EMPLOYMENT TRIBUNALS

Claimant: **Mr J Sleath**

Respondent: **West Midlands Trains Limited**

Heard at: **Birmingham**

On: **23 & 24 September 2021 and in chambers on 5 November 2021**

Before: **Employment Judge Flood**

Representation

Claimant: Mr Mitchell (Counsel)
Respondent: Mr Wallace (Counsel)

RESERVED JUDGMENT

1. The claimant's claim for unfair dismissal succeeds on the basis that the dismissal was procedurally unfair.

2. There was a 10% chance that the claimant would have been dismissed had a fair process been followed.

3. The dismissal was contributed to by the claimant's conduct, and the compensation which is due to the claimant is to be reduced by 60% in accordance with Sections 122(2) and 123(6) Employment Rights Act 1996.

4. A Remedy hearing will be listed and notified to the parties to determine the remaining issues set out at paragraph 7 below.

REASONS

The Complaints and preliminary/procedural matters

1. By a claim form presented on 9 November 2021 (following early conciliation between 13 and 23 October 2020) the Claimant brought complaints of unfair dismissal contrary to section 94 of the Employment Rights Act 1996 ("ERA") and direct and indirect discrimination on the grounds of religion and belief contrary to sections 13 and 19 of the Equality Act 2010 ("EQA"). A bundle of documents had been prepared and agreed by the parties in advance of the final hearing ("the Bundle"). Unless otherwise stated, references to page numbers in this document are to page numbers in the Bundle.

2. At a preliminary hearing on 23 February 2021 before Employment Judge Kelly the issues were identified (page 34-36) and the matter was listed for a further open preliminary hearing to consider issues with regard to the claimant's discrimination complaint. That hearing took place before Employment Judge Battisby on 25 June 2021. It was decided that the specific beliefs relied upon by the claimant in his complaints of discrimination were philosophical beliefs protected by the EQA. A deposit order was made under Rule 39 of the Employment Tribunals Rules of Procedure 2013 ("ET Rules") in respect of the discrimination complaints. The reserved judgment of Employment Judge Battisby issued to the parties on 21 July 2021 ("the OPH Judgment") was shown at pages 47-61 and was referred to by the parties throughout the hearing. In particular my attention was drawn to the following paragraphs of the OPH judgment:

   "44. .I accept his first post was initiated as a result of the public houses reopening. However, if one reads both his posts in full, it is clear he is also expounding in short and simple terms his beliefs about wanting to live in a free society without restrictions, such as on drinking alcohol, and being against religious theocracy. Whilst he may have been misguided or inaccurate in his interviews with the respondent and his cross examination by Mr Wallace about the meaning of 'caliphate' and the way of life in Dubai and other Islamic states generally, that does not detract from the core elements of his beliefs."

   …

   "47. . On Grainger III, the respondent refers to the claimant's beliefs as relating to 'libations, alcohol and pub culture' which are not weighty or substantial as far as human life and behaviour is concerned. Of course, this does not reflect the findings made as to the whole of the claimant's beliefs, which are clearly weighty and substantial matters. The respondent also contends there were anti-Muslim or anti-Islamic sentiments behind the beliefs, which, if strongly held, were undoubtedly weighty, but would fail under Grainger V. The submission further contends that anti-caliphate beliefs cannot be considered relevant to an aspect of human life or behaviour, since such beliefs necessarily speak to a by-gone era. I find the claimant's references in the post were his way of expressing his beliefs about religious theocracies such as in a territory run by ISIS, which is obviously contemporary and relevant."

   …

49. Regarding Grainger V and whether the claimant's beliefs are worthy of respect in a democratic society, the respondent refers to the beliefs expressed by the claimant as being anti-Islam and Anti-Muslim, so fail the test even under the heightened Forstater standard. Given the findings made as to the claimant's beliefs, I disagree with the submission. Again, considering manifestation in the limited way described in Forstater, I do not consider for the purposes of the present exercise that the claimant's views are, or were intended to be anti-Islam or anti-Muslim, but, in any event, to use the words of the President in Forstater, the Claimant's beliefs do not get anywhere near to approaching the kind of belief akin to Nazism or totalitarianism that would warrant the application of Article 17. That is reason enough on its own to find Grainger V is satisfied'.

3. The claimant failed to pay the deposits ordered and so his complaints of direct and indirect discrimination were struck out under rule 39 (4) of the ET Rules by a judgment sent to the parties on 9 September 2021. The unfair dismissal complaint remained and was listed for hearing and came before me.

4. On the first day of the hearing, an issue arose with the claimant's witness statements. The claimant had submitted two witness statements one dated 19 May 2021 and a further statement headed "Second Witness Statement of Jeremy Sleath" dated 15 September 2021. That second statement was provided in hard copy and contained a number of hyperlinks to external webpages including to entries on Wikipedia, the BBC's and The Guardian newspaper's news website and also to a High Court judgment. Mr Mitchell made an application that the documents behind those hyperlinks be admitted in evidence. He submitted that they were clearly relevant to some of the matters raised (particularly at appeal) and that no prejudice was caused to the respondent. Mr Wallace objected to this application suggesting there was no proper basis for such documents to be admissible as there was no suggestion that such website pages had been under consideration by the respondent at any point during the dismissal and appeal process.

5. I was content to admit the High Court decision (as it was a matter of public record) but was concerned as to the practicability of admitting documents behind hyperlinks, given that hard copies of the statements had been provided and that the Tribunal's systems did not permit the use of hyperlinks to external websites. I was also concerned about the possibility of webpages changing or being updated and so that there was a risk of the parties and the Tribunal not seeing the same version of any document linked to. I asked Mr Mitchell to produce hard copies of all the documents relied upon but he was unable to do so. An adjournment to consider any possible solutions took place and an attempt was made to e mail the links directly to the Tribunal administration which was also not successful. A solution was found with a supplementary bundle being sent to the respondent and the Tribunal containing the information contained in the hyperlinks which was in the end admitted without further objection.

6. Following discussion it was also agreed that the hearing would deal with liability only with a separate remedy hearing to take place, given that there were issues of pension loss and because the claimant sought reinstatement. No significant evidence had been called or considered on these matters. I decided that the hearing would deal with liability and also the issues of contribution and Polkey but that remedy would be dealt with if necessary at a further hearing. The evidence got underway at 2.35 pm on the first day of the hearing. Having concluded the evidence and submissions at 4pm on the second day of the hearing, the claim was adjourned for a reserved decision to be made which was listed before me on 5 November 2021.

<u>The Issues</u>

7. The issues which needed to be determined were:

Unfair dismissal

7.1. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98 (1) and (2) of the ERA? The respondent asserts that it was conduct.

7.2. If so, was the dismissal fair or unfair in accordance with ERA section 98(4) and in particular, did the respondent in all aspects act within the so called 'band of reasonable responses'? The claimant relies on the following:

i) The dismissal was outside the range of reasonable responses to the act because it was disproportionate to the fact, particularly given:

(1) The claimant's length of service and good service record
(2) The posting was on a private facebook page and the posting was not public and it did not link the posting to the respondent
(3) The posting was not offensive or racist and was not an act of misconduct under the respondent's disciplinary procedure or at all
(4) The claimant has a right to freedom of speech as a human right

ii) The appeal decision was originally to reinstate the claimant but this was overturned on review, unjustifiably, apparently because the claimant contacted the respondent about the logistics [of] being reinstated, which was not a disciplinary allegation.

iii) The appeal decision maker unreasonably took account the claimant not wishing to take a holiday in Dubai

Remedy for unfair dismissal

a. Does the claimant wish to be reinstated to their previous employment?

b. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

c. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

d. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

e. What should the terms of the re-engagement order be?

f. If there is a compensatory award, how much should it be? The Tribunal will decide:

    a) What financial losses has the dismissal caused the claimant?
    b) Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
    c) If not, for what period of loss should the claimant be compensated?
    d) Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
    e) If so, should the claimant's compensation be reduced? By how much?
    f) If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
    g) If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
    h) Does the statutory cap apply?

g. What basic award is payable to the claimant, if any?

h. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

<u>Findings of Fact</u>

8. The claimant gave evidence by way of a witness statement and orally in response to cross examination, re-examination, and Tribunal questions. The respondent's witness, Mr S McBroom ("SM") gave evidence in the same manner. I have considered the relevant parts of the Bundle.

9. The oral evidence given by witnesses was broadly consistent with their witness statements and the pleadings. There was not that much discrepancy between the factual accounts of the witnesses attending the Tribunal hearing (as the factual circumstances were not in dispute).

10. On the relevant evidence raised, I make the following findings of fact:

    10.1. The claimant had worked with the respondent for 17 years (15 December 2003 until 16 September 2020) and had a clean disciplinary record. He was employed as a train conductor based at Leamington Spa and his role involved ensuring the safe and timely running of trains, ensuring passenger safety and maximizing income through the checking and selling of tickets. This was a customer focused role and is described by SM as being 'on the frontline' of the respondent's operations. The claimant does not appear to have attended any formal equality and diversity training sessions whilst employed by the respondent.

    10.2. The claimant's contract of employment was at page 123-129. I was referred to the disciplinary policy of the respondent applicable to his employment which was at pages 130-151. It contained a list of examples of gross misconduct at page 138 that I was referred to and in particular:

    "*Persistent or deliberate discrimination or harassment, or incitement to harass or discriminate, on the grounds of race, sex, or gender reassignment, religion, disability, age or sexual orientation"*

    ….

    "Bringing the company into serious disrepute, i.e., where the act of misconduct is known, or has the potential to become known, to external people or organisations and may damage the company reputation."

    The claimant acknowledged that this was just a list of examples and that other actions similar in seriousness could amount to gross misconduct and potentially lead to dismissal.

    At page 144, I was also referred to the following section:

    "When considering their decision, the hearing manager must also take into account the employee's length of service and their previous record as appropriate."

    At page 147, the section on the appeal hearing included the following provisions:

    "*At the hearing, the employee or their representative or companion will be given every opportunity to present their appeal, together with any witnesses or supporting new evidence that is directly related to their grounds of appeal.*

Once all the information has been heard, the employee or their representative should be provided with a further opportunity to add any additional information or to sum up.

Once all the information has been given the hearing manager will adjourn to consider the information presented.
The hearing manager will then reconvene the hearing and advise the employee of the decision. Should a hearing manager be unable to conclude the appeal hearing on the day, where possible the reconvened hearing date should be agreed at the hearing to avoid further delay to process."

10.3. The Code of Conduct was at pages 152-8 and included the following provisions:

"customers and colleagues expect the highest standard of conduct from West Midlands Trains employees"

…..

"All employees should respect their colleagues. West Midlands Trains will not allow any kind of discriminatory behaviour, harassment or victimisation.

Employees should conform with the Company's Equal Opportunities policy, on the intranet, in all aspects of their work, from recruitment and performance evaluation to interpersonal relations".

The claimant acknowledged that this meant that the respondent had a zero tolerance approach to discriminatory behaviour and that this did not always require an intent to discriminate or that the behaviour was malicious. SM was asked whether the respondent had a Social Media policy and if so why it had not been produced. He said he believed that there was such a policy and did not know why it had not been produced as it was relevant. He was also asked about the Equal Opportunities policy and whether it formed part of his review and if so where it was and again SM said he did not know. Neither policy was before the Tribunal.

Facebook posting on 4 July 2020

10.4. On 4 July 2020 there was an easing of the Covid 19 restrictions in place in England and this was the first day when pubs were permitted to reopen (with some social distancing and other measures in place). The claimant was off work and attended a pub. He then posted the following message on his Facebook page (shown at page 79):

*"Thank F*** our pubs open up today. We cannot let our way of life become like some sort of Muslim alcohol-free caliphate just to beat Covid19. We must button up, face it, stiff upper lip it, if necessary herd immunity it, but*

we must learn to live with it & not let our fantastic culture & way of life be trashed"

This post was tagged to the RMT Leamington Branch Facebook group which was visible to all RMT members in the Leamington area who followed that Facebook group. The claimant acknowledged that he saw Facebook as a platform to engage although he did not agree that his views were necessarily controversial. He said that this comment was a social and political comment on the necessity of lockdowns. It was put to the claimant that in this context the reference to Muslims and a caliphate was unnecessary and gratuitous but he did not accept this was the case as he was unaware of any other type of state that banned alcohol.

10.5. The claimant made a further posting that someone had complained about his initial post stating (page 80):

"Apparently someone has complained about a comment i made about hoping UK never becomes an alcohol-free muslim caliphate! (Or Islamic State). Unbelievable but true! If that's a controversial statement now, the world's gone mad! – Incidentally, i wouldn't want UK to become any sort of religious or theocratic State, whether muslim, hindu, buddhist, Jewish, chinese politburo, or even Christian. I wouldn't even want an atheist state, my faith, if it involved banning other beliefs!"

10.6. The respondent received a complaint via its local union reps from a Senior Conductor at a train station in Birmingham who had been offended but wished to remain anonymous.

Investigation

10.7. The respondent commenced an investigation and on 7 July 2020. Mr T Wignall, Senior Conductor Manager at the respondent ("TW") invited the claimant to attend a fact finding interview to be held on 9 July 2020 (letter at page 64). The purpose of the meeting was described as being to *"discuss and establish facts regarding a post on the social media"* and that *"due to the sensitive nature of the social media post this is a very serious matter".*

10.8. The claimant attended that meeting and was accompanied by his trade union representative, Mr N Mason with Ms N Iqbal from the respondent's HR department there to take notes. During that meeting the claimant acknowledged he had made the post on 4 July 2020 and explained he was:

"*celebrating our pub culture and hope we never become an alcohol free Muslim caliphate as it says on the post. Majority of opinion of most of country apart from a few fanatics*". He was asked how he thought it might be interpreted by others by TW to which he responded:

"Someone could half read and think it is anti-Muslim but it is anti-Muslim IS – the fascist group"

During this meeting he accepted in retrospect it was not appropriate to tag in RMT (albeit the claimant now says in evidence that he did not think it was inappropriate to do this and had only admitted this at the time to try and be co-operative). It was also noted that the claimant had a habit of tagging RMT in anything he posts because he thought it would

"reach a wider audience – to fire up debate"

There was a discussion at the meeting about the claimant's understanding of the meaning of the word 'caliphate' with the claimant suggesting it was a word used by extremists as in the situation established in Syria. JW read out an online definition which was wider and referred to caliphates being historically polities based on Islam which developed into multi-ethnic trans-national Empires. The claimant suggested IS had grabbed hold of the word.

He was then asked by TW whether he felt the post was appropriate "*given the world-wide climate at the moment*" and he replied:

"Considering how ultra-sensitive some people are – I am considering not going on Facebook if it is going to cause problems – if people can't have a decent debate about things – it is a shame."

10.9. The claimant asked about who had screenshotted the post and complained and was told it was a submitted to a Conductor Manager at a Birmingham station and the claimant queried the politics of the complainant asking whether they were sympathetic to IS and that he reckoned that the complaint had come from a politically correct nonMuslim rather than a Muslim. The claimant said he had also posted pictures of the Black Lives Matters protests. He was asked about his follow up post and NI asked the claimant whether he didn't think people would take offence from his post and he replied:

"I wouldn't say that, people are bound to take offence at something. Certainly it wouldn't surprise me."

The claimant went on to complain about the respondent raising the issue which had nothing to do with trains and that they had taken the side of the "*troublemaker*". NM went on to state that the claimant had not meant to cause controversy with his original post and that he was not racist and that people of colour would attest to that.

10.10. Following an adjournment, the claimant was suspended from duty with TW stating that he acknowledged that the claimant said his comment was not meant to be Anit-Muslim but it "*is perceived as racist*" and that the respondent did not tolerate discrimination of any sort "*including racial*

discrimination". He explained that the matter was being taken very seriously and would be investigated. The claimant's suspension was confirmed in a letter date 9 July 2020 (page 68-69) with the reason being stated as:

"Social Media posts that are perceived to contain racist or discriminatory comments inline with WMT code of conduct"

He was informed that he was not permitted to discuss the matter with anyone other than his representative. He was told to contact TW if he had any questions about his suspension and was given the details of the Employee Assistance Programme ("EAP"). The claimant was by a letter dated 5 August 2020 invited to an investigatory interview to be held with Ms G Hunt Deputy Area Conductor Manager (Central) ("GH") on 12 August 2020 (page 70).

10.11. The claimant attended the investigatory interview with GH and was accompanied by his trade union representative Ms G Thomas ("GT"). Ms Iqbal attended to take notes. The claimant was asked by GH about his original facebook post and what he broadly meant by it and he explained:

"Glad that the pubs are open, people of all cultures [can meet] good to have…fact the pubs are open [again] – that's all I want to say."

GH stated that the *"reason you are here was because someone took offence to it. What would your response be to them?"*, the claimant stated that he would apologies to them and reassure them that the post was against IS State and not 99.9% of Muslims, but the extreme wing. The claimant was asked if he could see how someone would see it as targeted to Muslims in general and he acknowledged that this was "*possible",* but he did not say that. There was then a discussion about the meaning of caliphate with the claimant saying he meant it was the same as IS but acknowledging it could possibly mean kingdoms and countries through history. He said it was possible that people could take it as offensive as referring to all Muslims but that he was not referring to all Muslims, as "*a lot of Muslims drink*". He also acknowledged he could have worded it differently. The claimant was asked what he meant when he used the phrase "*our way of life*" and the claimant said he was referring to life in relation to the pandemic and that pub culture was important, not just for drinking but for the culture of strangers talking to strangers which did not exist in all cultures to the same extent.

10.12. The claimant asked whether his comment had in fact caused offence and whether more than one person had complained, noting that his comment had not been removed by Facebook. GH informed him that one complaint was sufficient. The claimant suggested that the complainant should have taken the issue up with him rather than report it. The claimant was asked about whether the comment caused controversy and debate and he said he did like a debate and different opinions. He said he could

not see how anyone would not be against IS and it was then suggested by GH that his post did not "*refer to IS, it just says Muslim*". The claimant then said "*Muslim is another form of Islam*" and asked GH "*If it just mentioned IS, would that have been acceptable?*". GH said that the comment would have been controversial but not the same as "*grouping all Muslim people together*". The claimant then stated that most Muslim states in the world were alcohol free and mentioned Dubai and said that his comment was not slurring the Muslim religion and that "*not all Muslims don't drink*", making an analogy to people who were "*Jewish by faith but still eat bacon*".

10.13. The claimant was asked about the sort of debate he hoped his post would stir and he explained it was a debate around Covid "*not a debate around Muslims*" which he did not intend at all. He was asked whether he could understand how his post could be interpreted and whether he understood the impact he had caused and he said:
"I understand now – I should have just said "alcohol-free society", going on to say
"If [only] I had said "alcohol-free state" and left out "Muslim" and "caliphate".
GH then asked the claimant that going forward how he could ensure his posts don't cause offence and he suggested he would not mention, IS, Muslim or any other religion or come off Facebook altogether. GH suggested that if a posting was being made that could cause debate, the claimant could consider if anyone could be offended. The claimant explained his posts could be spur of the moment but that he was not drunk when the post was made and specifically blanked out the f word so I would not offend anyone by swearing. The claimant went on to say that he realised not it was the wrong wording and when asked if there was anything he wanted to add he said: *"Apologies if I offended anyone"*

10.14. The claimant was informed that the investigation would now be completed and he would be informed of what would happen next but remained suspended.

10.15. GH then collated her Investigation report which was shown at pages 76-86. This report set out the background to the incident noting that the claimant had been employed since December 2003 and had a "*clean safety record and no previous disciplinary record on file*". It went through the steps taken so far and appended copies of the Facebook posts in question. The second Facebook post shown also showed a follow up comment from an individual who had read the post and a response from the claimant (which also tagged the RMT Leamington page) as follows:

<u>Comment on post</u>

"If I am being honest, when I saw the status update I thought to myself that while I understood what you were getting at, I didn't think you have worded it in a very good way. Given the current climate I'm not at all surprised someone reported it. People are very happy to go straight for the report

button rather than approach the person who has offended them and explain why they were upset by what they read

<u>Response from claimant</u>

"Yes….or just not follow me? But how on earth can it be remotely controversial to not want our country to be an alcohol free Islamic caliphate,…?..I may have some other views that are controversial, but that surely is not one of them. Whoever the anonymous person is, he or she should try living in a country without free speech

10.16. The investigation report summarised the discussions in the fact finding interview including that the claimant said his post was to celebrate pub culture. It also included the written report made by the employee who had complained (page 81). This complaint started by stating that the reason the employee had made the report anonymously was that he raised an incident of racist behaviour in the workplace previously and was then singled out by colleagues and so was concerned it would happen again. It went on to state:

"I found this post offensive because I did not feel that it was necessary to include the word "Muslim" in the description. There are lots of people who don't drink who are not necessarily religious and I felt that it was an opportunity for other people to comment and incite a controversial debate"

It further went on to stated that there was a "*racist culture within West Midlands Trains where people feel it is okay to make racist remarks and there does not seem to be any comeback of this. I feel that this needs to change and this is why I raised it to the union members in the first place with the intention of him being spoken to and warned of his behaviour*"

It noted that the complainant's parents had been subject to racism through their lives and that it was not acceptable for this to be happening. The complaint also noted that he did not want the claimant to lose his job but to be made aware and to understand that he needs to be mindful of what he says and how his comments can make other people feel.

10.17. The investigatory report went on to summarise the discussions of the investigatory interview again noting that the claimant had intended his post to stir up debate surrounding the Covid 19 pandemic and had not intended any offence or have a debate about Muslims. The report noted in its factors for consideration that the claimant's post caused offence to a member of staff and that:

"*The post can be deemed as Islamaphobic due to the perceived attachment to Muslims*".

It noted that the respondent did not tolerate racial or any other form of discrimination and inappropriate behaviours which was a breach of the

Code of Conduct. It went on to note that the claimant acknowledged his post may have caused offence but this was unintentional and he would apologise if this was the case.

It concluded that the Facebook post caused offence and was "*deemed to be potentially racist in nature*". It also concluded that the claimant acknowledged the post may have caused offence but did not intend to offend but to celebrate the pubs reopening and potentially cause discussion around Covid 19. The report recommended that the matter be referred to a disciplinary hearing.

Disciplinary hearing

10.18. The claimant was invited to a disciplinary hearing by a letter of 26 August 2020 (page 87-88) from Ms J Teale, Area Conductor Manager, LNR at the respondent ("JT") which attached the relevant investigatory documents. This informed the claimant that he had been charged with an allegation of gross misconduct namely:

"Posting racially offensive and discriminatory posts on Social Media in contravention of WMT's code of conduct"

He was informed that a possible outcome of this meeting could be summary dismissal and that the hearing was to explore evidence, to listen to the case and evidence from all parties, consider the claimant's response and decide whether the case was proven or not and consider an appropriate sanction. It confirmed no decisions had been made at that stage and the claimant could be accompanied by a trade union representative. The claimant was again offered EAP support.

10.19. The hearing took place on 3 September 2020 chaired by JT with Ms Iqbal taking notes. The claimant attended with GT as his trade union representative. The minutes of the hearing were shown at pages 89-92. The claimant was informed that the meeting was to consider the allegation that he had posted racially offensive and discriminatory posts on social media in contravention of the respondent's code of conduct and the claimant replied that *"Somebody found it racially offensive*". Having confirmed that all parties had the documents in the pack, JT asked the claimant whether there was anything he wanted to add and he stated:

"*No, other than I repeat that I would apologise if I offended anyone. I personally don't think, I'm proscribing what society other people live in or campaign in. if I can't have a personal view, we are in a pickle. I accept that someone can be offended – there was no intention at all. As I said I get on with all sorts of people"*

GT then went on to explain that the claimant's reference to caliphate in the post meant IS, and he did not know at that time what caliphate meant until the first fact finding interview when it was explained to him.

10.20. The claimant was asked why if he was posting something to celebrate the facts that pubs had reopened after the lockdown, he made reference to a 'Muslim caliphate' and why that was brought into a celebration of pubs re-opening. The claimant stated that he was not aware of any other state that banned alcohol. When asked about stirring up debate, the claimant explained that this was a good thing and that his view espoused in the post about dealing with Covid 19 was now being accepted by politicians including the Transport Secretary. JT explained she understood but that her issue was the reference in this post to a Muslim caliphate and that she was

"*struggling to understand why you would add that into the tweet. There are other ways you can say that you are happy the pubs have re-opened"*

GT answered for the claimant and said it was "*Stupidity*" and the claimant did not see it as offensive at the time but now looking back he would not have included it. The claimant said he would have put that he did not want to live in an alcohol free state and then went on to state that he did not understand why beliefs could not be criticized and that criticizing Nazisim does not mean that he was criticizing or offending German people. He said it was anti racist to be against IS. JT stated that the claimant was entitled to personal views but had to be aware of what is said and where it is said and that personal views may be offensive to others, especially if posted on social media. She put it to the claimant that as an intelligent individual he must have realised that by posting the comments he could potentially have caused offence. The claimant stated:

"*I was astonished that anyone would be offended by that. I accept that someone has. I was talking about IS, I thought everyone was against IS*"

He went on to explain that he was talking about <u>the</u> Islamic State (as referenced by the BBC and news organisations) and not an Islamic state.

10.21. JT then challenged the claimant that the way his post read did not necessarily express what he thought and that someone reading it would not know what was meant by it. The claimant said he understood that but that in that case this would be someone misinterpreting it and that he could not be blamed for how someone interpreted his comment. When asked whether he had anything to add GT pointed out that the employee who complained did not want the claimant to be dismissed and that the claimant was an elder gentleman and things had changed from the way they were. He suggested it was "*highly stupid as opposed to anything nasty*". He pointed out that the claimant was against racism and attended Black Lives Matters protests. The claimant then said he was "*deeply offended of being accused of any racial slur*" and that his father had helped defeat the Nazis and would be proud of him standing up for *"freedom of speech – part of what the war was fought for"*. There was a discussion between the claimant and JT about the difference between a face to face conversation and

posting on social media in terms of the effect that words had. The claimant acknowledged that he did not intend to refer to Islam again as it was a "*hot potato*". He also added that he had tried to clarify his post with a further post stating that it was a theocratic hard line state he objected to and when a comment was made that someone could be offended, he deleted the original post. He acknowledged that although he did not find the comments offensive, he has taken on board the conclusions of the report as someone who had not been subject to racial abuse.

Decision to dismiss

10.22. The Tribunal did not hear any evidence from JT, the dismissing officer who has since left the respondent's employment. The dismissal letter prepared by JT was at page 93 and this informed the claimant that the claimant would be summarily dismissed and set out the reasons for dismissal. It stated:

"..*after considering the evidence presented and listening to the mitigation and case provided, I can confirm I have concluded that I have found the case against you proven and your conduct justifies disciplinary action*"

…..

"It is my belief that you consciously used the words "Muslim alcohol-free Caliphate" to spark such a debate without any thought or regard whatsoever for the feelings of the recipient.

You made a conscious and deliberate decision to sign your post 'RMT Leamington Branch' and to include RMT Leamington Branch in the message recipient list in order "to reach a wider audience". In doing so, you knowingly brought the inflammatory message into the WMT workplace in contravention of WMT's Code of Conduct."

The letter went on to acknowledge that the claimant had said he was "*astonished*" that someone would be offended by the message although he accepted that someone was but that he should not be blamed for someone misinterpreting his comments. The letter noted that the claimant had apologised but also went on to note that the claimant had referred to the complainant as a troublemaker and that people were ultrasensitive noting that this "*leads me to conclude that you have no understanding of the impact of your message on others and the potential offence and harm it could cause*".

The letter went on to note that it was the belief of JT that "*you deliberately used those inflammatory words to spark a debate without any thought or regard whatsoever to the feelings of the recipients and while you stated you would apologise if you offended someone and acknowledged it was not appropriate to include the RMT, I witnessed no sincerity or genuine remorse for your actions and the offence they caused to others."*

10.23. The letter noted that although only one employee had raised a complaint, that "*WMT have a duty and responsibility to ensure all its employees come to work feeling safe, respected and valued by their colleagues and the company.*"

It further stated that the respondent was working to create a safe and inclusive culture where concerns could be raised and that these would be dealt with in a constructive way. It noted that given comments made by the claimant and the manner in which he answered questions, JT did not believe that the claimant had any remorse for his actions and was not confident it would not happen again. The letter informed the claimant he would be dismissed without notice and that he had a right to appeal. SM was asked about this letter and in particular what was not included in it during cross examination although there was no suggestion that he was involved in writing it. He acknowledged that there was no express reference to the claimant's length of service or disciplinary record and no reference to the consideration of a lesser sanction. He also agreed that the letter did not mention that the claimant had intended his post to celebrate the opening of pubs after lockdown (a matter of public interest); that the claimant had deleted his post or that he had used asterixis to blank out letters to obscure his use of a profanity.

Appeal

10.24. The claimant appealed against his dismissal with an e mail dated 20 September 2020 send to A Mead which is shown at page 95. He stated that he wished to appeal against the "*astonishing*" decision of JT and stated that the reason he had been dismissed was:

"*I posted on facebook when the pubs reopened on 4/7/20 "Great! I don't want to live in an alcohol-free muslim caliphate type of State*"

He raised three grounds of appeal. Firstly that the response to the alleged wrongdoing was "*totally disproportionate*". Secondly that *"[JT's] report is error strewn & contains inaccuracies*" and thirdly that his "*human rights of Freedom of Expression have been violated, under UN conventions*".

The claimant also sent an email directly to JT on 23 September which was shown at page 97. In this email the claimant said he had received the "*error-strewn 'Outcome Report'*" by e mail although it was blurry and that he had not received a printed copy, nor had he received the minutes of the first meeting held on 9 July. He signed off the e mail:

"*I do hope you enjoy your job Jean, it must be great fun."*

10.25. SM was appointed as the appeal manager. He had conducted many appeals during his career and also confirmed that he had attended on line equality, diversity and inclusion training. In advance of the appeal hearing

he had read the investigation report, the minutes of all the investigation meetings, the disciplinary letter and appeal and the relevant parts of the Code of Conduct and disciplinary procedure. SM also spoke to JT in person about the rationale for her decision. SM explained that his conversation with JT was to ascertain her view on what had driven the claimant to do what he did. SM said that during that conversation JT was "categorical" in telling him that she had formed the firm belief that the claimant was an intelligent man and not stupid as had been suggested by his trade union representative. He said that JT told him she had been convinced that the claimant was trying to be provocative and that his conduct had been deliberate rather than ignorant and that she felt he had not shown genuine remorse which had been supported by the e mail he sent after his dismissal. SM stated that JT told him this had signified to her that there was a "*significant risk of [the claimant] making similar remarks in future".* This evidence was unchallenged and so I accepted that this conversation took place as SM says.

10.26. An appeal hearing was held on 12 October 2020 and was chaired by SM. N Birha attended from the respondent's Employee Relations department as a note taker and the claimant attended with his trade union representative K Usher ("KU"). The minutes of that meeting were at pages 100-105. KU started by presenting the claimant's grounds for appeal suggesting that there were insufficient grounds to dismiss the claimant. He stated that the claimant's statement was not intended to be offensive but was an expression of relief that the pubs were open. He suggested that when you looked at the full context of the statement, it was not targeting one group of an individual. He went on to state that the claimant had already apologised at the last meeting and that:

"*perhaps he didn't make himself to clear in respect of the hearing manager, they may have felt he was being disrespectful, arrogant or even flippant in how he intended things to be".*

He went on to suggest that the respondent had been inconsistent in its decision making referring to other complaints made by members of the trade union about race discrimination. He also suggested that the respondent had "*ignored its responsibility in ensuring the message of diversity and inclusion and anti-discrimination has been lost and needs to be addressed".*

KU went on to suggest that the claimant had been made a scapegoat and that he could have been offered a lesser punishment, such as a "*final warning with diversity training or a warning with training"*

10.27. KU acknowledged that the claimant's post contained word that in hindsight he could have removed but that his intention related to the relief of the pubs being opened up again. He stated that the claimant had never been disciplined and had only had two days off sick in 17 years. SM noted that the claimant had accepted that a lesser punishment would be

appropriate and asked whether he would accept a final written warning. KU confirmed that there would be no further appeal against that and that the claimant wished to clear his name and would be prepared to make a written statement. SM then asked the claimant if his dismissal was overturned how he would address the matter with his colleagues and what his actions would be. The claimant said he felt that anyone could believe anything as long as violent actions were not promoted and that in his comments he was "*making clear comments that I didn't want an Islamic state, I want a plural state where everyone can believe their own beliefs*". He went on to explain that he had been glad that the pubs were open as someone who lives on his own, that is where he meets people and that if there were a Muslim caliphate, there would be no pubs. He stated that he did not intend to offend anyone and if he did he would "*profusely apologise*" but also that he found it difficult that someone would be upset at the type of society he wanted to live in. The claimant went on to note that there had been rumours about the nature of his comment and that it had said things that were not there. He then questioned whether the comment was racist, noting that :

"*you can get aside the more academic thing of whether Islam is a race of note, if I was to convert to Islam, it wouldn't change my race, so to call it racism is a bit dubious*"

He went on to explain that the reference to stirring up debate was that he wanted to stir up a debate about lockdown, not religion. The claimant acknowledged in cross examination that he was not directly answering the question posed by SM in his response. He denied that he was rowing back on his earlier apology when making these statements

SM explained that he needed to understand the reason why the claimant made the comment and that the choice of words was not the right choice. He asked the claimant about the timing of the post and whether he was on duty or not. The claimant said he was off duty and that he had used asterisks when using a swear word as he did not want to offend anyone with swearing. He said he was "*debating whether we have to just live with this virus basically".*

10.28. The claimant was then asked about his e mail to JT after dismissal and the "*inflammatory comments*" he made and SM suggested that the claimant didn't seem to be able to help himself. The claimant explained he was upset at being dismissed and because JT had put Kind Regards at the end of his dismissal letter (this does not appear to be in the letter shown at page 94). He said he did not mean to be rude but that he meant it must be difficult doing a job like JT was doing. SM suggested that that was not the intent and that it was a sarcastic comment. The claimant agreed it was sarcastic but that it was not rude and that it was a private e mail. During cross examination SM confirmed that sending this e mail was not part of the disciplinary allegations against the claimant but rather that he saw it as an example of how comments made by the claimant could be offensive. The claimant confirmed in questioning that he was not really sorry for the

comment he made to JT as he felt her letter was sarcastic and his response was justified.

10.29. Following an adjournment SM asked the claimant if he was reinstated, given he had upset people, what steps he would take to address it and suggested that he could do a letter of apology. The claimant said he would do that and when prompted by KU he also said he would apologise to JT for his letter to her. KU went on to state that the claimant was not acting maliciously and had not intended to cause offence and asked SM to overturn the decision and provide some diversity and inclusion training. SM then stated:

"I will say I am not going to make decision today, I will give it some thought and I will get a decision to you by the end of the week in writing by a letter"

He went on to agree that he would telephone KU with the outcome by the end of the week. He acknowledged that at the conclusion of this meeting there was no mention of a further appeal meeting

10.30. SM explained that he was minded to overturn the claimant's dismissal and replace it with a final warning and some training. He explained that this was not because he thought the decision of JT was wrong but there was potential to avoid a dismissal if the claimant would "*change his ways".* He communicated this to GU by telephone and told told GU that the reinstatement would be "*subject to conditions that I would put in place (including training).*" I accepted SM's evidence that he was clear to GU that the claimant was not to come to work until the decision had been finalised nor was he to contact colleagues. SM explained that (and I accepted this) he did this because the decision to reinstate was a sensitive matter and the claimant's potential reintroduction to the business had to be managed correctly.

10.31. The claimant e mailed SM at 23:01 on 14 October 2020 to thank him for the decision that had been verbally communicated to KU (page 106). SM replied to the claimant the following morning on 15 October and also copied KU and stated:

"I need to be clear that my decision to reinstate you is conditional. There are steps that need to be taken prior to your reinstatement which I have outlined to Ken and will be contained within the letter I will be sending you.

I must stress that you must not contact colleagues at work detailing the contents of your conditional reinstatement. Should you fail to do this then my decision will be reviewed.

In the meantime please act under the guidance of Ken until we can get you back in the workplace"

The claimant acknowledged that he was aware at this stage that his reinstatement had not been finalised and was not certain or guaranteed. He did not accept that the contents of that conditional reinstatement included the fact of the conditional reinstatement itself but that he felt this meant something like having to go on a diversity course.

10.32. In order to finalise his decision, SM went over all the notes and paperwork and he recalled that the claimant had made a comment that had troubled him in the appeal hearing namely that *"If there was a Muslim caliphate there would be no pub".* SM said (and I accepted) he felt that this comment was like the claimant was reaffirming his original statement and that if he repeated that in the appeal hearing, he could do so at any time and it suggested to SM that what the claimant had said may be *"a deep rooted view that he held, rather than an ignorant or careless remark".* SM said he decided to reconvene the appeal hearing so this could be tested further. It appears that a communication by e mail was sent to the claimant at this time about an appeal review but a copy did not appear to be in the bundle. However the claimant in an email to SM on 20 October 2020 (page 107) stated *"I noticed an appeal review from you today, but my phone won't download it"* which suggests some communication was sent. Therefore I accept that by this stage, SM had already decided that he needed to review or look again at his decision to reinstate and get the claimant's input on this matter and that he had informed the claimant that a further meeting would take place. However in this same email of 20 October the claimant further stated that he had contacted his Duty Train Crew Manager ("DTCM") about whether he should come in to work and that he had also e mailed his line manager but had not heard back from him. He went on to thank SM for his appeal decision and noted it was *"the right decision as no-one opposes hate & racism more than me!"* He further e mailed asking whether the e mail was to convey the result of the appeal and that a letter would be OK as KU had already told him.

10.33. SM replied to the claimant's email the following morning 21 October 2020 as follows:

"I couldn't have been more clear in my e mail to you , on 15th October 2020, that your reinstatement would be conditional and that there are steps that need to be taken prior to your reinstatement. These steps would be outlined in a letter to you.

You have not had a letter sent to you yet however you are aware that your return to work is conditional therefore to contact your DTCM suggests a complete disregard that conditions must be completed before your dismissal is overturned.

The claimant was invited to a further meeting which SM stated was to *"understand why you have acted in this manner. I also have further questions about comments that you made in the appeal hearing, that I have since reflected on, which I would like to explore."*

It went on to instruct the claimant that until he had successfully completed the conditions to be outlined in a letter he must not make contact with the workplace and again reiterated that the reinstatement would only be confirmed if SM was satisfied that conditions had been successfully completed and if he was not that the dismissal would stand.

10.34. The claimant replied later that day (page 109) and stated that he had only contacted his DTCM to establish when he was next on duty as he wanted to ensure he did not "*drink much*" if he was working the next day. He also pointed out he had not seen the conditions of reinstatement and that his phone could not always download files. He also said he needed to know if he was back on the payroll as having lodged a claim for Job Seeker's Allowance he had to inform the DWP of any change in circumstances.

10.35. The claimant was invited to an 'Appeal Hearing Review' meeting by a letter dated 22 October 2020 from SM (page 110-111). This noted that the claimant had been in contact with the workplace and stated that his reinstatement was conditional and would only be confirmed once he had "*satisfactorily complied with the conditions of the appeal outcome*". He was invited to attend a meeting which SM stated was in order "*to understand why you have made contact with work, especially after an e mail from me that explicitly told you not to do so. I also have further questions about comments that you made in the appeal hearing, that I have since reflected on, which I would like to explore.*"

Appeal Review/Appeal Reconvened Meeting

10.36. The meeting took place on 29 October 2020 and the minutes are shown at pages 112-117. SM was cross examined about this meeting and what its purpose was. He was insistent that this was not a separate stage of the appeal process but it was simply him reconvening the appeal meeting that had already been held. He acknowledged that the letter inviting the claimant was headed Appeal Review meeting and that this was an ill choice of words as it was simply a reconvening of the original appeal hearing. I accepted this explanation. SM acknowledged that there was no provision in the disciplinary procedure which expressly dealt with conditional reinstatement but this was something the respondent had the power to do and had been done before. At the outset the claimant was given a copy of the printed minutes of the appeal hearing and the meeting was adjourned so he could review them. He made some comments about the content which were noted. SM then asked the claimant what challenges he felt that SM had in integrating the claimant back into the business after he had made the Facebook comments. The claimant acknowledged that the respondent had to have a clear policy of not allowing racist or offensive comments. SM stated that he had to establish that he believed the comment was an ignorant mistake and that the respondent had to "*demonstrate that we haven't taken this lightly and we must be able to justify any actions we take*

as an outcome of this case. The reputation of the company, my reputation and the RMT's reputation is all at risk here." KU went on to state that he did not think the claimant had any malice in making his posts and that his choice of words were not right. He said that a notice of apology had been prepared and that this was sincere. SM said he did believe that but that the claimant had made a statement at the appeal hearing which he did not challenge the claimant on namely that "*If there was a Muslim caliphate there would be no pub".*

10.37. The claimant explained that he meant that if it was a caliphate, you would not be able to drink alcohol. He was asked what he meant by caliphate and the claimant replied that he thought it meant *"state, a ruling religious authority that would mean you have to convert to being Muslim and not drink alcohol. I want a country that is free, so not a caliphate, because there would be no pubs".* SM stated that he felt that the claimant showed *"an immense level of ignorance".* Following an adjournment the SM made a further comment that he felt that the claimant did not understand the word caliphate and that he stated that there were no pubs in Muslim countries. He was asked whether he had ever visited or was aware of Dubai. The claimant said he had but would not visit Dubai and the pubs there were for non-Muslims specifically.

10.38. SM then stated that he was concerned that what the claimant had said demonstrated his ignorance about Muslim states and that training would not change his views which could make him a *"significant risk".* He stated that he had to consider *"the business interest and the potential of you offending people again in making ignorant statements that are inflammatory and offensive"* and that he felt the risk of this was high. He then went on to raise concerns about the ability of the claimant to understand instructions as he contacted the workplace when being told not to. SM stated that after being sent an e mail instructing him not to contact anyone, he then sent further e mails to his line manager and another manager. SM stated that this raised concerns about whether the claimant would understand the importance of any conditions of his reinstatement. He went on to note that if KU supported the claimant it would "*look bad for the RMT as a union*". The claimant explained that he had contacted employees of the respondent as he had made a benefits claim and he could be in breach of the law if had done so if circumstances had changed and he had been reinstated. SM said he understood this reason but he had made it clear to the claimant that he must not do so, which is what concerned him about reinstating the claimant. SM went on to state:

"You have made a racist statement which has offended people within the business which you state was unintentional. Whilst I am less unsure over whether this was malicious it's the risk of offending people again that concerns me. The conditions of your reinstatement were intended to mitigate against this risk but I am now unsure if this will be effective therefore the risk remains."

10.39. Following an adjournment the claimant was asked to explain his statement was to why he would not go to Dubai. He explained it was too hot and made reference to people being jailed for having pain killers, that the policy were corrupt and that Dubai had *"built up their empire on slave labour through sweatshops".* He also stated it was not the place he wanted to go and he did not fly and had not been outside of Europe (for ecological reasons). The claimant contends that he was asked questions about Dubai to trap him so that inferences could be drawn from his comments about not wanting to go there. I do not find that there was any such intention or plan to deliberately trap the claimant into making comments but rather the questions about Dubai arose from the discussions about Muslim states being alcohol free (with Dubai being used as an example of a Muslim state that was not totally alcohol free as SM told us he had recently booked a holiday there). The claimant also suggests that he is correct in his assessment about Dubai and that it is not a modern, progressive society as appeared to be suggested during the appeal hearing. In cross examination SM agreed that this may be the case. In his evidence he made reference to a number of articles about matters arising in relation to Dubai and also to the British Foreign and Commonwealth travel guidance about the country. I do not need to make any findings of fact on this matter and indeed it would not be appropriate for me to do so. This is dealt with further in terms of what the respondent concluded about these issues in the conclusions section below.

10.40. SM said he did not feel that the claimant was intentionally malicious but that there was a risk to the business, his own reputation and the reptation of the RMT that the claimant would cause offence again. SM also stated that e mails sent by the claimant suggested that he did not understand the seriousness of the situation he was in. The claimant was invited to make a statement and he reiterated his apology and said it was not his intention to cause harm to any group. He also stated that he did not oppose "*not mentioning Islam or caliphate while at work. It's clearly open to much misinterpretation*". The claimant read out a pre-prepared apology which it was being proposed be sent out to colleagues which read:

"Dear brother, sister and colleagues, my sincerest apologies related to a comment made about pubs opening with COVID. I can assure you my comment was not intended to cause offence, should any of my colleagues have been upset by these comments, I sincerely apologise. I hope my comments can be forgiven and hope we can continue to work together in solidarity. This has been a valuable lesson learnt for me".

The claimant said in cross examination that he was not sure that this was a good idea as it may be a hostage to fortune and result in him receiving hate mail but this had been KU's idea and he went along with it.

10.41. SM repeated his concern that the claimant had not learnt a lesson but that he hoped not. He went on to outline the timeline for what would happen next in that he would telephone KU by 2pm that Wednesday to confirm the outcome of the appeal and what return to work would look like if this was

the action taken, followed by a letter. He was advised that if he needed to make contact with the company in the meantime, this should take place with SM and only him. KU then reiterated to the claimant that he should not contact anyone from the company. The claimant then said *"what about work friends and others? Am I allowed to discuss it with my siblings?"* SM clearly became irritated with the claimant and responded *"I am concerned yet again that you do not understand, if I find out you discussed any detail about what is going on her, you should just shut down the conversation".* The claimant then asked about if someone asked him to meet for a drink and SM stated that if he found out comments about the matter had been made, his deliberation would be very simple. The claimant asked again what if one of his siblings asked about the matter. SM then spoke to KU and asked whether he was being unclear and suggested that KU take the claimant outside noting that it was *"not good".* At this stage KU told the claimant to *"just shut up".* The meeting ended with SM suggesting to the claimant that he did not discuss the matter with anyone and that he should *"stop digging yourself more holes. You are not to discuss this subject with anyone until you hear from me at 2pm on Wednesday."* SM denied that he was at this stage bullying the claimant or setting him up to fail. He admitted that he had become exasperated with the claimant at this point in the meeting as the claimant continued to ask questions. He also denied that the respondent had no authority to place the claimant under restrictions from discussing the matter with his family as he said he was advising the claimant not to do this.

10.42. Following the meeting, SM made the decision not to allow the claimant's appeal and to uphold his dismissal. He concluded that the claimant had acted maliciously which was why he was originally minded to overturn the dismissal but also concluded that the claimant's *"inability to moderate his behaviour and to consider the effects of the words that he used put WMT's business interests at too high a risk"* and that there was a probability that he would make further statements of this nature and so his "*continued employment would place the reputation of WMT and its employees at too great a risk*". It was put to SM in cross examination that reputational damage had not formed part of the original decision of JT to dismiss the claimant nor his original decision to reinstate conditionally and he acknowledged that was the case. I accepted SM's explanation that he was concerned about the claimant's lack of remorse in particular his communications to and about JT following the dismissal. SM also said that as he was finalising his decision, he had noted that an article had appeared in the Leamington Courier, a local newspaper on 9 November 2020 about the claimant's situation (page 122). He told us that the article had quoted the claimant as saying that his message had been misunderstood and that he could not see how anyone could be offended which in his view showed that the claimant had no understanding of what he had done wrong and lacked remorse. SM said he did not explore the allegation that the outcome letter of JT had been inaccurate as this had been discussed and the claimant had the opportunity to correct any errors. He did not accept the claimant's contention on his freedom of expression

stating that whilst he had this right, the claimant also had to take responsibility for what he said which might offend other people. I accepted the evidence of SM that he took into account the claimant's long service and clean disciplinary record but ultimately concluded that the inability to show genuine remorse and lack of understanding that he had done wrong meant that there was too high a risk of repeat behaviour.

10.43. The letter confirming the appeal outcome was sent to the claimant on 9 November 2020 (page 118-121). This letter set out the background to the appeal and the reason for the appeal review meeting. It referred to initial comments made by the claimant during that meeting as set out above, in particular relating to the state of Dubai. SM stated that his comments were concerning and demonstrated that the claimant's view of a Muslim country was inaccurate and that there was a deep rooted and inaccurate view of the Muslim culture. SM went on to note that he found it staggering that the claimant went on to make comments around Dubai and corruption, slave labour and sweat shops. He went on to state that it was the claimant's "*inability to moderate*" his behaviour and consider the effects of the words he used that put the business at risk of him making further statements of this nature. The letter noted the discussions about the claimant being instructed not to discuss matters with anyone and that he had gone on to do this. SM suggested that the fact that the claimant had contacted line management about a return to work before any diversity and inclusion training had been arranged or discussed showed a disregard for the importance of that training and the spirit within which the claimant would enter into it. The letter went on to state that the claimant had shown a level of ignorance about the word "caliphate" and that comments during the appeal meetings caused concerns that future comments would be made and a similar situation would arise again. The letter also referenced the article in the Leamington Courier as shedding doubt on the claimant's degree of contrition or awareness of the seriousness of the comment made. SM acknowledged that his letter of outcome did not make reference to the claimant's arguments on exercising free speech. He also acknowledged that he did not make express reference to the context of the post being made in response to pubs reopening; that he had deleted his post when it was pointed out it may offend and that he had obscured letters to avoid using a profanity and that a further post had been made clarifying and apologising later in the day. SM stated that although there was no reference in his appeal letter to the claimant's length of service and record that he did consider whether a lesser sanction was appropriate and I accepted that this was the case.

10.44. SM was questioned at length during cross examination about his conclusions on the nature of the misconduct committed by the claimant. It was suggested to him that the claimant's conduct being neither persistent nor deliberate did not fall within the definition of gross misconduct in the disciplinary procedure referred to above. SM did not agree with this contention and stated that it was the association with the words he used in particularly the use of the words "Muslim" and "caliphate" that caused

concern. It was also suggested to SM that the conduct of the claimant could not be racially offensive as it related to the religion of Islam which it was contended was not a race and so the letters issued to the claimant which referred to this were incorrect. SM acknowledged this may be the case. He was also referred to the conclusions in the OPH judgment about the Facebook posting made by the claimant and asked if he disagreed with the conclusions of Employment Judge Battisby to which he responded he did not but remained of the view that the claimant's posting had been racist.

10.45. SM was also asked about the nature of the complaint that had been made to the respondent about the claimant's Facebook post and asked him whether he had investigated any matters relating to the motivation of the complainant in making the complaint. It appeared to be suggested to SM that the complainant had a particularly sensitivity to such matters having made a previous complaint about racism (not related to the claimant) which he felt was ignored. SM confirmed he did not undertake any investigations into this matter as he felt that the reference to the previous complaint being made was the reason why the complainant wanted to remain anonymous and not the reason or making the complaint in the first place. I accepted this explanation.

The Relevant Law

11. The Claimant complains of unfair dismissal contrary to **Section 94 of the ERA**. The Respondent alleges that the dismissal was on the grounds of gross misconduct. The employer must (a) show the reason for the dismissal and that it is one of the potentially fair reasons set out in **section 98(1) and (2)** and; (b) if the employer has done this, then the Tribunal must then determine whether dismissal was fair or unfair under **section 98(3A) and (4)** depending on the circumstances including the size of the administrative resources of the Respondent.

12. **Section 122(2) of the ERA** provides as follows:
"*Where the tribunal considers that any conduct of the complaint 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".*

13. **Section 123(6) of the ERA** provides as follows:
"*Where the tribunal finds the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding".*

14. Conduct is one of the six potentially fair reasons for dismissal set out in **section 98**. If a dismissal is asserted to be on the grounds of conduct, then the test laid down in **British Home Stores –v- Burchell [1978] IRLR 379** requires an employer to show that:-

(i) it believed the employee was guilty of misconduct;
(ii) had reasonable grounds to hold that belief;
(iii) it formed that belief having carried out a reasonable investigation.

15. **CJD v Royal Bank of Scotland [2014] IRLR 25** – "conduct" does not need to carry an element of culpability or be reprehensible and can cover matters arising in private life provided they "*reflect in some way upon the employeremployee relationship*".

16. In determining the question of reasonableness it was not for the Tribunal to impose its standards and decide whether the employer should have behaved differently. Instead it had to ask whether "*the dismissal lay within the range of conduct which a reasonable employer could have adopted*" as set out in the case of **Iceland Frozen Foods v Jones [1982] IRLR 439**.

17. The "range of reasonable responses" test applies not only to the actual decision to dismiss, but also to the procedure adopted by the employer in putting the dismissal into effect - **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.**

18. The circumstances relevant to assessing whether an employer acted reasonably in its investigations include the gravity of the allegations, and the potential effect on the employee: **A v B [2003] IRLR 405**. A full investigation may not be required when the employee admits important facts but investigation about motivation may still be required – **Boys and Girls Welfare Society v Macdonald [1996] IRLR 129 and CRO Ports London Limited v Wiltshire UKEAT/0344/14.**

19. A fair investigation requires the employer to follow a reasonably fair procedure. Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures and the appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

20. The same considerations as to procedure apply to an appeal process which is also capable of remedying unfairness earlier in the process **– West Midlands Co-operative Society Limited v Tipton [1986] IRLT 112**

21. Tribunals must not put themselves in the position of the employer and consider what they themselves would have done in the circumstances. It must not decide what it would have done if it had been management, but whether the employer acted reasonably. A decision must not be reached by a process of substituting themselves for the employer and forming an opinion of what they would have done had they been the employer. — **Grundy (Teddington) Ltd v Willis 1976 ICR 323, QBD; HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR 1283, CA, .**

22. **Game Retail v Laws UKEAT/0188/14/DA (EAT 3 November 2014) –** the EAT did not set out specific guidance with respect to conduct around the use of

social media. The EAT upheld an appeal against a finding of unfair dismissal noting that the Tribunal ought to have considered the fact that the employee followed his employer (and vice versa) on twitter, so social media posts might be seen by its employees. There was a balance to be drawn between an employer's desire to remove or reduce reputational risk from social media communications and the employee's right to freedom of expression and generally speaking employees have the right to express themselves provided it does not infringe on their employment and/or is outside the work context.

23. **Polkey v A E Dayton Services Ltd [1987] IRLR 503 HL**, the chances of whether or not the employee would have been retained must be taken into account when calculating the compensation to be paid to the employee.
    Tribunals are required to take a common-sense approach when assessing whether a Polkey reduction is appropriate - **Software 2000 Limited v Andrews [2007] IRLR 568**; the nature of the exercise is necessarily "broad brush" - **Croydon Health care Services v Beatt [2017] IRLR 274**; and the assessment is of what the actual employer would have done had matters been dealt with fairly not how a hypothetical fair employer would have acted (**Hill v Governing Body of Great Tey Primary School [2013] IRLR 274**).

24. When considering contributory fault the conduct must be "culpable or blameworthy" - **Bell v The Governing Body of Grampian Primary School [2007] All ER (D) 148**. The Tribunal may take a very broad view of the relevant circumstances when determining the extent of contributory fault **Gibson v British Transport Docks Board [1982] IRLR 228**.

25. **Article 10 of the European Convention on Human Rights ("ECHR")** provides:

    "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority …

    2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

26. **The Human Rights Act 1998 ("HRA")** provides:

    3 Interpretation of legislation
    (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

6.— Acts of public authorities.

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

[...]

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) "An act" includes a failure to act but does not include a failure to— (a) introduce in, or lay before, Parliament a proposal for legislation; or (b) make any primary legislation or remedial order.

Schedule to HRA

Freedom of expression

Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

…..

Prohibition of discrimination

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

27. **X v Y [2004] EWCA Civ 662, [2004] IRLR 625 –** the Court of Appeal gave the following guidance to Tribunals dealing with points raised under the Human Rights Act in unfair dismissal cases between private litigants:

    (1) Do the circumstances of the dismissal fall within the ambit of one or more of the articles of the Convention? If they do not, the Convention right is not engaged and need not be considered.

    (2) If they do, does the state have a positive obligation to secure enjoyment of the relevant Convention right between private persons? If it does not, the Convention right is unlikely to affect the outcome of an unfair dismissal claim against a private employer.

    (3) If it does, is the interference with the employee's Convention right by dismissal justified? If it is, proceed to (5) below.

    (4) If it is not, was there a permissible reason for the dismissal under the ERA, which does not involve unjustified interference with a Convention right? If there was not, the dismissal will be unfair for the absence of a permissible reason to justify it.

    (5) If there was, is the dismissal fair, tested by the provisions of s98 of the ERA, reading and giving effect to them under s3 of the HRA so as to be compatible with the Convention right?

28. **Redmond-Bate v DPP** Times 28-Jul-1999, [2000] HRLR 249, [1999] EWHC Admin 733, (1999) 7 BHRC 375, [1999] Crim LR 998, (1999) 163 JP 789, CO/188/99 – *"Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having."*

29. **Smith v Trafford Housing Trust** [2012] EWHC 3221 – *"The right of individuals to freedom of expression and freedom of belief, taken together, means that they are in general entitled to promote their religious or political beliefs, providing they do so lawfully. Of course, an employer may legitimately restrict or prohibit such activities at work, or in a work-related context, but it would be prima facie surprising to find that an employer had, by the incorporation of a code of conduct into the employee's contract, extended that prohibition to his personal or social life."*

30. **Herbai v Hungary 2019 ECHR 793** "*the following elements [are] relevant when examining the permissible scope of the restriction of free speech in the employment relationship in the present case: the nature of the speech in question, the motives of the author, the damage, if any, caused by the speech to the employer, and the severity of the sanction imposed*"

Submissions by the parties

31. Mr Wallace prepared written submissions and added to these orally. He suggests that the Article 10 rights and the authorities cited by the respondent are a red herring and that the exercise that the Tribunal must carry out in determining whether a dismissal is fair or unfair under section 98 (4) ERA applying the Burchell principles is no different to what the HRA requires, namely a balancing of a right of freedom of expression against the protection of the rights of others in the workplace.

32. He submits that the reason for the claimant's dismissal was conduct, i.e. making the Facebook Post and that both JT and SM had a genuine belief that the claimant had committed that conduct (with the other allegations levelled at him about his inability to follow instructions and the level of contrition/risk of repeat offending also relating to his conduct and being aggregating factors). He further says the respondent had reasonable grounds for concluding that the claimant had committed misconduct because it reasonably believed that the comment was offensive. He submits firstly that the Facebook post was not private as the claimant had intentionally tagged the RMT Leamington branch thereby broadcasting his comments to those working in the rail context likely to include many of the respondent's employees. He suggests this associates the claimant's comments with his employment directly. He goes on to suggest that the respondent had ample reason to believe that the post was offensive particularly as a Muslim employee had complained. He suggests that the claimant could not explain why the reference to Muslim caliphates had been included in an otherwise areligious political post and so the respondent had rightly concluded that there was something wrong about the placing of the words that might be interpreted by others as something more than a criticism of <u>the</u> Islamic State (as the claimant may have understood it) but something more broadly associated with the religion of Islam. He points to the uncertainty as to the meaning of the word caliphate and so submits it was reasonable for the respondent to conclude that the claimant's use of the term "Muslim caliphate" was open to different interpretations and was gratuitous in the context of the post. He contends that the employer's decision that the post was offensive was within the range of reasonable responses and cautions the Tribunal not to substitute its own decision on this rather than adjudicating on the respondent's decision. He suggests that findings and conclusions in the OPH do not alter that overarching test that it is the employer's decision and whether it is within the range of reasonable responses that is key.

33. He contends the investigation was reasonable and appropriate and there was sufficient investigation as to the effect of the Facebook post and any mitigating factors all the way up to appeal stage. He contends that the respondent considered length of service and good record at least at appeal but that it considered that the risk of re-offence (which he says was paramount to the ultimate appeal decision) that outweighed that mitigation. He also suggests it was reasonable for the respondent to conclude that the claimant's expressions of contrition were not unequivocal or genuine and that the claimant was really sorry that his post had caused him trouble not that the post had actually caused offence (as he could not contemplate why anyone would be so offended).

34. As to the overturning of the original appeal decision, Mr Wallace suggests this was not a procedural irregularity. He suggests that the reinstatement decision initially made was conditional and had not been finalised and it was the claimant's behaviour during the appeal hearings that gave SM cause for concern that there was a risk of re-offending. He suggests that it was entirely within the range of reasonable responses for the respondent after a period of reflection to determine that as the claimant had not complied with his instructions and so coupled with his lack of genuine contrition showed a real risk of reoffending. He suggests that SM was taking a reasonable step to balance how to deal with a difficult issue with his desire to bring the claimant back to work.

35. He went on to suggest that if there is a finding that the claimant's dismissal was unfair that a significant reduction of 60% for contribution is appropriate given the fact that the claimant's lack of contrition and reckless behaviour had contributed significantly to his dismissal in this case. He further suggests a Polkey reduction of 40% on the basis that the findings of fact suggest that the claimant probably would have said something of a similar nature again so that dismissal in the near future (had the claimant been subject to a final written warning) was very likely. In the alternative he submits that the procedural irregularities could have been remedied with little or no effect on the timing of dismissal.

36. Mr Mitchell submits that the dismissal is manifestly unfair on both substance and procedure. He submits that this case is all about the claimant's right to free speech and so Article 10 of the Human Rights Act is engaged and refers me to the authorities set out above on how the Tribunal should approach matters. He contends that considering the matters set out in the most recent authority of **Herbai v Hungary** above that firstly the claimant's motive in making the post was not to upset or offend. He suggests that there was no damage at all to the employer and that the sanction to the employee was at the most severe level for an employee at the senior stage of his working life. He submits that the case of **Game Retail** could not be further from the facts where then, the employee had repeatedly sent offensive, threatening and obscene tweets and he was followed by 65 of the respondent's stores which made this visible to a wide audience.

37. He points out that the respondent has not called evidence from the dismissing officer and suggests that the dismissal letter contains errors which he submits shows that the dismissal is procedurally and substantively unfair. He points out that the dismissal letter does not refer to the context of the post re the ending of lockdown; the fact that the claimant had apologised (and the suggestion that this was an aggravating factor is entirely false and contrary to the evidence); his long service and clean disciplinary record; the fact that the claimant deleted the post and obscured swear words so as not to offend and also whether there was any consideration of a lesser sanction. He points to the failure to refer to or even bring into evidence policies on social media or equal opportunities which he states is puzzling. He contends that the actions of the claimant do not fall within the definition of gross misconduct relied upon as they were neither

persistent, nor deliberate. He also suggests that the reference to race discrimination in the accusations levelled against the claimant is incorrect as the Facebook post does not mention race but religion. He submitted that the evidence of SM as to the significance of the Facebook post as contradictory and inconsistent. He suggests to me that the context of the post is important as the claimant was simply seeking to celebrate the end of lockdown. He submits that the claimant did not appreciate that the post was public and that the comparison used by the claimant comparing lockdown to an alcohol free Muslim state was a legitimate comparison for him to make. He submits that there is no dispute that Islam proscribes alcohol and that the attempt of the respondent to suggest that the reference to caliphate had wider meaning which would give offence is missing the point. On this point he relies on the OPH judgment and the comments of Employment Judge Battisby as set out above and suggests that this Tribunal is bound by the findings of conclusions made in the OPH judgment and so the Facebook post cannot be said to be anti-Islamic.

38. Mr Mitchell also submits that the investigation carried out was flawed as the matters raised by the claimant repeatedly that he was being scapegoated; that the complainant had made previous allegations of race discrimination which were not addressed and that there was a wider problem of racism within the respondent were not addressed or considered. He suggests the respondent should have gone back to the anonymous complainant to determine whether his complaint was in fact an overreaction or misunderstanding.

39. He makes various points about the unorthodox procedure operated by SM on appeal and suggests that the two stages carried out and the conditional reinstatement followed by upholding dismissal is impermissible within the terms of the respondent's own disciplinary procedure and unfair. He suggests that contrary to what SM says nothing changed in the 17 days between the initial decision to reinstate and the final decision to uphold dismissal with regards to the allegations against the claimant but that the real issue that led to the change of mind was the fact that the claimant had contacted his managers (Mr Mitchell says perfectly understandably). He also suggests that the questions at the second appeal hearing about Dubai and the fact that SM takes exception to the claimant's views about wanting to go there shows an astounding lack of impartiality. He makes the submission that SM took against the claimant during the appeal hearing and again his decision makes all the same mistakes of the dismissal decision in that it failed to consider matters of context, long service and good record. He suggests that the suggested of the claimant failing to comply with a condition of reinstatement is a fiction.

40. He goes on to submit that no contribution can be appropriate as the claimant has done nothing wrong as he simply expressed his opinions in a lawful and fair way which led to one complaint from he suggests an individual with a historic grievance. He suggests that no Polkey reduction is appropriate as it is in his view difficult to conceive of a less fair procedure throughout,

Conclusion

41. When considering the unfair dismissal complaint the first issue to determine is what was the reason for dismissal and was it a potentially fair one in accordance with sections 98 (1) and (2) ERA. I must then go on to consider whether the dismissal was fair or unfair in accordance with ERA section 98(4) and in particular, did the respondent in all aspects act within the so called 'band of reasonable responses'. Having heard the parties submissions on whether Article 10 is engaged, I accept that in considering the provisions of sections 94-98 ERA, I must interpret those provisions in order to give effect to the claimant's Article 10 rights. However I am also satisfied that in applying the tests set out by the authorities referred to above, this already provides for me to give due and appropriate consideration to such rights. The claimant's Article 10 rights and whether there were unjustifiably interfered with by his dismissal are a relevant factor to weigh in the balance when considering whether the actions of the respondent at all stages fell within the "band of reasonable responses" and so whether the dismissal was fair tested by the provisions of section 98 ERA. This is further addressed at paragraph 48.4 below.

42. The respondent asserts that it was conduct and I find that the respondent has discharged the burden of proof in establishing that conduct was the reason for dismissal. Firstly, looking at the tests in Burchell above, I am satisfied that the dismissing officer, JT genuinely believed that the claimant had posted a racially offensive and discriminatory post contravening the respondent's code of conduct (see paras 10.22-10.23 above). The appeal officer SM also considered the matter, and I was also satisfied by the genuineness of his belief that the claimant was guilty of that misconduct as alleged (para 10.42 above). The respondent suggests that the appeal decision was in fact based on different grounds related to the claimant contacting his line manager contrary to instructions and lacking contrition about making the posts. I conclude that firstly these matters were also related to the conduct of the claimant. However I also conclude that the respondent treated those as aggravating factors to the original and underlying allegation that a racially offensive and discriminatory post had been made, rather than separate allegations of misconduct. There was some suggestion that the reason for the dismissal related to bringing the respondent into disrepute but I do not find that this was the operative reason for the dismissal or the decision to uphold the dismissal. I also conclude that the conduct established related to matters that reflected in some way on the employer-employee relationship as envisaged in the *CJD v Royal Bank of Scotland* case above. The posting was made on Facebook but the fact that the claimant tagged RMT Leamington to reach a wider audience (para 10.8) appears to have brought it to the attention of a number of the respondent's employees (members of the RMT and following the RMT Leamington branch Facebook page). Tagging RMT Leamington made a connection between the claimant and the respondent as a significant operator in the rail industry within the West Midlands where Leamington RMT members were very likely to be working.

43. Secondly, when considering the second Burchell test whether the respondent had reasonable grounds for that belief, I have also concluded that it did. It was not in dispute and the claimant admitted from the outset that he was responsible

for Facebook post (para 10.8). The key issue which I must determine is whether that belief formed by the respondent that the Facebook post was offensive was within the band of reasonable responses. I conclude that it was for the following reasons:

43.1. The respondent had received a complaint from one its employees about the post (para 10.6) which stated that the complainant found the post offensive and why that was the case (para 10.16).

43.2. The respondent had seen and included in its investigation report a comment made publicly on a related post from the claimant that the Facebook post had not been worded well and the commenter was unsurprised it had been reported (para 10.15).

43.3. The claimant himself also appears to have some awareness that his comment may not have been appropriate and should not have been made in the way it was. He acknowledged during the investigation that this could be interpreted as anti Muslim if it was "*half-read*" (para 10.8); that it was "*possible*" that someone could see his comment as being targeted towards Muslims (para 10.11); that he could understand how his post could be interpreted and that he should have left out "Muslim" and "caliphate"(para 10.13). He also acknowledged at the disciplinary hearing that although he did not see it as offensive, looking back he would not have included the comment (para 10.20) and he accepted that someone was offended (para 10.20). I also note that when later making reference to his own post in meetings and his appeal letter it is differently worded Compare the actual post at para 10.4 above which is worded:

"We cannot let our way of life become like some sort of Muslim alcoholfree caliphate just to beat Covid19."

to the way it is described later by the claimant at paragraphs 10.4, 10.5. 10.8, 10.24 and 10.27 as firstly stating that the claimant hoped the UK never became an alcohol-free Muslim caliphate and even later that the claimant himself did not want to live in an alcohol-free Muslim caliphate. The strength of the message in this original post with its reference to "*we cannot let our way of life*" has been diluted in later descriptions of it suggesting that the claimant was perhaps aware he had taken his comments too far.

43.4. The investigation report prepared by GH concluded that the post could be deemed to be Islamaphobic due to the perceived attachment to Muslims and was potentially racist (para 10.17).

44. I was not persuaded by the arguments of Mr Mitchell that firstly the Facebook post cannot fall within the definition of gross misconduct set out in the respondent's disciplinary policy (para 10.2 above) because it was neither 'persistent' (being a one off statement) or 'deliberate' (the respondent having accepted that the claimant did not intend his Facebook post to be offensive to

Muslims). The list set out in the disciplinary policy contains examples of gross misconduct. It does not prescribe strictly what in any given situation the respondent will consider to be an allegation of misconduct or gross misconduct which may lead to disciplinary action. The claimant knew this (para 10.2). I also note that the Code of Conduct makes it clear that "*any kind of discriminatory behaviour, harassment or victimisation*" will not be allowed by the respondent (para 10.3). A reading of these provisions to conclude that a comment of the nature made by the claimant is an allegation of "*making an racially offensive and discriminatory post contravening the respondent's code of conduct*" is not outside the range of reasonable responses given the findings of fact made above. I also do not accept the arguments put by the claimant in this case that because his comments related to the religion of Islam, they cannot in any way be racist. That seems to me to be an outdated and flawed argument. I find the respondent's decision to treat an allegation which it considers may be anti-Islamic as an allegation of racism as correct, appropriate and well within the range of reasonable responses. I have referred myself to the Equal Treatment Bench Book (2021 edition) for guidance on this issue and I set out below what would appear to be uncontroversial statements on the issue of Islamaphobia or anti-Muslim views and actions and how it is regarded within society:

"Anti-Muslim Racism: Islamophobia What is Islamophobia?

213. There is some debate amongst academics as to whether the term 'Islamophobia' is out-dated and narrow in its strict meaning, and whether 'antiMuslim racism' is more accurate.

214. In practice, the term 'Islamophobia' has come to be used by many within and outside the Muslim community to mean anti-Muslim racism in its broadest sense. While most obviously it refers to hate crime which is targeted towards Muslims, it can be extended to cover all attitudes and actions that lead to discriminatory outcomes for Muslim citizens.

215. Following widespread consultation, the All Party-Parliamentary Group on British Muslims ('APPG') concluded that the term 'Islamophobia' should continue to be used. It has gained traction in private and public spheres and is the term of choice among most British Muslims to describe their experience. The APPG recommended adopting the following definition:

'Islamophobia is rooted in racism and is a type of racism that targets expressions of Muslimness or perceived Muslimness'.

216. The Muslim Council of Britain ('MCB') welcomed the definition and added three essential principles:

- *Islamophobia is a form of racism.*
- *Islamophobia is more than just anti-Muslim hatred or bigotry.*
- *Islamophobia does not incorporate criticism of Islam as a faith, but some people may hide behind 'criticism of Islam' when engaging in Islamophobia.*

217. A former director of Runnymede Trust has identified the key elements of Islamophobia as follows:

- *Negativity and hostility in the media and the blogosphere, in the publications of certain think tanks and influence-leaders, and the speeches and policy proposals of certain political leaders, both mainstream and marginal.*
- *Hate crimes on the streets against both persons and property, damage to cultural centres, and desecration of Muslim cemeteries and religious buildings.*
- *Harassment, abuse and rudeness in public places.*
- *Unlawful discrimination in employment practices and the provision of services.*
- *Non-recognition of Muslim identities and concerns, and removal of Muslim symbols in public space.*

218. According to evidence reported in the Leveson Inquiry, four of the five most common discourses used about Muslims in the British press associate Islam/Muslims with threats, problems or in opposition to dominant British values. Between 2000 and 2008, references in the press to radical Muslims outnumbered references to moderate Muslims by 17 to one."

45. I do not accept the contentions made by Mr Mitchell that the OPH Judgment is determinative of the issue of whether the Facebook post was offensive or not. The OPH judgment deals with a separate matter namely whether the beliefs espoused by the claimant were capable of being philosophical beliefs under the Equality Act 2010. Employment Judge's Battisby's comments about whether the views of the claimant as expressed in the Facebook post were anti-Islam or anti-Muslim were made for the purposes of determining this particular issue which is made clear at paragraph 49 of the OPH Judgment (para 2). Moreover I accept the point made by Mr Wallace that it is whether the conclusion of the respondent that the comments were offensive was within the range of reasonable responses that is in issue, not whether this Tribunal or any other Tribunal concludes that the views were or were not offensive per se. That would be to slip into the substitution mindset and would be incorrect.

46. When considering the third Burchell whether the belief that the respondent had was formed following a reasonable investigation, I have also found that it was. The investigation carried out was thorough and proportionate and carried out in good faith. The claimant was interviewed twice to get his view on the matter (paras 10.8 and 10.11). Fundamentally the facts as to what had taken place were undisputed but the claimant was given ample opportunity to explain the context of the post during the investigation (paras 10.8, 10.11, 10.13). The claimant complains that the investigation was flawed as it did not consider the motives of the complainant in making the complaint after he raised these and also by not investigating wider issues of racial discrimination and scapegoating the claimant (para 10.9). I do not consider that any failure to do these was outside the range of reasonable responses as the complaint received by the respondent was clear and contained no particular ambiguity. The reference to that complainant making previous complaints of racism appears to relate to the reason the complainant wanted to remain anonymous, rather than the reason he made the complaint at all (para 10.45). Other than more general contentions that the complainant was a "troublemaker" or "ultra sensitive", the claimant has no specific challenge to the validity of the complaint the respondent received. In those circumstances it would be unusual and inappropriate (and somewhat troubling) for an employer

to go back and question the motives of a complainant making a complaint about racism or suggest that they had perhaps been mistaken. The other points raised about the culture at the respondent were equally generalised in nature and did not directly impact the issues at consideration in the claimant's particular case. The fact that the respondent did not take these steps was plainly not outside the band of reasonable responses that an employer may take.

47. When looking at whether the dismissal was reasonable in all the circumstances, I must firstly consider whether the dismissal was procedurally fair. The investigation is dealt with in detail above and I have concluded it was a reasonable investigation. I find that other aspects of the procedure adopted by the respondent were within the range of reasonable responses He had all the information from the investigation well in advance (para 10.18). He was aware of the allegations made against him. He had the opportunity to be accompanied and represented by his trade union representative. The disciplinary hearing conducted by JT was thorough (paras 10.18-10.21). The claimant was given every opportunity to explain his case and to set out his side of the story (paras 10.19-10.21). He was informed of the outcome and his right of appeal (paras 10.22-10.23). As to the procedure more specifically, the main criticisms levelled by the respondent and my conclusions as to whether these apply and put the investigation outside the range of reasonable responses are as follows:

47.1. Neither the dismissal or appeal outcome letter makes reference to consideration of the context of the Facebook post; the claimant's apology; length of service and disciplinary record; the claimant's decision to censor profanities in the post and subsequently delete it; consideration of a lesser sanction.

It is correct that the dismissal letter and the appeal outcome letter does not specifically reference many of the above matters (paras 10.23 and 10.43), apart from the dismissal letter which does appear to in fact make reference to the claimant apologising (see para 10.22). However the crucial issue for the Tribunal is whether the relevant decision makers at each stage considered any of the above matters when making their decisions and if not, whether any failure to do so, put their decision making process outside the range of reasonable responses. I will deal with each in turn:

a) Consideration of the context of the Facebook post namely that it was a comment on the easing of lockdown restrictions on 4 July 2020

I was satisfied that this was something that was considered at investigation, disciplinary and appeal stage. The claimant first made the point at the fact finding interview on 9 July 2020 (para 10.8). He raised it again at the investigatory interview in 12 August 2020 (para 10.11). The claimant's view on why he made the post was noted 3 times in the Investigatory report of GH (paras 10.16-10.17). This was discussed with JT during the disciplinary hearing (paras 10.20) with JT being noted as confirming that she understood why the claimant had

made the post in the first place. The dismissal letter prepared by JT states that the evidence was considered and I was satisfied that this included the contents of the investigation report and the matters discussed at the hearing. The reason the claimant says he made the Facebook post and its context was raised in his appeal letter (para 10.24) and discussed at the appeal hearing on 12 October 2020 (para 10.26, 10.27) and on 29 October 2020 (para 10.40). As this matter is set out multiple times in written minutes of hearings and documentation produced throughout the process, I was satisfied that this matter was operative in the decision making of the respondent and was not disregarded.

b) The claimant's apologies

Again I was satisfied that the apologies made by the claimant were considered at all stages of the investigation, disciplinary and appeal process. The claimant's apology at the investigatory interview held on 12 August 2020 was noted in the minutes (para 10.13) and this was recorded in the investigatory report prepared by GH (para 10.17). His apology at the disciplinary hearing on 3 September 2020 was also noted (para 10.19) and indeed specifically mentioned in the dismissal letter (para 10.22). The apologies made at the appeal hearings were also referenced (paras 10.26, 10.27, 10.29, 10.36 and 10.40). I was therefore satisfied that these had been considered by the dismissing and appeal officers. Moreover it is clear to me that the dismissing officer went further as she considered not only the fact that apologies were made, but whether those apologies were sincere and genuine and demonstrated that the claimant had showed real remorse for his actions. There was a discussion about this during the disciplinary hearing itself (para 10.19, 10.20 and 10.21) with the claimant explaining that he was astonished that offence could have been taken and that he could not be blamed for someone misinterepreting his comment. This was again specifically considered and referenced in the dismissal letter (para 10.22) with JT reaching the conclusion that the claimant's apologies were qualified by his own belief that essentially he had nothing to apologise for. SM made a similar conclusion at the second appeal hearing when he mentioned his doubt about the degree of contrition shown by the claimant (para 10.43). These conclusions about the genuine nature of the apologies made were within the range of reasonable responses for the respondent to have reached given the findings of fact set out above.

c) The claimant's length of service and disciplinary record

I was satisfied that the dismissing officer did take consider the claimant's length of service and clean disciplinary record. This was recorded in the investigatory report prepared by GH (para 10.15) which was before the dismissing officer. Moreover this was expressly raised

in the appeal hearing before SM (para 10.27). I accepted the evidence of SM that he did consider this matter at the appeal stage (para 10.42).

d) The claimant's decision to censor profanities in the Facebook post to avoid making offence

This was raised by the claimant at his investigatory interview and recorded in the minutes (para 10.13). This was also self evident from the extract of the Facebook question itself included as part of the investigation report (10.15). This was raised again at the appeal hearing on 12 October 2020 (para 10.26). It appears to have been a matter that was at least in the contemplation of the decision makers, but in any event, if this was not considered expressly, I cannot conclude that it was outside of the range of reasonable responses to fail to consider this matter. It does not appear to be suggested that the claimant was trying to deliberately offend. The offence taken as to the use of bad language is moreover perhaps a different type of offence to that taken by someone who believes they have seen a racist comment so is not particularly instructive on this matter.

e) The claimant's decision to delete the Facebook post

This was raised during the disciplinary hearing and recorded in the minutes (para 10.21) which suggests the information was before the dismissing officer. I cannot conclude that it was expressly considered but do conclude that any failure to specifically consider this issue was not outside the range of reasonable responses given the other findings of fact above. The claimant made the Facebook post and this was seen by the complainant who complained about it. This was the issue that was the subject of the disciplinary proceedings and any later decision to delete the post was at most a minor consideration to the issues in dispute and not factoring this into the decision is not outside the range of reasonable responses.

f) Consideration of a sanction less than dismissal

It is correct to say that there was no discussion about the appropriate sanction and the claimant's views on what this could be were not sought during the disciplinary hearing before JT. This matter was not expressly referenced in the dismissal letter (para 10.23). I therefore cannot conclude that this was considered by the dismissing officer which is a defect in the disciplinary process. However it is quite clear that this was considered at the appeal stage. There was a discussion about lesser punishments such as a final warning if reinstatement was allowed and what steps could be taken to address concerns in the first appeal meeting (paras 10.26. 10.27 and 10.29). I accepted SM's evidence that his initial conclusion was that he should reinstate the claimant and replace it with a final warning and some training (para 10.30). This was clearly and patently something that was considered

at appeal stage so the failure to consider this at disciplinary stage was corrected at appeal.

47.2. The appeal decision was originally to reinstate the claimant but this was overturned on review, unjustifiably, apparently because the claimant contacted the respondent about the logistics [of] being reinstated, which was not a disciplinary allegation.

The way that the appeal was handled was unorthodox and outside the description of the procedure set out in the respondent's disciplinary procedure. The respondent's procedure provides for the appeal outcome to be adjourned for a decision to be made and then reconvened (para 10.2) and so the step taken by SM at the conclusion of first appeal hearing that he would not make a decision that day (para 10.29) was appropriate. However what then took place was somewhat irregular. Rather than reconvene the hearing at that stage to further discuss/advise the claimant of his decision, SM then telephoned the claimant's trade union representative to advise him that the claimant was to be reinstated but that this would be subject to conditions (para 10.30). Whilst no doubt this was done to try and assist the claimant, it was unfortunate that the message did not have the clarity required for such an important decision. If the claimant was to be reinstated, or if this needed to be discussed further, the meeting should have been reconvened at this stage in accordance with the respondent's own policy for any conditions to be attached to reinstatement and any alternative sanction to be considered, discussed and communicated. This unfortunately left the claimant in a state of limbo where he was under the impression that he was getting his job back when in fact it appears the decision was yet to be made. I consider that the respondent's actions in the way it handled the communication of the initial decision on appeal to reinstate subject to conditions to be outside the range of reasonable responses.

These actions then influenced the course of events at the second appeal hearing. The claimant had been informed verbally he had been reinstated by KU and SM had e mailed him to state that the decision to reinstate was conditional on steps being taken which would be notified to the claimant. He was informed that he should not contact colleagues at work and if he did that the decision could be reviewed (para 10.31). The claimant in fact did take steps to ascertain whether he had been allocated shifts and told SM that he had done so in his e mail of 20 October 2021
(para 10.32). SM then wrote further to the claimant and suggest that he had disregarded clear instructions not to communicate with colleagues and he needed to understand why this had been done(para 10.33). This was one of the triggers for the second appeal meeting (albeit I also accepted that SM had already decided to hold a meeting to discuss concerns about comments made by the claimant at the first appeal meeting – see para 10.32). The fact that a hearing had not been reconvened first before a decision was communicated appears to have contributed at least in part to a chain of events whereby the respondent decided that the claimant's

original offence was aggravated. This may well have been avoided if the respondent had not communicated a partial decision in this way and simply reconvened the appeal hearing to discuss these matters and reach a final decision. This was a procedural irregularity that in my view was outside the range of reasonable responses.

I do not consider that the terminology used by the respondent about this second appeal hearing at the time (appeal review meeting) as opposed to by the time of the hearing (appeal reconvening meeting) is significant. The issue in my view was the communication of a partial or incomplete decision to the claimant without reconvening the hearing itself which was outside the range of reasonable responses and unfair.

47.3. The appeal decision maker unreasonably took account the claimant not wishing to take a holiday in Dubai

There was much discussion at the Tribunal hearing regarding the questions the claimant was asked at the second appeal hearing about his views on Dubai and whether these were correct. Much of the matters under discussion are of very limited relevance to the issues I have to determine. However I was troubled by the questions posed to the claimant about Dubai during the appeal hearing as they appeared to me to be only tangentially relevant to the issues under consideration. The claimant had been dismissed for making a Facebook post that was deemed to be racially offensive and discriminatory. I accepted that despite being initially minded to reinstate the claimant, SM had a concern about the comment made by the claimant at the appeal hearing that if there was a Muslim caliphate there would be no pub and that this was reaffirming the original post (para 10.32). During the second appeal hearing, this was put to the claimant and his views about what it would mean to live in a state that was governed by the Muslim religion (and its impact in particular on whether pubs were allowed) were further explored.

However following the adjournment the discussion shifted on to the reasons the claimant may have not to visit a specific state (which happens to be a Muslim country), namely Dubai. The claimant set out his reasons why this was not somewhere he was interested in visiting making comments about the climate, his disinclination to travel by air (it turns out for ecological reasons), his view that there was corruption in the Dubai authorities and concerns about issues around exploitation of workers. Whether the claimant was correct or incorrect, none of these facts appeared to me to be linked in any way to the nature of the Facebook post itself which was more a comment on Muslim culture, the banning of pubs and the drinking of alcohol, linking that with what the claimant saw were negative connotations on British culture. Whilst I accept that the questions may have been posed innocently by SM, I conclude that to ask those questions and to then take into account the claimant's responses specifically his views on Dubai and link them back to the earlier Facebook post was unfair and was outside the range of reasonable responses.

48. The next issue to determine is therefore whether dismissal itself was within the range of reasonable responses. The respondent says dismissal was outside the range of reasonable responses to the act because it was disproportionate to the fact. It relies on a number of matters which I will deal with in turn:

48.1. <u>The decision did not take into account the claimant's length of service and good service record</u>

My conclusions on this matter are set out at para 47.1 (c) above. I conclude this was considered by the respondent so this is not something that operates to bring the dismissal outside the range of reasonable responses.

48.2. <u>The posting was on a private Facebook page and the posting was not public and it did not link the posting to the respondent.</u>

I set out my conclusions on this matter at para 42 above so again conclude this is not a relevant factor that brings the dismissal outside the range of reasonable responses.

48.3. <u>The posting was not offensive or racist and was not an act of misconduct under the respondent's disciplinary procedure or at all</u>

My conclusions on this matter are set out at paras 44 and 45 above. I also remind myself again that it is the respondent's conclusions on these matters and whether these are reasonable and within the band of reasonable responses that is the question here and not whether the Facebook post is found by this Tribunal to be objectively offensive or racist or an act of misconduct.

48.4. <u>The claimant has a right to freedom of speech as a human right</u>

I acknowledge that these are engaged in the Tribunal's considerations of whether the claimant's dismissal was unfair or not and in particular when considering whether dismissal was within the range of reasonable responses, I have also considered whether the dismissal in the case ostensibly for making a Facebook post (which was an exercise of the claimant's right of freedom of expression) was a justifiable interference with that right. I have taken into account Mr Mitchell's submissions about the importance of free speech and considered each of the authorities cited. Ultimately however I have concluded that interference with the claimant's Article 10 rights here were justified. Firstly the Facebook post was made in a work related context (by virtue of the claimant's choice to tag RMT Leamington into his Facebook post and so make the post visible to a number of the respondent's employees) and so was not simply a private matter. Secondly and most importantly the respondent decided that the Facebook post in question was deemed to be racist and discriminatory and I have concluded that it was within the range of reasonable responses for the respondent to come to that decision. Taking action in relation to that

post (including dismissing the claimant) to protect its employees was in these circumstances a reasonable step to take. The right to freedom of expression is a qualified right that can be restricted for a number of reasons as set out in Article 10 (2) including "*the protection of the reputation of the rights of others*". Article 14 of the HRA specifically notes that the enjoyment of rights under its provisions "*shall be secured without discrimination on any ground rights of its employees not to suffer discrimination without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".* On this basis I am satisfied that the claimant's Article 10 rights have been given due consideration in the application of sections 94-98 ERA in this claim.

49. There is no doubt that the respondent's decision to summarily dismiss was a harsh decision with serious implications on the claimant. I have sympathy for the claimant having lost his job for one infraction after such a long period of employment without incident. However, whether the Tribunal believes the decision was harsh or not is not the test I must apply. I must not substitute my own decision for that of the employer. Although harsh, it cannot be said that this decision is outside the range of reasonable responses. The respondent did consider alternatives to dismissal as part of its consideration at appeal. A different employer may have decided that on balance a final written warning was appropriate (as SM had initially concluded). This employer (and SM himself on further consideration) did not. Both sanctions were within the range of reasonable responses.

50. Therefore in conclusion, whilst I determined that the respondent dismissed the claimant for misconduct and that dismissal itself was in the range of reasonable responses and so was substantively fair, the dismissal was unfair because the respondent acted in a procedurally unfair manner in the way that it handled the appeal, in particular the communication of a conditional reinstatement followed by a decision upholding the dismissal which was taken out of process and the taking into account of irrelevant factors when considering that appeal. Those matters I consider to be beyond the range of reasonable responses and so the dismissal was procedurally unfair.

51. The next consideration is what remedy is appropriate in this claim. The claimant seeks reinstatement and as the parties agreed that further evidence and submissions would be required on this matter, I would not be able to deal with remedy in this reserved decision and a separate remedy hearing is required to be listed. However as I had evidence on and heard the parties submissions on Polkey and contribution, and the parties were content for this to be dealt with in principle as part of the liability decision, I have considered each of these matters. For the purposes of the conclusions below, I have proceeded on the basis that reinstatement has not been ordered.

<u>Polkey</u>

52. Firstly, I considered whether any adjustment should be made to the any compensation that may be awarded to the claimant on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's case the claimant might have been fairly dismissed in accordance with the principles in **Polkey v A E Dayton Services Ltd above**.

53. The procedural flaws which have led to the finding of unfair dismissal relate to the handling of the claimant's appeal, in particular the respondent's failure to reconvene an appeal hearing to communicate its decision and for any conditions to be attached to his proposed reinstatement and any alternative sanction to be considered, discussed and communicated. I also found that the respondent asked and took into consideration irrelevant questions in the second appeal hearing. I find that if the respondent had properly convened the appeal hearing and not asked the irrelevant questions, there is a still a chance that it may not have decided to reinstate as planned and ultimately dismissed the claimant. I refer to my findings of fact at paragraphs 10.32 above about the concerns that SM already held in support of this conclusion. SM was clearly already having doubts about his initial decision to reinstate and those may have come to the fore during a correctly reconvened appeal hearing and changed his decision even if events had not unfolded as they did. I do not regard it as very likely but it is possible. I consider that there is a 10% chance that the claimant would still have been dismissed had the appeal procedure been a fair one. I do not accept the further contentions of Mr Wallace that even if the claimant had been reinstated on appeal that it was probable that the claimant would have committed an act of misconduct of a similar nature again. It is clear that the respondent at appeal stage had concerns of this nature, and they may be correct in their view that the claimant's opinions on the matters that were the subject of the Facebook post had not changed. Nonetheless I was satisfied that had the claimant been reinstated, the claimant would have been able to moderate his behaviour (at least with reference to making Facebook posts of this nature). In support of my conclusions I refer to my findings of fact at paras 10.8, 10.13, 10.21, 10.40). Therefore any compensatory award that may be made to the claimant should be reduced by 10%.

Contribution

54. When considering a deduction to the basic or compensatory award on the basis of contribution. Firstly, it is necessary to identify the conduct which is said to give rise to possible contributory fault. Secondly, I must decide whether that conduct is blameworthy. Thirdly, under section 123(6) ERA, I should consider whether the blameworthy conduct caused or contributed to the dismissal to any extent and finally I must determine to what extent it is just and equitable for the award to be reduced.

55. The claimant's conduct said to give rise to contributory fault is the claimant's reckless behaviour in making the Facebook post in the first place and his lack of genuine contrition about the consequences of the Facebook post. I find that that the claimant's conduct in relation to both these matters (as exemplified by

my findings of fact at paragraphs 10.4, 10.8, 10.12, 10.20, 10.27, 10.37) was blameworthy for the same reasons set out in the conclusions above in particular paras 43 to 45. I do not accept the contentions of the claimant that he was simply expressing his opinion in a lawful and fair way. That blameworthy conduct I have already found was the reason for the dismissal
(see para 42). I conclude that the claimant's actions brought about his dismissal to a greater extent than the unfairness of the respondent's appeal processes. I find therefore that it would be just and equitable to reduce any basic and further reduce any compensatory award by 60% to reflect the claimant's culpability in his own dismissal.

Employment Judge Flood
17 November 2021

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RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
25/11/2021

FOR EMPLOYMENT TRIBUNALS