EMPLOYMENT TRIBUNALS

Claimant: Ms D Derby

Respondent: Southwark Council

HELD AT: London South ET by Cloud Video Platform **ON:** 11, 12 and 13 October 2021

BEFORE: Employment Judge Barker

REPRESENTATION:

Claimant: Mr Wise-Walsh, counsel
Respondent: Ms Ahmad, counsel

JUDGMENT

The claimant was not unfairly dismissed. Her claim of unfair dismissal fails and is dismissed.

REASONS

1. The claimant was employed by the respondent as an assistant practitioner in the respondent's social care team, working with older persons and adults with disabilities. She began work on 1 August 2012 and was summarily dismissed by reason of gross misconduct on 13 August 2019. ACAS Early Conciliation took place from 5 November 2019 until 19 December 2019 and the claimant's ET1 claim form was lodged at the Tribunal on 3 January 2020.

2. The Tribunal heard evidence from the claimant and from three witnesses for the respondent, being Marylin Akuoko, the investigating officer, Suzanne Barcz the dismissing officer and Simon Rayner, the appeals officer.

3. The Tribunal issued case management orders dated 12 October 2020 and 9 March 2021. The claimant had brought claims of disability discrimination but at a hearing on 9 March 2021 was found not to meet the test in section 6 Equality Act 2010 for disability, so those claims were dismissed in a judgment dated 9 March 2021. The

orders of 9 March 2021 made provision for the exchange of witness statements simultaneously on 13 September 2021 at 5pm, but the claimant's witness statement was not served on the respondent until sent by her solicitor by email at 22.32 on Sunday 10 October 2021, the day before the first day of this hearing. The witness statement itself is 23 pages long and much of it consists of un-numbered paragraphs. It also contains no cross-references to pages in the bundle and it is not in chronological order. The Tribunal was assisted by the parties' counsel in locating references in the statement, but this ought not to have been necessary.

4. The respondent's counsel had not had the opportunity to take instructions on the contents of the claimant's witness statement by 10am on the first day of the hearing. Ms Ahmad assisted the Tribunal by taking instructions during the adjournment for the Tribunal to read the bundle of 310 pages and by having compiled both a list of issues and a reading list for the Tribunal, to which Mr Wise Walsh agreed, which I was grateful for.

5. The claimant experienced difficulties in connecting to the hearing on each day of the hearing, and the Tribunal clerk informed the Tribunal at the start of day 1 and day 2 that she was having difficulties in connecting to the microphone so that the Tribunal could hear her. The Tribunal discussed with the parties on an ongoing basis the timetable according to which witnesses would be heard, and the claimant was given an indication on day 1 that she would likely be called to give evidence at about noon on day 2, which moved back to 2pm and then 3pm. On returning from lunch at 1.45pm on day 2, the claimant's solicitor Mr Ewan told the Tribunal that the claimant would likely be coming to his office on day 3 to give evidence due to the difficulties with her connection. When at 2.45pm on day 2, the Tribunal attempted to swear her in, she could not be heard. Attempts to connect using a mobile phone to supplement her video connection did not work, as there was considerable echo and feedback on the line, to the extent that there were considerable difficulties in hearing the claimant take the oath when sworn in.

6. It was regrettable that this problem had not been resolved by this stage in the proceedings, particularly given the indications made throughout the hearing about when the claimant would be called to give evidence and as to the difficulties that would be encountered if the claim was to be adjourned part-heard. After a period allowing Mr Wise Walsh to take instructions from the claimant, it was agreed that the Tribunal would adjourn at 3pm and resume at 9am on day 3, with the claimant attending at Mr Ewan's office. The claimant did so, and the evidence and closing submissions were able to be heard in the time available for the hearing.

Issues for the Tribunal to decide

7. The issues for the tribunal to decide were agreed by the parties at the start of the hearing on 11 October 2021. The claimant accepts that the respondent had a potentially fair reason for dismissal, that being misconduct, but she otherwise disputes the fairness of her dismissal. The issues agreed are:

    i. Was the claimant's dismissal unfair on both substantive and procedural grounds?

ii. Did the respondent genuinely believe that the claimant had committed the misconduct alleged?
iii. Was that belief based on reasonable grounds?
iv. Did the respondent undertake an investigation that was fair in all the circumstances?
v. Did the respondent follow a fair procedure, within the meaning of s.98 Employment Rights Act 1996?
vi. Was the respondent's decision to dismiss within the band of reasonable responses available to a reasonable employer?
vii. In respect of remedy (should the claims succeed), to what level of basic and compensatory award is the claimant entitled in respect of her claim for unfair dismissal? To what extent should any compensation be reduced in respect of *Polkey* and/or contributory fault? Has the claimant taken reasonable steps to mitigate her losses?
viii. Should any adjustment be made in respect of the so-called 'ACAS Uplift' and if so, by how much?

8. In particular the claimant will say that an unfair procedure was adopted in that:

i. There was an overall delay in the process, including that the minutes of the investigatory meeting in January 2019 were not shared with the claimant until June 2019;
ii. The claimant was nevertheless only given six days' notice of the investigatory hearing;
iii. In breach of the respondent's own policies, HR advised the investigating officer to make a recommendation to the disciplinary panel, that the claimant be dismissed. This report was also before the appeals officer who did not order a fresh report be produced;
iv. The investigating officer was allowed to question witnesses at the disciplinary hearing but the claimant's companion was limited in his ability to ask questions;
v. The HR advisor at the disciplinary hearing raised her voice at the claimant;
vi. The claimant was subject to time pressure during the disciplinary hearing which restricted her right to present her case;
vii. The disciplinary officer appeared at the appeal hearing to present the management case, instead of the Business Manager;
viii. The claimant submitted a grievance against the respondent's conduct of the disciplinary process which was not properly considered by the respondent, including but not limited to the fact that no hearing was convened to consider it.

9. The claimant will also say that the decision to dismiss her was substantively unfair, in that:

i. the respondent did not give proper weight to the fact that the claimant was the victim of what she says was substantial and prolonged racial harassment.

ii. The claimant will also say that the respondent failed to give weight to her "*contrition and insight*"
iii. The claimant says that the respondent failed to take account of her health issues, including sciatica, which caused her to need to park closer to the office; and
iv. The respondent failed to establish how well known the respondent's social media policy was to the claimant before giving weight to the claimant's breaches of it in relation to her dismissal.

10. Although the Tribunal has considered the evidence submitted by the parties, findings of fact have only been made in relation to evidence that was relevant to the issues the Tribunal had to decide. Therefore, where this judgment and reasons is silent on a point made, it is not that it was not considered, but that it was not sufficiently relevant to be included in this judgment and reasons.

Findings of Fact

11. At the time to which these proceedings relate, the claimant was working for the respondent at its offices in Queens Road, Peckham as an assistant practitioner working with disabled people, reviewing their care and support needs.

12. She accepted that her post required an enhanced DBS check and the post was classified as a regulated activity under the Safeguarding Vulnerable Groups Act 2006 and therefore brought with it a high expectation of the conduct of the post holder. She also accepted that it was part of her job description to provide community support and a service to those who have complex problems and that some of those she worked with were challenging individuals who can act in a discriminatory way to those looking after them. Mr Rayner also gave similar evidence and said "*we work with very unwell people and they can be abusive*".

13. It was agreed by both parties that the availability of parking at the respondent's Peckham office was problematic and that employees arriving by car would frequently have to drive for some considerable time around the nearby streets to find somewhere to park. The evidence before the Tribunal was that the claimant complained on at least two occasions as early as December 2017/January 2018 to the respondent's Parking department about being prevented from parking on the streets nearby, due to residents blocking parking spaces.

<u>History of disputes with SC</u>

14. An individual who will hereafter be referred to as "SC" (as agreed by the parties) was a resident in a street (hereafter identified as X Road) approximately one mile away from the respondent's Queens Road offices. SC, a 55 year old male, was well known in the area. He was described by the respondent as having a history of learning difficulties and mental health issues and Ms Akuoko told the Tribunal that he was known to the respondent's adult social care team, having been referred to them some years earlier, although he did not have a social worker and was not receiving care services at the time to which these proceedings relate.

15. It was well known by the respondent's staff who worked at Queens Road, and it was not disputed by either party, that SC spent most of his time during the working week sitting outside the shared house in which he lived, on a chair or an upturned bucket, surrounded by traffic cones and/or sand bags. The Tribunal was told that he would offer to wash cars of those who parked nearby, for money or beer, and that he reserved parking spaces outside his house which he would occasionally provide in exchange for payment. On other occasions, SC would refuse to move the cones to allow drivers to park there.

16. SC was also in the habit of dressing in costumes, which included a traffic cone and an "afro" wig. Jackie McGeever of the respondent's Anti-Social Behaviour Unit told the claimant in an email on 5 June 2018 "*I have seen this man in various guises which often reflect what is in the news, i.e. he has variously been Donald Trump and David Bowie.*"

17. It was the evidence of Mr Rayner, which I accept, that it was apparent to anyone driving past when SC was sitting outside his house, that SC presented with issues with his mental health. Mr Rayner told the Tribunal "*it was very obvious he was unwell*". Mr Rayner said that when he visited the Peckham office, he had noted the situation outside SC's house and the parking cones, and had driven past without stopping to engage with SC. Mr Rayner said

> *"you could see… it would distress him to move those cones. I don't want an altercation with anyone, residents, about bins etc, not just SC."*

18. Mr Rayner told the Tribunal that he understood that there had not been any disciplinary action taken against any other employees of the respondent over parking disputes with SC or any other residents. The respondent's staff had been advised not to park outside SC's house. The Tribunal accepts that another of the respondent's employees reported an assault by SC in a separate dispute over parking, in that SC had pushed this employee with a closed fist. There was evidence of a complaint letter written by that employee, Mr Bovell, in August 2108, where he doubted SC's lack of mental capacity and highlighted that SC's landlord was also complicit in SC's abuse of the respondent's employees.

19. This was also the claimant's evidence, which I accept, that the landlord himself was also aggressive and offensive towards her and other members of the respondent's staff who became involved in parking disputes with SC.

20. The claimant's complaint about SC on 24 January 2018 was that SC put out cones on the road to prevent people from parking and that he was verbally abusive and made racist comments towards her. The claimant followed up her complaints from January 2018 in an email dated 22 February 2018 to the respondent's Estate Parking Manager and described issues with two residents blocking parking, one of whom was SC. The claimant states that

> "*last time he tried to do this with me I had to call the police. Today [he] … put out sand bags and cones to prevent people from parking….*

> *The residents… need to know that they are not allowed to put their bins to prevent people from parking. I pay road tax like everyone else and should be allowed to park without being confronted by residents when I move their bins so I can park my car. I am regularly met with aggression, racism and a few years ago my car window was smashed. My other colleagues have also had issues trying to park their car…. but they are not as persistent as me and don't report it.*
>
> *I hope that something is done about this and not just left (As I am very persistent)".*

21. In a response sent by email from the Highways Licensing and Enforcement Manager of the respondent, Craig Taylor, in early 2018, the claimant was told the following in relation to SC:

> *"Regarding [X] Road, we have been through a very lengthy process when dealing with the person who places items in the parking bay and sometimes sits in a chair in the parking bay. This process involved several council departments and the Police, as yet we have been unable to resolve the situation. We are passing this to the community support team who will be able to further engage with the resident to work out the problem being caused and resolve the reasons behind this actions."*

22. The claimant forwarded this email to Emma Whitehead, an acting senior practitioner in the respondent's community review team on 25 April 2018, which was the same day that the claimant and several other of the respondent's employees were involved in a lengthy argument with SC over parking.

23. The claimant's contemporaneous account of this incident was recorded by her in an email to Jake Barnes and Emma Whitehead of the same day. In it, she describes approaching SC, who was sitting in the parking bay beside two cones, and asking him twice to move the cones so she could park, which he refused to do. The claimant then got out of her car and moved the cones herself, but SC refused to move. The claimant's email states "*I reminded him that he has no right to prevent me from parking and that he had said the same thing to me the day before*". The claimant then describes SC becoming agitated and shouting abuse at her, after which she called the police and while waiting for the police to arrive, SC's landlord arrived and SC continued to abuse her while she sat in her car and waited for the police to arrive. The claimant's separate "Chronology of incidents" attached to her witness statement records that SC's abuse included referring to her as a "*black bitch*" and saying "*I hope you have your papers in order*" which the claimant understood to be a reference to the Windrush scandal which was in the news at the time.

24. Jake Barnes told the claimant the same day *"I am very sorry to hear about this incident and have reported it to the police. The issues has been ongoing for months/years and we need to take a firm stance. We all have the right to come to work safely and without persecution or hostility. I will raise with the service managers and facilities to see what further steps we can take."* He told her she could leave early if she wished.

25. This incident was also reported to the respondent by SC's landlord, by way of a complaint made in April and repeated by letter on 23 May 2018. The landlord's account of the incident was that the claimant and five other employees argued with SC over parking and the police were called. The landlord informed the respondent that SC had "*learning difficulties*".

26. In a supervision meeting on 23 May 2018, the claimant told Jake Barnes that she suffered from back pain and struggled to walk long distances from her car to the office and that the issue of parking was causing her stress and that she wanted the respondent to "*take more action*". An incident on 27 April 2018 with SC was discussed. The claimant was told by Mr Barnes that *"this resident experiences an undiagnosed learning disability and has harassed other members of staff seeking to park in the local area*". She was offered the option of working out of a different office and was told that her team (Adult Social Care) was unable to direct parking wardens to stop residents preventing staff parking.

27. Matters continued to be reported both by the claimant and SC's landlord to the respondent concerning ongoing conflict between the claimant and SC. The claimant took images of an incident where SC dressed in a Jamaican flag outfit and a black afro wig, which the claimant understood to be a response to a Jamaican flag sticker on her car, and which she found offensive and provocative.

28. The claimant met with the respondent's Anti-Social Behaviour Unit officer, Ken Dale, in June 2018. On 7 June 2018 Mr Dale emailed the claimant with their list of agreed actions to take in relation to SC and his behaviour towards her and other colleagues. These actions were that Mr Dale would liaise with the local policing team, refer the claimant to Victim Support, and that the claimant would complete an HS1 form to report an issue with health and safety at work. She was also provided with contact details for the counselling and support service.

29. She was informed by Mr Dale on 14 June that they had referred the matter to the police and that the police had agreed they would take action against SC and his landlord. SC was to be served with a community protection warning and if this was breached, the consequences would ultimately be that he would be prosecuted.

30. The claimant was not happy with this and reported on 22 June that SC "*continues to harass and film me, even when I am not parking on [X] Road… there is no getting away from them… I see him walking down the road, going to Tescos and watch people laugh and joke with him and take pictures of him like he is a celebrity*".

31. The landlord made a further complaint on 27 June 2018 to the respondent that matters "*started up again yesterday with staff at the same site*". The claimant met with Ms Akuoko and Ms Whitehead on 27 July 2018 to discuss the landlord's complaint. The claimant is reported to have not denied "*shouting at the resident but advised that this was in reaction to ongoing abuse towards herself… Dinah advised that her frustrations that the resident is still allowed to prevent people from parking and feels that she has had limited support in relation to this*." The claimant was told that her managers had been liaising with parking regarding this and have advised her to park elsewhere in the meant time to protect herself from further altercations and abuse.

She was also offered the opportunity to work from another office, the Southwark Resource Centre ("SRC"), but she rejected this as she thought it would be too far for her. However, during this hearing it was put to her that the SRC was only about ten minutes away from Queens Road by car and the claimant accepted that she had not looked into this.

32. Ms Whitehead noted, in an email to Jake Barnes on 30 July 2018,

> *"Dinah did mention during the discussion that in usual circumstances she would use "brute force" to deal with the issue. However, she confirmed this is not something she would do on this occasion because she works for Southwark. I reminded her that this would not be appropriate behaviour and suggested she focus on dealing with things in the appropriate way."*

33. The claimant was contacted on 8 August 2018 by a police officer, who discussed with her the history of the reports to police and involvement by the respondent's Highways and Licensing Enforcement. The claimant told the Tribunal that she was very distressed to hear that her report on 25 April had been classified as the victim having been unwilling to prosecute, and the crime report closed. The police told her that they would be reporting the incident of 25 May as racially aggravated harassment and that SC would be issued with a harassment warning by the police, with any further infringements requiring SC to be interviewed by the police under caution.

34. In her response to the police on 9 August 2018 to indicate her unhappiness with the action taken so far, she mentions that she had that day parked her car on SC's road and walked past him on her way to work. He had filmed her and when she had pointed this out to SC's landlord, he had told her to "*fuck off*" twice.

35. The claimant was advised by the police (Officer Mike Hughes) on 13 August 2018

> *"I must advise you not to park in that same road…. if this was happening to me I would just park in a different road. I have entered a crime report for harassment as discussed because of the ongoing nature. SC was actually issued with a verbal harassment warning by an officer on my behalf on Friday 10th August. He has been told his behaviour is regarded as harassment and it must cease."*

36. The claimant responded on the same day and said

> *"…I am not happy that I am being told to park somewhere else… as it is my right and I pay road tax and able to park I will continue to park on [X] Road as I will not allow someone to stop me from doing what I am in my rights to do, just because it makes it easier for everyone else…*
>
> *In conclusion I am not going to park somewhere else and I am going to continue removing his contest to park on that road is there is nowhere else to park as I am in my right to do so."*

37. The claimant was referred to Occupational Health and a report was produced dated 1 October 2018. The claimant was reported to be off work due to stress, caused by the ongoing conflict over parking with SC and his landlord. She met Occupational Health again on 27 November 2018 and was again assessed as unfit for work until at least 2 January 2019 for the same reason, that being a "psychological reaction to stress".

38. The claimant told the occupational health assessor that she had been harassed by SC on both occasions when she had met up with management during her sickness absence, whilst she was parking her car. She told the assessor that she is unable to park anywhere else and that the alternative workplace offered to her was unsuitable due to her child care requirements.

39. The claimant's evidence to these proceedings as to the frequency and the severity of the harassment by SC was not consistent. The Tribunal is asked by the claimant to find that the respondent did not take enough account of the nature and frequency of SC's abusive behaviour towards the claimant, but the claimant's evidence under examination in chief when she was asked about other roads to park on near the office was as follows:

> *"I parked on a few different roads. I would try to look at other places to park. Incidents were few and far between with SC and I was coming in every day."*

40. In response to another question under cross-examination her evidence was "*there was prolonged racial abuse from SC, I was getting racial abuse all the time*."

41. The claimant produced a "Chronology of incidents" which is attached to her witness statement, which lists four incidents with SC and his landlord on:

- 26 January 2018;
- 25 April 2018;
- 24 May 2018; and
- 9 August 2018.

42. The Tribunal is aware that there were at least two further incidents with SC in X Road when the claimant came in to work for review meetings while off sick in the period up to the end of November 2018, which are referred to elsewhere in the evidence. As stated above, there is also the incident of 27 June 2018 where the claimant admits to shouting at SC in frustration.

<u>The Facebook Posts</u>

43. On 29 December 2018 the respondent received a complaint from a member of the public on behalf of SC, his landlord and a nearby boxing club that the claimant had posted photos and videos of SC on her Facebook account that stated that SC and the landlord were racist. SC's landlord in particular was said in the posts to be racist and the posts were critical of the fact that he worked with black children at the boxing club in question. The photos and videos were posted without any restrictions as to who was

able to view them and so they were accessible to any members of the public on Facebook.

44. The photos and videos contained comments from the claimant that described SC as a "*well known racist*". They included images of SC in an afro wig and the Jamaican flag outfit. When commenters asked the claimant where the incidents had taken place, she replied "*[X] Road, Peckham*". In the pictures, SC can be seen standing in front of the front door of a house with the house number clearly visible. The posts had attracted threatening and abusive comments which were directed principally at SC, such as "*F the car, run them over", "when I'm next in town I'll go looking for them with some of mine*" and "*he needs a Peckham beat down*". The claimant did not censure these comments but instead had responded positively to them, thanking people who had said that they had shared her post and commenting "*the more ppl know the better*".

45. The claimant was telephoned by Christine Jones on 2 January 2019, the service manager for her team, and then emailed later that day at 4.18pm and was asked to take the Facebook posts down. The email from Ms Jones stated

> *"I requested that you immediately take down this information from FB and confirm when this has been done. You asked why you had not had a chance to explain yourself and felt that this was nothing to do with the council. I explained that as you are an employee of Southwark Council and the gentleman concerned is known to us and therefore this does connect the council with this action."*

46. Ms Jones then had cause to email the claimant again on 2 January at 4.51pm to ask the claimant to take down the last part of the post that related to SC's landlord. Ms Jones had to email the claimant a third time at 12.11pm on 3 January to ask that she remove all posts, as some remained on Facebook including one of SC from 18 December 2018. The claimant was reminded again, as she had been in the previous communication from Ms Jones, that failure to do so would have "*consequences for both you and the council*."

Events of January 2019

47. The claimant emailed Ms Jones on 7 January 2019. Her email is highly critical of the respondent's response to SC and the ongoing parking dispute between SC, his landlord and the claimant. In the email, the claimant disclosed that she had attempted to park outside SC's house at her last review meeting and that he abused her and called her MP Diane Abbott. The claimant said

> *"I'm presuming that the reason he was so confident to say that I am not allowed to park outside his home was because the council have pacified the situation by telling them that I have been informed that I am not allowed to park there the first time, which no one has the right to tell me, as I am a full licence holder, I pay my road tax and my insurance and the road is not restricted, therefore I as a car user am allowed to park there. I have been advised by management not to park there under the guise that you are concerned with the impact that it has*

on me and my health, but this is not true as by me not parking there it makes it very easy for the council as they no longer have to deal with external complaints pertaining to this situation neither do the police."

48. The claimant reiterated that she had "*been dealing with this alone for over a year with no support and left to feel like I am in the wrong*."

49. I find no evidence in the documents or witness evidence before me that the respondent had ever informed SC or the landlord that the claimant would be prevented from parking outside SC's house. The claimant's witness statement, at paragraph 27 on page 8, states "*The respondent effectively said that I should put up with the racist abuse from [SC]"*. I find no evidence that this was the respondent's position regarding the racist abuse.

50. There is also contemporaneous evidence that the respondent had sought to support the claimant in dealing with the consequences of her ongoing dispute with SC, by way of access to counselling, help reporting the matter to the relevant agencies, a different work location and so on. The claimant's evidence at the time was that, because when she went back to X Road to park while off sick and attending a review meeting and because SC continued to block the parking space outside his house and refused to move the obstruction, that nothing had been done by the respondent to address the issue, particularly when SC became abusive when she confronted him over it.

51. I find that the claimant ignored the information that she had been given relating to SC and his circumstances. As late as 7 January 2019, when the claimant has been warned that her actions in posting on Facebook about the situation involving SC and his landlord had caused a significant concern for the respondent and would result in a management investigation, she was still asserting as her primary point in her letter to Ms Jones "*I am a full licence holder, I pay my road tax and my insurance and the road is not restricted, therefore I as a car user am allowed to park there."* She also asked the following questions:

- *"Why is criminality being confused with mental health?*
- *Should someone because of their mental health status be excused from being prosecuted when the commit an offence such as racial harassment, intimidation and verbal abuse?"*

52. In this letter, the claimant ignores the fact that the police had told her that the process of prosecution of SC had begun earlier in 2018. The claimant had also been told on several previous occasions as set out above (including Craig Taylor in early 2018 and Jake Barnes in May 2018) that the respondent and the police and other agencies had been attempting to deal with SC's behaviour for years, with limited success. She failed to consider that SC's behaviour may have been, in effect, intractable.

53. She had also persisted in trying to park near or outside SC's house, even when advised not to by the respondent and the police. She did not take the respondent's

advice to avoid SC to protect her own mental health, even while she was off sick with stress caused by the conflict itself. She did not explore the offer of working at the SRC offices, saying it was too far, but acknowledged under cross-examination that she had not actually determined what the parking situation would have been at the SRC or in fact how long it would have taken her to drive there.

54. I also note that the claimant says in her witness statement that the posts on Facebook were posted on her behalf by a third party. However, the posts are clearly made from her account which she then commented further on. She also made the posts public and gave evidence that she wanted people to know what the situation was, so that the respondent may be forced into doing "*something*", although she was unable to specify during the hearing what she thought the respondent might have been able to do.

55. As a result of the Facebook posts, the respondent carried out a safeguarding concern review of SC on 23 January 2019. This was before me in evidence. It describes the concern as follows:

> *"[SC] has been alleged to be a victim of emotional abuse and harassment by a staff member of LB Southwark. It is alleged that, following a falling out over a parking space outside his property, a worker has put his name and address on Facebook that claims that he is racist. This has led to a large number of people indicating that they think someone should hurt [SC]. [SC] as a result is believed to be feeling unsafe in his local area, where he is well known. [SC] has no formal diagnosis however has been in contact with mental health services for symptoms that include hallucinations… it is suspected that [SC] may have some difficulties protecting himself as a result of his possible mental disorder."*

56. The investigation concluded that SC was not at risk despite the social media attention. It concluded "… *he is well known and liked and people if anything appear to look out for him….[SC] may face recriminations if he continues to prevent people from parking outside his house, but I believe he understands these risks."* However, the safeguarding review sets out what the claimant was unable to take into account, which was that SC was a potentially vulnerable individual with a history of mental health issues and that in her role as a practitioner for the respondent's social care team, she ought to have known and understood the risks of exposing SC on social media in the way that she did.

<u>The Investigation Process</u>

57. Marylin Akuoko, who had investigated the initial complaint against the claimant from SC's landlord earlier in 2018, carried out the investigation into the complaint in December 2018. She called the claimant to a meeting on 24 January 2019. Ms Akuoko's evidence was that in the investigation meeting, the claimant did not deny that she put the posts on Facebook or show significant remorse or understanding of the danger that she had put SC in, or that he was a vulnerable person. The claimant complains of procedural unfairness in not having been given more notice of the investigation meeting. However I find that as the claimant and the respondent had already exchanged emails, some lengthy, in early January 2019 in relation to the issue,

the claimant was not taken by surprise by the investigation meeting or the subject to which it related, and that only being given 6 calendar days' notice of the meeting did not cause unreasonable prejudice or unfairness to her.

58. Her report to management concluded that the claimant had breached the respondent's social media policy in a number of ways and that she had breached the respondent's code of conduct in relation to employees' relationships with the local community and service users and that she had brought the respondent into disrepute.

59. Ms Akuoko took advice from the respondent's HR department and was told that she should make a recommendation based on her investigation. I accept that Ms Akuoko was reluctant to do so and uncomfortable with the advice she was given, but that she nevertheless did make a recommendation that the actions of the claimant amounted to gross misconduct and that summary dismissal was appropriate. The Tribunal accepts that this recommendation as to the nature of the offence and the sanction was in breach of the respondent's own disciplinary policy.

60. Ms Akuoko concluded that "*DD has not acknowledged the seriousness of this matter. DD is an experienced AP and should fully understand the needs of somebody such as SC. She fails to be able to acknowledge that SC behaviours are attributed to his learning deficit and MH issues and that he is an extremely vulnerable man due to this."*

61. The claimant's evidence in her witness statement was that she did not know about the respondent's social media policy or that her actions would be in breach of it. She repeatedly said that she made the posts out of frustration because she "*did not get any support from the respondent*". She also alleged in her witness statement that the respondent should have prioritised her over SC because she was an employee of theirs. Her witness statement questions SC's status as vulnerable. She states *"[SC] was not on the respondent's system and he had no diagnosis under a learning disability but all of a sudden out of nowhere he was known. This was not right and again showed how the respondent changed things to suit their narrative and go against me during the investigations."*

62. The claimant complains about the delay in the respondent's disciplinary proceedings. I accept that the process was not carried out promptly. The disciplinary investigation was not scheduled to take place until 18 June 2019, over five months after the investigatory meeting. Even though the claimant had a period of time off sick she was back at work by 4 March 2019. The investigation minutes were not given to the claimant for several months either. Given that the claimant had admitted to the Facebook posts, and given that the history of the claimant and SC was well known to the respondent, I find that there was no reason for there to have been such a delay, and I accept that this will have caused the claimant distress and anxiety.

63. The claimant returned to work on 4 March 2019 from her sickness absence in a different team and with restricted duties, being office based and not allowed to visit clients.

<u>The Disciplinary Stage</u>

64. The disciplinary hearing was heard by a panel of three of the respondent's employees, chaired by Suzanne Barcz. The date was moved from 18 June at the claimant's request and was heard on 19 July 2019. The claimant's representative accompanied her. Ms Akuoko presented the management case to the panel. The allegations for the disciplinary panel to decide were that the claimant had breached the respondent's Code of Conduct resulting in a complaint from a member of the public that she had, without permission, posted videos, pictures and negative comments on Facebook and that she had conducted herself in a manner that put a vulnerable member of the community at risk by posting a video of him and exposing his home address on social media.

65. Ms Barcz's evidence to the Tribunal was that the panel had realised that Ms Akuoko ought not to have made a recommendation as part of the management case and that the panel disregarded it and kept an open mind. I accept her evidence in this regard. Ms Barcz was a credible and consistent witness and I accept that she was aware of her role as panel chair and her responsibility to the claimant to ensure a fair hearing wherever possible. Ms Barcz admitted that the two or three hours set aside for the disciplinary hearing was entirely inadequate. The hearing took all day and was reconvened on 13 August to allow the process to be completed.

66. The claimant raises issues of procedural fairness in the respondent's conduct of the disciplinary hearing. She says as part of these proceedings that the investigating officer was allowed to question witnesses at the disciplinary hearing but her companion was limited in his ability to ask questions. She says that the HR advisor at the disciplinary hearing raised her voice at the claimant. She also says that she was subject to time pressure during the disciplinary hearing which restricted her right to present her case.

67. I find that the investigating officer was allowed to question witnesses to clarify points they were making during the disciplinary hearing. I also accept the evidence that the claimant's companion was restricted when he sought to answer questions on the claimant's behalf. I also find that the claimant's companion interpreted this instruction as a more general restriction on his right to address the panel. I accept that the claimant was restricted by the panel in her right to ask questions about SC's mental health condition, but that the panel did ask her witnesses to answer questions about how they thought SC presented, in terms of whether he presented with any mental health illness or disability. I accept Ms Barcz's evidence that the claimant did not initially accept that her actions could have put SC at risk and that she sought to ask a number of questions about SC's mental health and whether SC was, in fact, vulnerable. I find that, given the length of time that the hearing took, Ms Barcz did not act unreasonably in placing a limit on the claimant's questions about SC's mental health condition.

68. I further accept that the entire hearing was subject to time pressure, in that it was scheduled for an inadequate period of time (2-3 hours) but continued all day and was reconvened to allow for further evidence and discussion the following month. To that extent, the claimant presented two witnesses but in the face of the time pressure,

agreed not to call her third witness because she had wanted to conclude the hearing in a day and wanted the opportunity to make a statement herself.

69. In her statement to the panel, she outlined her clean disciplinary record and the fact that she felt that she was the victim of racial abuse due to the negligence of the respondent in failing to protect her from SC. She reiterated that she was "*not in my right mind*" at the time she posted on Facebook. She accepted that she should not have posted on Facebook, particularly when Ms Barcz informed her that the posts had been viewed over 7,000 times.

70. I accept that the claimant stated that she was not responsible for the comments that Facebook users had made as a result of her postings. This is consistent with her witness statement before this Tribunal in paragraph 31, page 9 in which she says "*I am not responsible for the public's opinion as they were responding to what they had seen in the posts and the video*". However, that video was posted on the claimant's Facebook account and once the comments were noted by her, including those which threatened SC's safety, and she responded to them, she did not take the posts down until the respondent insisted on it. Given the claimant's experience in her role in adult social care, she did not, I find, need to see the respondent's social media policy to understand that posting in this manner on Facebook and attracting threatening comments for SC was something that she should not have done as an employee of the respondent.

71. The evidence of Ms Barcz was that the panel met after 19 July and before the hearing was reconvened on 13 August to consider whether the charge of gross misconduct was made out and that their discussion took approximately two to three hours. They found that the claimant's conduct did amount to gross misconduct and therefore the purpose of the hearing on 13 August was to consider whether the claimant had any evidence in relation to mitigation and to consider the sanction to be applied to the claimant. The claimant was informed by Ms Barcz on 1 August that the gross misconduct charge against her was made out.

72. On 9 August 2019, the claimant raised a grievance for "*discrimination against me during this disciplinary process*". It was the respondent's understanding (as given by Ms Barcz in evidence) that it was suggested by Steven Parker, the respondent's HR business lead that as the claimant's grievance amounted to complaints about the respondent's conduct of the disciplinary process, that if a sanction was imposed on her at disciplinary stage, that the grievance would be considered as part of the appeal. Ms Barcz's evidence was that the claimant did not disagree with this suggestion.

73. The panel reconvened with the claimant and her companion on 13 August 2019. The claimant confirmed that she had no further mitigation to present and no further evidence was given by her on this occasion. After an adjournment of approximately two hours, the panel reconvened to give the claimant their unanimous decision, that she was considered to have committed acts of gross misconduct and that she was summarily dismissed with effect from 13 August 2019. This was confirmed in a letter of 16 August 2109 which also contained the claimant's right to appeal against the decision and the sanction.

74. Ms Barcz's evidence to this hearing was that:

a. It was acknowledged that *"the resident had racially abused Dina which the panel agreed would have been extremely distressing for Dinah*;"
b. It was also acknowledged and taken into account that the claimant had a good disciplinary record;
c. The claimant had put SC, a resident of the respondent council, at risk of harm by posting videos and pictures of him on Facebook, on a "public" setting. This was "*entirely wrong*";
d. The claimant had not discouraged to de-escalated threats or negative comments in the posts;
e. The period of time over which the postings were made "*suggested that this was not a 'heat of the moment' decision*" by the claimant;
f. The claimant was not, as she asserted, unsupported by the respondent in dealing with SC and was unable to clarify what else the respondent should have done that it did not do, other than that the respondent ought to have pressed the police more to deal with the matter as a hate crime, which they are unable require the police to do;
g. The panel did not establish whether the claimant had access to the respondent's social media policy. This was not considered necessary because even if the claimant had not known about the respondent's social media policy, the same principles were present in the respondent's Code of Conduct relating to not bringing the respondent into disrepute and treating members of the community with respect, not just direct service users; and
h. As the claimant was an Adult Social Care worker at the time, this had to be taken into account. The panel felt that the claimant did not have sufficient understanding or contrition of the impact of her actions. She said "*the way that she reacted by putting the resident at risk was not excusable. The Council has a right to expect a more responsible reaction*" and therefore a final written warning was insufficient. Ms Barcz concluded by noting "*what Dinah did was an appalling reaction to what had happened to her, despite having my sympathy for the abuse she suffered".*

<u>The claimant's appeal and the claimant's grievance</u>

75. Simon Rayner, who is the respondent's assistant director for mental health and disabilities, was the chair of the appeal panel, which consisted of three employees of the respondent including him. The appeal hearing took place on 5 November 2019 and the claimant was accompanied by an official from the Unison trade union.

76. The claimant's trade union officer presented the claimant's case as being that the disciplinary panel may well have been influenced by the recommendation of Ms Akuoko that the claimant should be dismissed. He also submitted that the claimant had not been supported by management after she was subjected to racial abuse. He also stated that the claimant should have been given a car parking space where she

worked and/or should have been allowed to work from home. It was also submitted on the claimant's behalf that she regretted her actions but had posted on Facebook as a "*defensive act*". The claimant's case was that dismissal was too harsh a sanction and that a final written warning was appropriate.

77. The panel asked the claimant some questions. Mr Rayner gave evidence that the claimant had said that she posted on Facebook because she wanted people to know what was happening to her. The claimant gave the same evidence during these proceedings. Mr Rayner's view was that this *"suggested to me that her actions had been calculated*".

78. Mr Rayner told the Tribunal that the panel agreed that the investigator should not have recommended a sanction in the investigation report, but that the recommendation had not influenced the disciplinary panel, who had carried out their own assessment of the claimant's circumstances and mitigation.

79. The appeal panel also carried out their own assessment of the claimant's mitigation. Mr Rayner's evidence was that *"the panel was fully aware how distressing the racial abuse was. Nevertheless, Dinah's reaction to it was extremely ill-advised and could easily have put SC in danger*".

80. The panel, on Mr Rayner's evidence, "*concluded that what she had done was appalling. Therefore the decision of the disciplinary panel to dismiss Dinah summarily was not disturbed. A final written warning would not have been sufficient in these circumstances.*"

81. Mr Rayner's evidence was that the claimant's grievance had also been considered in full at the appeal stage. His evidence and the notes of the appeal meeting was that the claimant and her union representative did not object to the grievance being dealt with in this way, which I accept was the case.

82. Mr Rayner accepted that he could have ordered a fresh investigation but did not consider it was needed and that an open mind had been taken to Ms Akuoko's recommendations, which I accept.

83. Mr Rayner also accepted that the claimant showed more contrition and insight at the appeal hearing than she had previously done and that this was taken into account by the appeal panel, which I accept, but that their conclusions were that such was the severity of the claimant's actions that the racial abuse and contrition were not "exceptional mitigating circumstances" needed to warrant imposing a lesser sanction than summary dismissal. The finding of gross misconduct and the sanction of summary dismissal was therefore not disturbed by the appeal panel.

The Law

84. It is well established law that determination of an unfair dismissal complaint is to be made, in the first instance, in accordance with section 98 of the Employment Rights Act 1996.

85. A respondent employer must show on the balance of probabilities that it had a fair reason for dismissal. In these proceedings the respondent's reason is that of misconduct.

86. Where the potentially fair reason given by the employer is misconduct, the Tribunal is to have regard to the guidance set down in the case of *British Home Stores v Burchell [1978] IRLR 379* which is:

- Did the respondent have an honest belief that the claimant had committed an act of misconduct?

- Did the respondent have reasonable grounds for holding that belief?

- At the time that that belief was formed on those grounds, had the respondent carried out as much of an investigation as was reasonable in the circumstances?

87. Although the ACAS Code of Practice on Disciplinary and Grievance Procedures is not legally binding, the Tribunal must have regard to it when assessing both the substantive and procedural fairness of an employer's decision to dismiss.

88. However, it is a well-established feature of the law of unfair dismissal that the investigation and procedure need only be within a range of reasonable actions. (*J Sainsbury v Hitt [2003] ICR 111, CA*). For example, the investigation need only be a reasonable one and need not be a forensic examination of all possible evidence.

89. The respondent must show that the reason to dismiss was within a range of reasonable responses that a respondent could have taken in that situation. There must be a fair investigation in all the circumstances, and the decision to dismiss must take into account equity and the substantive merits of the case.

90. Furthermore, the Tribunal is expressly cautioned against substituting its view for that of the respondent in reaching the decision to dismiss. The Tribunal must not decide the case on the basis of what it considers to be the correct action in the circumstances, but instead must decide whether the respondent's actions, including the decision to dismiss, were the actions of a reasonable employer in the circumstances.

91. Where it is a dismissal for gross misconduct the Tribunal has to be satisfied that the employer acted reasonably both in characterising it as gross misconduct, and then in deciding that dismissal was the appropriate punishment: *Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854*. This makes it important that the employer has considered any mitigating factors.

92. Whether or not an employer behaved reasonably in dismissing an employee is a question of fact for the Tribunal to decide. *Gilham v. Kent County Council [1985] ICR 233; Bowater v. North West London Hospitals NHS Trust [2011] IRLR 331.*

93. In *Polkey v AE Dayton Services Ltd [1987] 3 All ER 974*, the House of Lords held that the fairness of a dismissal is founded on the reasonableness of the employer's decision to dismiss judged at the time at which the decision takes effect. A tribunal is not bound to hold that any procedural failure by the employer rendered the dismissal unfair: it was one of the factors to be weighed by the tribunal in deciding whether or not the dismissal was reasonable within ERA 1996 s 98(4).

94. The more serious the misconduct of the employee, the more likely it is that a dismissal affected by procedural irregularities would nevertheless be considered fair (*Taylor v OCS Group Limited [2006] ICR 1602, CA*).

95. *Samuel Smith Old Brewery (Tadcaster) v Marshall & anor EAT 0488/09* held that it was not necessary to complete a grievance procedure before a disciplinary hearing could take place and it was only in the rarest of cases that it would be outside the range of reasonable responses for an employer to proceed with a disciplinary process before hearing a grievance appeal, particularly in the absence of clear evidence of unfairness or prejudice to the employee.

Application of the Law to the Facts Found

Was the decision to dismiss the claimant substantively unfair, in that no reasonable employer would have taken the decision to dismiss in the circumstances?

96. The claimant alleges that the respondent did not give proper weight to the fact that the claimant was the victim of what the claimant says was substantial and prolonged racial harassment. The claimant's case is that the respondent should have approached its decision on her conduct through the prism of her having been the victim of sustained racial abuse.

97. I find that the respondent reasonably took the view that, even though they accepted that the claimant had been subjected to racial abuse, and that this would have been highly distressing for her, this did nevertheless not excuse her actions in placing SC at real risk of harm. Given the claimant's role at the respondent, and the respondent's own duties in providing care and support for the communities in Southwark, the respondent did not act outside the range of reasonable responses in considering the welfare of SC and the risk to him first.

98. The claimant says that the respondent failed to give weight to her "contrition and insight". The respondent's evidence, and particularly that of Mr Rayner, was that her contrition and insight was not always consistent, even though she did show more contrition and insight during the appeal stage of the process. I find that the respondent reasonably acknowledged that the claimant had shown more contrition and insight over the course of the disciplinary and appeal process but that this was not sufficient to mitigate what she had done. This was not a conclusion that no reasonable employer would have reached in the circumstances.

99. The claimant says that the respondent failed to take account of her health issues, including sciatica, which caused her to need to park closer to the office. I find that the respondent did know that the claimant had sciatica, but that the impact of this

was not a significant factor in the respondent's decision to dismiss. This was not outside the range of reasonable responses in the circumstances, given that this was not a significant issue raised by the claimant. For example, it was not referred to at all in the claimant's appeal letter, although it was raised during the appeal hearing. I also find that the respondent offered an alternative workplace to the claimant, which was not fully explored by her.

100. The claimant says that the respondent failed to establish how well known the respondent's social media policy was to the claimant before giving weight to the claimant's breaches of it in relation to her dismissal. The respondent accepts that this was not done. However, in the circumstances of the claimant's case, this was not unreasonable, given that the claimant also breached the respondent's code of conduct by her actions and the disciplinary charges were based on the breach of the code of conduct and not breaches of the social media policy. It was also within the range of reasonable responses for the respondent's dismissing and appeals officers to conclude that the claimant's conduct was so unacceptable that, as an experienced assistant practitioner, she did not need to have express knowledge and awareness of the social media policy in order to have realised that what she had done was entirely inappropriate.

101. The claimant repeatedly alleged to the respondent that she had been given not support in dealing with SC and his landlord. I find that this is not correct. She had been offered counselling but said she found it unhelpful. She had been offered the opportunity to work from another office, but had declined. The respondent reported SC's conduct to the police on her behalf. She was advised to park elsewhere, but continued to assert her right to park where she wished. I find that when the claimant asserts that she was given no support, what she in fact means is that the respondent did not carry out her request to permanently prevent SC from restricting parking outside his house, or from harassing her when she tried to do so, when it had been made clear to her that this was not within the respondent's powers.

102. I find from the evidence before me that the claimant had become preoccupied with SC and his landlord and had become preoccupied with her right to park and her requirement to have them prevented from acting in an objectionable manner, which was absolutely understandable, but did not sit well with her professional role and her duties as an employee of the respondent. Although she had agreed not to use "brute force" in dealing with them, she found herself quite unable to let the matter go. This was despite being repeatedly advised by management, colleagues and the police to avoid escalating the situation and avoid confrontation and despite having been told on several occasions that the situation with SC had been a problem for the relevant authorities for some considerable time.

103. I find that she repeatedly refused to accept that SC had relevant mental health challenges or make allowances for them. She was unable, even in early 2019, to see her conduct in the context of her role with the respondent to care for community members, even after she had been asked to remove the Facebook posts by the respondent. This was a serious lapse of judgment. During this hearing, she was still at times unable to see her behaviour in an objective light.

104. The claimant's witness evidence is that SC's behaviour has now ceased and that there is ample parking on X Road. Even if her actions in exposing SC on Facebook have achieved this result, the respondent's conclusion that she exposed SC to unacceptable risk of harm in doing so is a reasonable conclusion to reach, I find. SC was likely to have come to serious harm as a result of the exposure. Posting as she did on Facebook was an extremely high-risk strategy by the claimant and one that the respondent reasonably concluded could not be compatible with her continued employment by them, given the nature of their work and their role in the community.

105. Section 98(4) of the Employment Rights Act 1996 provides that consideration of the fairness of a dismissal must be made in accordance with "equity" and the "substantial merits" of the case. In the claimant's case, she was an employee with 7 years of service for the respondent and a clear disciplinary record. I find that the respondent took this into account. However, the respondent reasonably concluded that the circumstances of the claimant's misconduct and its seriousness meant that this was not sufficient grounds for avoiding summary dismissal. In addition, the respondent took into account that the claimant was critical of the respondent itself on the posts, which they reasonably found to be a breach of her responsibilities as an employee. They also concluded, reasonably, that the claimant had been identified on the posts as working for the respondent and that overall she had brought the respondent into disrepute by her actions, which added to the seriousness of her actions.

106. Section 98(4) also provides that the size and administrative resources of the respondent must be taken into consideration in an assessment of the fairness of the dismissal. The respondent is a large employer and well-resourced, with access to HR advice and support. In some aspects, its procedures were very good, such as having a panel of three individuals making decisions at disciplinary and appeal stage, and allowing the claimant a whole day for the disciplinary hearing, plus a separate opportunity to make representations in mitigation if she wished. In other respects, the respondent's procedures were flawed, as set out below, but were nevertheless fair overall.

<u>Did the respondent conduct a fair procedure, within the range of reasonable responses?</u>

107. It is a well-established principle of unfair dismissal law that the procedure adopted by the respondent need only fall within a reasonable range of procedures that could be adopted by a reasonable employer (*J Sainsbury v Hitt [2003] ICR 111, CA*). It is also the case that, the more serious the misconduct of the employee, the more likely it is that a dismissal affected by procedural irregularities would nevertheless be considered fair (*Taylor v OCS Group Limited [2006] ICR 1602, CA*). A Tribunal is not bound to find that any procedural breach renders a dismissal unfair. Breaches of procedure are factors to consider in an overall assessment of the fairness of the dismissal.

108. In this case, the claimant was dismissed for a breach of the Code of Conduct of the respondent by posting videos, pictures and negative comments on Facebook and that "*a vulnerable member of the community was put at risk*" by posting a video of

him and exposing his home address on social media. The claimant was not dismissed for a breach of the respondent's social media policy specifically and the respondent's failure to establish whether she had access to and was aware of the social media policy before dismissal was not unreasonable. The respondent also took into account the claimant's experience and concluded that she did not need to be familiar with the social media policy to know that she should not have done what she did. This was reasonable.

109. I accept that the process was subject to delay, in particular the period between the investigatory stage and the invitation to the disciplinary hearing, and again between the outcome of the disciplinary hearing and the appeal hearing. I accept that the claimant was not given the notes from the investigation meeting for many months. This is clearly inadequate. However I find that the primary facts were not in dispute and the key facts were established by contemporaneous, or nearly contemporaneous screenshots, emails, letters and meeting minutes. The cogency of the evidence was not affected by any delay. Furthermore, the claimant continued to be employed and paid throughout the process and so did not suffer financial losses as a result.

110. I also accept that the claimant was only given 6 days' notice of the investigation meeting. The issue to be covered by the investigation meeting had been discussed at some length by the claimant and the respondent before she was invited to it and so I find that on balance there was no prejudice to her in receiving only 6 days' notice.

111. The claimant disputed that she had exposed SC's home address on social media. I find that the respondent reasonably concluded that she did expose SC's home address on social media. They established that she identified SC as living in [X] Road, Peckham and that she posted a video of him where he was clearly seen standing outside a house with a visible number on the front door. Even though the number was not of his own house, but the house next door, this was sufficiently close, I find, for the respondent to have reasonably concluded that this exposed SC's home address to being found and increased the risk of him coming to serious harm. Photographs of the front of his property were also posted online, including of SC's arrangement of traffic cones and other obstacles placed in the road, which also assisted his identification online. In this context, the respondent did not act unreasonably in the conclusions they reached, even though I accept that the claimant did not specifically identify the claimant's actual house number online.

112. The claimant disputed that SC was actually "vulnerable". She highlighted that SC was not in receipt of any social care services from the respondent at the time and was being cared for by his brother. She disputed the respondent's assessment of SC and whether he presented as having mental health issues, and brought witnesses to the disciplinary hearing to support her contention that SC was not vulnerable and had full mental capacity. The respondent (by the evidence of Mr Rayner) accepted that the respondent did not consider that SC needed safeguarding protection and therefore did not follow their own internal procedures associated with individuals where there is a safeguarding concern, but that it was possible for an individual to be vulnerable even if they did not meet the threshold for being a safeguarding concern.

113. Both Ms Barcz and Mr Rayner also gave evidence that the threshold for a vulnerable individual to qualify for social care services was high. Therefore, the respondent's view was that it was possible for SC to be vulnerable but not qualify for safeguarding assessment or social care services, which I accept. Ms Barcz also gave evidence that, in fact it would have made no difference to her view of the correct disciplinary sanction to be applied even if SC had not been vulnerable, given that he was a resident of the respondent council that the claimant and other employees were hired to serve and he had been put at serious risk of harm.

114. I accepted the evidence of Mr Rayner that it was obvious from SC's immediate presentation that he was unwell on account of his mental health and therefore a vulnerable individual. I accepted Ms Akuoko's evidence that SC had accessed the respondent's social care services in the past and was known to them, even though he had not accessed them at the time to which these proceedings relate. All three of the respondent's officers who gave evidence to the Tribunal on this issue were involved in working with individuals with social care needs and I find that they gave the issue serious consideration. I therefore find that it was not outside the range of reasonable responses for the respondent to conclude that SC was vulnerable and it was not unreasonable for this to be a factor that they took into account in the decisions they made in relation to the disciplinary process.

115. In conclusion, applying the principles in the case of *British Home Stores v Burchell,* the respondent had a genuine belief in the claimant's misconduct. This was held on reasonable grounds following a reasonable investigation, particularly as the claimant accepted that she had put the posts on Facebook and the respondent had exercised its reasonable judgment as to SC's vulnerability and the potential risk to him.

116. Did the respondent follow a fair procedure, that is, one within a reasonable range (as per *J Sainsbury v Hitt*)? As concluded above, there were clear flaws in the respondent's procedure. The delay to the process was a breach, as both the respondent's own procedures and the ACAS Code of Practice require a timely procedure to be carried out, and the procedure in this case was subject to significant delay. The most significant breach of procedure was that of Ms Akuoko having made the recommendation that the claimant be dismissed as part of her investigation report. It was also a breach of procedure that Ms Akuoko was permitted to question witnesses at the disciplinary hearing. The respondent's own policy prohibits both of these actions.

117. However, I accepted the evidence of Ms Barcz that the disciplinary panel of three people were aware that Ms Akuoko ought not to have made the recommendation that she did and I accepted her evidence that they ignored it and reached their own conclusions on the evidence before them. It was clear that they took time to deliberate on both the charges before them and the sanction to be applied.

118. The appeal hearing similarly was conducted by a panel of three people who were aware that Ms Akuoko ought not to have made the recommendation she did and I accept Mr Rayner's evidence that they reached their own conclusion on the information before them. I therefore find that Ms Akuoko's breach of procedure did not affect the overall fairness of the respondent's procedure and that it was not the case that no reasonable employer acting fairly would have acted in this way. The error was

noted at the second and third stage of the process and was accounted for. I do not accept that the respondent acted unreasonably in failing to order a fresh investigation be carried out, particularly in the circumstances of this case where the claimant admitted to the misconduct alleged.

119. As for the questions asked by Ms Akuoko at the disciplinary hearing, these did not affect the fairness of the hearing itself. As stated above, there was considerable discussion at the disciplinary hearing as to whether the claimant, or her witnesses, considered SC to be vulnerable and Ms Akuoko asked questions as part of that. The claimant states that her companion was prevented from asking questions, but I find that the respondent reasonably attempted to limit him answering questions on the claimant's behalf as they needed to hear her own evidence. The claimant was given the opportunity, in the all-day disciplinary hearing, to put her own points forward and to call witnesses and make a closing statement. She was given a further opportunity on 13 August to make further points in mitigation but declined to do so. Therefore, although I accept that some limits were placed on the claimant, she nevertheless had the chance to put her points forward in a reasonable manner. I also do not accept that as the respondent's HR advisor raised her voice on one occasion with the claimant, that this was a material cause of unfairness in the overall process, even though she should not have done this. It did not cause a material disruption to the hearing, on the evidence before me.

120. There was a further breach of good practice in the respondent's conduct of the claimant's grievance, although I accept that the claimant, along with her trade union representative, did not object to the grievance being dealt with as suggested. This was not unreasonable given that it related to the respondent's conduct of the disciplinary stage, and that the points raised by her in this regard were considered by the panel. However, it is good practice to allow the claimant a separate grievance hearing and this was not done.

121. The ACAS Code of Practice on Disciplinary and Grievance Procedures provides examples of situations where it may be appropriate to suspend the disciplinary process and deal with the grievance raised. This includes in situations where there are allegations of discrimination or bias. The claimant's grievance letter makes repeated reference to "*discrimination*" but does not say what this is, or what protected characteristic was affected. The grievance letter therefore did not, I find, put the respondent on notice that there was serious risk of unfairness in continuing with the disciplinary process. In fact, the grievance letter repeats many of the points raised in the claimant's appeal letter. I therefore find that the substance of the grievance and the appeal were materially similar.

122. Given the seriousness of the claimant's conduct and the lack of any exceptional mitigating circumstances, and the respondent's otherwise careful consideration of the points raised by her in the disciplinary and appeal hearings and the absence of any evidence of serious risk of unfairness, I do not find that the lack of a separate grievance hearing rendered the disciplinary process outside the range of reasonable responses in this case.

<u>Conclusion</u>

123. In conclusion, the seriousness of the claimant's misconduct was such that the flaws identified in the respondent's process did not affect the fairness or reasonableness of the decision to dismiss. The decision to dismiss and the process followed were fair and reasonable in the circumstances. The claim for unfair dismissal fails and is dismissed.

_____
Employment Judge Barker

Date_____13 January 2022_____