

90. The respondent's disciplinary policy at paragraph 6.6 did not strictly require evidence to be submitted in advance of the appeal hearing but simply said that copies should be provided *"in advance if at all possible".* It also provided that where that was not possible, the manager could ask to adjourn the hearing to allow copies to be made.

91. Not only did the respondent's policy not require evidence in advance, it provided an alternative to allow new evidence to be received and considered. There was no evidence that the respondent had even considered postponing the hearing for that reason.

92. There had been no reasonable investigation undertaken into the claimant's son's admission of responsibility for the posts and it followed that the respondent had no reasonable grounds to sustain a belief that the claimant had been guilty of the anti-Muslim post.

93. Mr Lawson conceded that if the claimant had been guilty of sharing the anti-Muslim video that the dismissal would have been within the band of

reasonable responses. However, the Alex Salmond post was an assertion of the economic benefits of immigrants. It may not have been a particularly elegantly expressed post but it was not sufficiently serious that it would reasonably entitle the respondent to dismiss.

94. In all the circumstances, dismissal was outside the band of reasonable responses. There were several reasons for that. In the first place, the claimant had been unfamiliar with the respondent's social media policy. Her evidence was that she had not read it until she was sent a copy in advance of the disciplinary process. The content of the policy in relation to personal social media accounts had not been made known to her. She denied that Debbie Rolland had taken her through the policy when they were discussing setting up the Twitter account.

95. There was also a lack of clarity in relation to when the social media policy was introduced. Miss Jalloh had said it was introduced in 2018 when the Twitter account was set up, whereas the appeal outcome letter said that it had been available at the time when the claimant had gone through her induction when she began her employment in 2015.

96. It was important to consider that the posts were made prior to the claimant commencing her employment with the respondent. The claimant had no reason to believe she had to trawl through old Facebook posts to search for anything that could be misinterpreted. It was relatively clear that had the claimant been asked, she would have deleted that message and indeed any other message that would potentially cause offence. There was no indication that this would ever happen again.

97. There had been no evidence led about the impact of the post of the claimant's work. There was no evidence to suggest that any damage had actually been done to the respondent by the comments. If indeed the respondent was so concerned about the social media profile of its employees, it should have informed them specifically of their expectations in that regard. A further step would have been to check employees' social media accounts to ensure compliance but they did none of that.

98. There were various lesser sanctions available to the respondent in terms its disciplinary policy. A lesser sanction would have been appropriate in the circumstances.

99. Miss Jalloh's finding was that she was concerned for the safety of staff and residents. There was no evidence to support her finding that the claimant posed any risk to staff or residents. Miss Jalloh had said that she was concerned about what she would tell the Care Inspectorate and SSSC if she had not dismissed the claimant. She had given the impression she felt some risk to the respondent unless she made that decision. Against the background of SSSC, having considered and decided that no action should be taken, it seemed unlikely that there would have been adverse consequences at the hands of the SSSC or Care Inspectorate if a lesser sanction had been applied.

100. Miss Jalloh had said that she had undertaken investigation in relation to the activities undertaken by the claimant with ethnic minorities. This had never been put to the claimant during the discipline case. No particulars had been provided about who these individuals were. The claimant did not believe that there was any evidence whatsoever that she had failed to engage in her role with people from ethnic minorities.

101. Mr Lawson submitted that it was clear that Miss Jalloh's view was not that she was dealing with a breach of the policy but rather with an employee who held views that were so objectionable that she could not continue in her employment. That was not the allegation the claimant had faced.

102. Mr Lawson referred to the case of ***Strouthos v London Underground 2004 IRLR 636,*** which was authority for the proposition that an employee should only be found guilty of the offence with which they have been charged and that it was a basic principle that a charge against an employee should be precisely framed and the evidence confined to the particulars in the charge. Care must therefore be taken in the framing of a disciplinary charge and the circumstances in which was permissible to go beyond that charge in the decision by the disciplinary manager were severely limited.

103. That principle applied equally to Miss Jalloh going beyond a breach of the social media policy by also relying on the SSSC Code of Practice. At no stage was the SSSC Code put to the claimant during the disciplinary proceedings.

104. Mr Lawson referred to ***Foley v The Post Office 2000 IRLR 827***. The respondent must take account of the claimant's employment record or other similar incidents of such conduct. There was no record of the claimant having committed any other social media breach.

105. The framing of the social media policy to deal with any posts either "past, present or future" was too wide. It was difficult to imagine what would not have fallen within that policy.

106. In dismissing the claimant, the respondent had also breached the claimant's right to freedom of expression in terms of Article 10 of the European Convention of Human Rights and her right to a private life under Article 8.

107. Mr Lawson submitted that there was doubt about Miss Jalloh's reliability. She had given evidence in relation to the texts about the Facebook posts that she had received from the whistle-blower. She had initially indicated that this was from a "*private"* number but then changed her evidence to say that it was from *"an unknown number".* If the text had come from an unknown number, then she could have clicked on it for the information but she had chosen not to.

108. In terms of remedy, Mr Lawson submitted that the claimant's valuation and the steps that she had taken to mitigate her loss had not been challenged. He asked the tribunal to take into account that the national minimum wage had increased in April 2019 and that the claimant's rate of pay would have increased to £8.21.

109. She sought compensation for four months only, having undertaken agency work in the period between her dismissal and finding suitable alternative full time work on 3 June 2019. There was no evidence of her having failed

to apply for particular vacancies available in that period. Four months was in any event a reasonable period in which to find suitable alternative employment.

110. Mr Lawson submitted that the burden fell on the respondent to establish that there should be a Polkey deduction but that the respondent had failed to produce sufficient evidence to discharge that burden. The respondent had no reasonable grounds to believe that she had shared the anti-Muslim post. If she was successful in relation to that post, then we were left with the Alex Salmond post. Miss Jalloh had been asked if she would have dismissed for that one post and she was unable to say "yes or no".

111. In terms of contributory conduct, Mr Lawson submitted that the respondent had shown no grounds to sustain a belief that she was responsible for the shared video and the respondent had not established that she was responsible for it. There should therefore be no reduction for that.

112. In respect of the Alex Salmond post, that should not attract any reduction because the post was so long ago prior to commencement of her employment and in any event, it was to no meaningful degree culpable because it represented a view shared by a large proportion of the population.

The relevant law

113. Section 94 of the Employment Rights Act 1996 (ERA 1996) provides the claimant with the right not to be unfairly dismissed by the respondent.

114. It is for the respondent to prove the reasons for its dismissal and it is a potentially fair reason in terms of section 98 (ERA 1996). At this first stage of enquiry, the respondent does not have to prove that the reason did justify the dismissal; merely that it was capable of doing so.

115. If the reason for dismissal is potentially fair, then the tribunal must determine, in accordance with the equity and the substantial merits of the case, whether the dismissal was fair or unfair under section 98 (4) ERA 1996. This depends on whether in the circumstances (including the size

and administrative resources of the respondent's undertaking) the respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. At the second stage of enquiry, the onus of proof is neutral.

116. If the reason for the claimant's dismissal relates to the conduct of the employee, the tribunal must determine that at the time of dismissal, the respondent had a genuine belief in the misconduct and that the belief was based upon reasonable grounds having carried out a reasonable investigation - ***British Home Stores v Burchell 1978 IRLR 379.***

117. In determining whether the respondent acted reasonably or unreasonably, the tribunal must not substitute its own view as to what it would have done in the circumstances. Instead, the tribunal must determine the range of reasonable responses open to an employer acting reasonably in the circumstances and determine whether the respondent's response fell within that range.

118. The respondent's response can only be considered unreasonable if no employer acting reasonably would have responded in that way. The range of reasonable responses test applies both to the procedure adopted by the respondent and the fairness of its decision to dismiss - ***Iceland Frozen Foods Limited v Jones 1983 ICR 17EAT.***

119. Any provision of a relevant Acas Code of Practice, which appears to the tribunal may be relevant to any question arising in the proceedings shall be considered in determining that question (section 207A, Trade Union and Labour Relations (Consolidation) Act 1992).

120. The Acas Code of Practice on disciplinary and grievance procedure provides that:

a) Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions;

b) Employers and employees should act consistently;

c) Employers should carry out any necessary investigations to establish the facts of the case;

d) Employers should inform employees on the basis of the problem and give them an opportunity to put their case in response before any decisions are made;

e) Employers should allow employees to be accompanied to any formal disciplinary or grievance meeting;

f) Employers should allow an employee to appeal against any formal decision made.

The code also provides that in misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.

Discussion and decision

121. Dealing in turn with the issues to be determined, the tribunal finds –

What was the reason for the claimant's dismissal?

122. The Tribunal was satisfied that the respondent dismissed the claimant for having on her personal Facebook page two posts whose contents were in breach of its social media policy because they were inappropriate according to that policy and likely to cause offence. There was no evidence whatsoever that Miss Jalloh had the motive asserted by the claimant, which was to dismiss her in order to replace her with a personal friend.

Was the reason for dismissal a potentially fair reason within the meaning of section 98 (1) and (2) of the Employment Rights Act 1996?

123. The tribunal was satisfied that this reason related to the claimant's conduct and was a potentially fair reason.

Did the respondent have a reasonable belief that the claimant had been guilty of misconduct?

Did the respondent have reasonable grounds for that belief?

124. The question for the tribunal was not whether the claimant had in fact posted the offending Facebook posts but whether the respondent reasonably and genuinely believed that she had done so and that they were in breach of its social media policy and whether there were reasonable grounds for that belief, having carried out a reasonable investigation.

125. In the first place, the tribunal was satisfied that the claimant knew or ought to have known about the social media policy. She had been made aware of its existence and it was available to her on the respondent's shared hard drive and in a separate physical folder.

126. In the course of her duties, the claimant had undertaken to manage the respondent's Twitter account. In discussions with Miss Jalloh and Miss Rolland about adding that to the responsibilities of her role, the social media policy had been properly drawn to her attention.

127. It was reasonable for the respondent, even if they did not provide her with a paper copy, to expect the claimant to have proper regard to that policy in circumstances where it governed her actions in respect of her management of the Twitter account. It was her job to understand the policy and to apply it.

128. The offending posts in question appeared consecutively on the claimant's personal Facebook page and had been posted on the same day. While the claimant had admitted responsibility for the post relating to Alex Salmond, the respondent was entitled on the evidence of the Facebook page to conclude that the anti-Muslim post had also been made by her and the accompanying video shared by her.

129. The tribunal had no difficulty in concluding that the respondent had a reasonable belief that the claimant had made the offending posts and that they were on her Facebook page in breach of the respondent's social media policy, which had been properly drawn to her attention because it was part of her role to understand it and apply it. It was also satisfied that this belief was held on reasonable grounds.

By the time it held that belief, had the respondent carried out as much investigation as was reasonable in the circumstances

130. The tribunal was satisfied that the respondent's investigation had been even handed and reasonable in the circumstances. On receipt of the anonymous text, Miss Jalloh had carried out an appropriate investigation by searching for evidence as to whether the offending posts were still present on the claimant's Facebook page and had then considered them in the light of the respondent's social media policy, which had also been produced.

131. While the tribunal accepts that the disciplinary allegation in Miss Jalloh's letter of 16 January 2019 did not refer directly to the offending posts, it was nevertheless satisfied that in all the circumstances the claimant was fully aware of the allegations against her, having regard to the evidence produced, and that she had every opportunity to respond meaningfully.

Was the decision to dismiss fair having regard to section 98 (4) of the Employment Rights Act 1996, including whether in the circumstances the respondent acted reasonably in treating the reason for dismissal as a sufficient reason for dismissing the employee?

Did the decision to dismiss and the procedure adopted fall within the “range of reasonable responses" open to a reasonable employer”?

132. The tribunal accepted that it may have been possible for the claimant's 'friends' on Facebook to have viewed these posts as non-consecutive. However, if Miss Jalloh was able to log onto Facebook, search for the offending posts and find them appearing consecutive to one another, then it was likely that other people visiting the site, including staff and residents,

would see the same thing. It was also evident that the claimant's public profile on Facebook indicated that she was employed by the respondent.

133. The posts in question would have been especially upsetting and offensive for the respondent's employees, its residents and their families, particularly if they were from ethnic minorities. They were also likely to be harmful to the respondent's image and reputation.

134. It was fair for the respondent to rely on its policy that posts that were made in the *"past, present or future"* could be equally liable to offend. The claimant knew or ought to have known about the existence of that policy. She should have taken steps to delete any posts that were contrary to it, having regard to the nature of the respondent's business and the likely impact of such posts.

135. The tribunal noted the respondent's repeated references to the Care Inspectorate and to the various codes issued by the SSSC. It was not unfair for the respondent to apply its own social media policy in the light of its obligations to the SSSC and to the Care Inspectorate and the claimant's obligations as a worker registered with the SSSC. However the tribunal accepted that the principal reason for dismissal was the claimant's breach of the respondent's social media policy and not her breach of any Code issued by the SSSC.

136. In relation to Article 8, the right to privacy, the tribunal found that the claimant had no reasonable expectation of privacy in relation to the offending posts. Her Facebook settings were such that anyone could view her posts even if they were not her 'friends' on Facebook, and it was by that means that Miss Jalloh had discovered them. Article 8 had therefore not been engaged. However even if it had been engaged, the respondent's interference would have been justified and proportionate in order to protect its residents, its staff and its reputation.

137. The tribunal accepted that Article 10, the right to freedom of expression, had been engaged. However it also found that it was justified and

proportionate for the respondent to interfere with that right by limiting it for these purposes in order to protect its residents, its staff and its reputation.

138. However the tribunal must also take into account, firstly, that Miss Jalloh had failed to share with the claimant her finding that she had looked for, but had not found, evidence of her having arranged activities with residents from ethnic minorities and, secondly, the respondent's failure to engage at all with the letter from Mr Gilmore that was presented at the appeal hearing.

139. While Miss Jalloh's failure to find evidence of the claimant's engagement with residents from ethnic minorities was ultimately not a deciding factor in her decision to dismiss the claimant, the claimant should nevertheless have been given an opportunity to comment on it. A reasonable employer would have given her that opportunity and the respondent's failure to do so was outside the range of reasonable responses.

140. Further, while the respondent had set a deadline by which new evidence should have been produced before the appeal hearing and the claimant had not complied with it, she had nevertheless come to the appeal hearing armed with a letter from her son, which she claimed proved her innocence. Having regard to the terms of the respondent's own discipline procedure and the fact that the claimant had presented this letter as evidence of her innocence, it was unfair to refuse to consider that evidence at all. A reasonable employer would have engaged with Mr Gilmore's letter and the respondent's failure to do so was outside the range of reasonable responses.

141. The claimant's dismissal was therefore unfair because of the respondent's failure to share with the claimant the further evidence obtained by Miss Jalloh after the disciplinary hearing and also its unreasonable failure to engage with the evidence from Mr Gilmore that was presented at the appeal. For these reasons the respondent did not act reasonably in treating the claimant's conduct as a sufficient reason for dismissing her.

If the respondent did not adopt a fair and reasonable procedure, was there a chance the claimant would have been dismissed in any event?

142. In ***Software 2000 Ltd v Andrews and others UKEAT/0533/06,*** the EAT held that –

> *"The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice"*

143. Dealing firstly with Miss Jalloh's failure to share with the claimant her finding that she had not found evidence of activities with residents from ethnic minorities, the tribunal was satisfied that this was not a factor that influenced her decision to dismiss, which she had taken because the claimant had breached the social media policy. This failure was therefore not causally relevant to the dismissal. Even if that finding had been shared with the claimant for her comments, any response she would have given on that particular issue would have made no difference to the outcome.

144. In relation to the respondent's handling of Mr Gilmore's letter presented at the appeal, it was notable that the letter did not describe, even in general terms, the content of *"the post in question"* that it purported to take responsibility for.

145. On the face of it, Mr Gilmore's letter admitted a single unidentified post and not both posts. By the time of the appeal, the claimant had changed her position from admitting the Alex Salmond post to denying she had made either post.

146. If the respondent had considered Mr Gilmore's admission of one unidentified post it would have had regard to both posts and taken into account that they were written in exactly the same style, which was characterised by block capitals and lengthy ellipses. It would have been evident that both posts were made by the same person. It would therefore

have been evident that the position advanced on appeal, which was based on (1) the claimant's denial of both posts and (2) Mr Gilmore's admission of only one of them, was unsustainable.

147. Mr Gilmore's letter gave the impression that he was unaware of the content of either post. Indeed, it gave the impression of having been created solely to assist the claimant's appeal, particularly in light of its timing. The claimant will likely have known that Mr Gilmore's letter contained a falsehood. This leads to an inevitable conclusion that she advanced her appeal unreasonably.

148. The tribunal therefore finds that even if the respondent had taken account of Mr Gilmore's letter it would not have attached any weight to it whatsoever and that it would have made no difference to the outcome.

149. In the circumstances, even if Miss Jalloh's undisclosed findings had been shared with the claimant and even if Mr Gilmore's letter had been considered at the appeal, there is a 100% chance the claimant would have been dismissed in any event. Any compensation must therefore be reduced to nil.

Did either party unreasonably fail to comply with the Acas Code of Practice and, if so, should the tribunal reduce or increase any compensatory award due to the claimant (and if so, by what factor not exceeding 25%)?

150. The tribunal accepts that at the time of the disciplinary hearing it was anticipated that Mr Logendra would hear the appeal and that in theory Mr Carson could have dealt with the disciplinary hearing.

151. However it also accepts that in circumstances where there are a limited number of managers within the respondent's organisation, pressure of business was such that Miss Jalloh needed to conduct the disciplinary hearing, having also carried out the investigation. In these circumstances there was no unreasonable failure to comply with the Acas Code.

By her conduct, did the claimant contribute to her dismissal and should any compensatory award be reduced accordingly (and, if so, by what factor)?

152. Section 123 of the Employment Rights Act 1999 provides that –

"(1) Subject to the provisions of this section and [sections 124, 124A and 126]1, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

…

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

153. The respondent's social media policy was a reasonable one and the claimant had a responsibility to have proper regard to it in order to fulfil her role. The respondent did not fail to make the claimant aware of that policy or its importance to its staff and residents. The claimant's misconduct by virtue of her breach of that policy was the sole cause of her dismissal. The respondent's procedural failings were not causally relevant to her dismissal. The claimant's contribution was such that if a compensatory award had been made, it would have been just and equitable to reduce that award by 100%.

Did the claimant engage in conduct that was culpable or blameworthy and, if so, should the tribunal make a reduction to any basic award to which the claimant would be entitled (and, if so, by what factor) to reflect this?

154. Section 122 (2) of the Employment Rights Act 1996 provides that -

"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.'

155. As the respondent's procedural failings were not causally relevant to the claimant's dismissal and her culpable and blameworthy conduct in breaching the respondent's social media policy was the sole cause for her dismissal the tribunal finds that it would also be just and equitable to reduce her basic award by 100%.

What financial loss has the claimant suffered in consequence of her dismissal and has she taken reasonable steps to mitigate her loss?

156. The claimant has suffered financial loss, valued by her at £4,184.58 and it is accepted that she took reasonable steps to mitigate her loss. However for the reasons set out above, she is entitled to no compensation.

Employment Judge: R King
Date of Judgement: 30 March 2021
Entered in register: 30 March 2021
and copied to parties