EMPLOYMENT TRIBUNALS

Claimant: **Ms S Watkins**

Respondent: **One Direct Maintenance Limited**

Heard at: **East London Hearing Centre**

On: **Thursday 16 January 2020**
Friday 17 January 2020
Tuesday 11 February 2020
Tuesday 25 February 2020

Before: **Employment Judge Barrowclough (sitting alone)**

Representation

Claimant: Mr Basham (Lay representative)

Respondent: Mr Kibling (Counsel)

JUDGMENT

The judgment of the Employment Tribunal is that the Claimant was unfairly dismissed, in breach of s.94 Employment Rights Act 1996. Secondly, the Tribunal finds that the Claimant caused and/or contributed to her dismissal to the extent of 100%, in breach of ss.122 &123 of that Act: accordingly no compensation is payable to her by the Respondent. Thirdly, the Claimant's claim for notice pay is dismissed. Finally, the Tribunal makes an order under rule 50 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 prohibiting the disclosure of, or any reference to, Ms AB or her family or their address, including the making of any statement that could result in a member of the public identifying them individually or collectively, or that they, or any of them, are tenants of the One Housing Group Limited.

REASONS

1 This is a claim for unfair dismissal, together with thirteen weeks' notice pay. The Respondent accepts that the Claimant was summarily dismissed on 8 April 2019, by reason it is said of gross misconduct, and that she had then been continuously employed for some thirteen years. The Claimant was represented by Mr Basham, a friend and independent adviser, and gave evidence in support of her claim. In addition, Mr Basham called as witnesses Ms Stacey Hounslow, a former employee of the Respondent, who was employed by them between June 2018 and December 2019, and Mr Patrick Bonner, the GMB Union Representative who represented the Claimant at both the disciplinary hearing and the subsequent appeal which resulted in her dismissal. The Respondent was represented by Mr Kibling as Counsel. He called as witnesses (a) Ms Hilary Judge, the Respondent's Head of HR, in attendance at the Claimant's appeal hearing; (b) Ms Amanda Obra, another of the Respondent's HR advisers, who was present at the Claimant's disciplinary hearing; (c) Mr Lee Abbott, the Respondent's Head of Planned Maintenance, who conducted the Claimant's disciplinary hearing, and who took the decision to dismiss her; (d) Mr Mark Hutchison, the Respondent's Head of Gas, who conducted an investigation into the Claimant's alleged misconduct; and finally (e) Mr Luke Driscoll, the Respondent's Director of Property and Asset Management, who heard and dismissed the Claimant's appeal against the decision to dismiss her.

2 The hearing before me took place over the course of three days, 16 and 17 January and 25 February 2020, when I heard evidence from all of the above witnesses together with submissions from the parties' representatives, and at the conclusion of which I reserved my judgment, due to a lack of available time. In addition, I record, this case was originally listed for a resumed hearing on 11 February 2020, but unfortunately could not then proceed, since the Respondent failed to produce the witness table bundles and witness statements which were in their custody. Together with statements from all the witnesses, I was provided with an agreed trial bundle and in due course, with Mr Kibling's written closing submissions.

3 At the outset of the hearing, and at the request of the Respondent, I made an Order under rule 50 of the 2013 Employment Tribunal Regulations, prohibiting the disclosure of, or any reference to, Ms AB or her family or their address, including the making of any statement that could result in a member of the public identifying them individually or collectively, or that they or any of them are tenants of the One Housing Group Limited. That Order was requested and made to continue until the conclusion of these proceedings. At the end of the oral hearing before me, Mr Kibling applied for the Order to be made permanent, although Mr Basham on behalf of the Claimant disagreed. I address that issue and record my decision in relation thereto at the conclusion of these reasons.

4 The relevant factual background can be summarised as follows. The Respondent, whose correct title was confirmed as being One Direct Maintenance

Limited, is a company created to provide in-house repair and maintenance services in relation to properties owned or managed by One Housing Group Limited ("OHG"). OHG is a Registered Social Landlord with over 17,000 properties in London and the home counties, providing accommodation and homes for some 35,000 tenants. The Respondent company was created in 2014 by OHG to provide repair and maintenance services to its properties and for its residents. The Respondent's head office is in Camden, with two subsidiary offices in East London. The Claimant had commenced employment with OHG in August 2006 in the role of a Customer Care Contact. On 1 April 2016, the Claimant transferred to the Respondent's employment, thereafter undertaking the role of a Resident Liaison Officer. The Claimant has always worked part time hours, latterly Wednesday's to Friday's. At the time of termination of the Claimant's employment, her line manager was Ms Jessie Howard, albeit she was then away on maternity leave and had been replaced on a temporary basis by Ms Michelle Faure, who herself reported to Mr Abbott. As noted, Mr Abbott's role was Head of Planned Maintenance. There are approximately 96 individuals in that department, many of whom work remotely or from their homes in providing maintenance services, repairs, and assistance to tenants. It was not disputed that no previous performance or disciplinary issues or problems had arisen during the Claimant's employment prior to the events leading up to her dismissal.

5 In early 2019, there was widespread public debate and publicity concerning the case of AB. AB's parents were tenants of an OHG property at the time, and AB had previously lived with her parents in their rented property. On 19 February 2019, the Claimant engaged in an exchange of messages on Facebook concerning AB, including herself making a comment or posting. It was common ground between the parties that she did so in her own time and using her own PC, rather than whilst at work and/or using the Respondent's equipment. Copies of the Facebook exchange and messages, including the Claimant's post, are in the agreed bundle, and the relevant details have also been included in a confidential annex, namely the original unredacted version of this judgment which was promulgated and sent to the parties. The initial posting commenting on AB's case was made by Ms Sonia Nash on 19 February. Ms Nash is a friend of the Claimant's, and is also one of the Respondent's former employees. Her comment (and subsequent postings) was available to and could be seen by a number of people within Ms Nash's Facebook group. Included in the bundle is a list compiled by the Claimant of 17 current or former employees of the Respondent (not including herself) who were part of that group. Additionally, others who were not and who never had been employees of the Respondent could and did read the message. That is clear from the fact that Ms Nash's comment received 22 "likes", and also that two such individuals (Ms Svetlana Falla and Ms Marian Bartlett) both responded to the message and posted comments, as did the Claimant. The Claimant posted an offensive comment concerning AB's case, details of which have been placed in a confidential annex. In the course of her evidence, the Claimant agreed that, as part of her duties with the Respondent, she had in fact been involved in improvements to the property tenanted by AB's family.

6 On 11 March thereafter, one of the members of Ms Nash's Facebook group (subsequently anonymised) who had seen the various posts sent an email to Mr Richard Hill, OHG's Chief Executive, who had been in that role since October 2017, stating that he/she had also worked for OHG for a number of years before moving on, and commented: '*The subject of Ms AB has sparked many debates and opinions which*

is ok. However, I came across something on Facebook between a current employee and ex-employee which I found distressing. Not only were they both using colourful language, but have also given out confidential details about current tenants'. Attached to the email was a screen shot of the various posts referred to above.

7 On 13 March Mr Hill forwarded the email and accompanying screen shot to Ms Katie Dent, the OHG Director of HR, and Ms Ria Bailes, an Executive Director of OHG. As part of their email exchange that day, Ms Dent said that she and Mr Hill agreed that this was *'potential gross misconduct by One Direct Resident Liaison Officer, Sarah Watkins, (a clear and serious breach of our social media policy)'*, and that she had asked Ms Judge to suspend the Claimant and to initiate an investigation.

8 As a result of that instruction, Mr Abbott gave the Claimant a letter from Ms Judge suspending her from work with immediate effect on full pay. Mr Abbott had asked the Claimant to come into the office on 13 March in order to give her that letter, although he had told her that she should then come in to attend a team meeting, in order (he said) not to upset her by telling her the true reason. A copy of the suspension letter is included in the trial bundle. It states that the reason for the Claimant's suspension was an alleged breach of section 3.6 of the Respondent's social media policy. The Claimant was advised that the allegations she faced were potentially very serious, and if upheld, that disciplinary action could include dismissal without notice. The Claimant was told not to come to work, and not to access the Respondent's systems or facilities or approach or contact any of its staff, apart from her chosen representative concerning the investigation that was to be undertaken. Enclosed with the letter were copies of the Respondent's social media policy, and of its disciplinary procedure and code of conduct. The Claimant duly left the Respondent's premises, Mr Abbott following her into the car park to observe and ensure her departure.

9 The Claimant's contract of employment with the Respondent dated 1 April 2016 is also copied in the bundle. It contains, at clause 15, a provision prohibiting the Claimant from using or disclosing any confidential information about the Respondent, its employees, customers or third parties; as well as a social media policy, the Respondent's disciplinary policy and procedure and their code of conduct. Clauses 3.6 and 3.8 of the social media policy provide that the policy will apply to use by staff of social media in a personal capacity insofar as it may reflect or affect the Respondent; that any communications that employees make in a personal capacity through social media must not bring the Respondent, its employees or activities into disrepute or breach confidentiality; and that any breaches of this policy may lead to disciplinary action and may constitute misconduct or gross misconduct, and could lead to summary dismissal. The disciplinary procedure includes a non-exhaustive list of acts of gross misconduct, including breach of confidentiality or bringing the Respondent into serious disrepute; and also sets out the applicable disciplinary process, including investigation, hearings, penalties and appeals. In relation to disciplinary investigations, it provides that there is no right for employees to be accompanied at investigatory meetings. Finally, the Respondent's code of conduct provides guidance on the standards expected by the Respondent and that all employees are expected to maintain confidentiality of all information available through the course of their work.

10 Mr Mark Hutchison then conducted an investigation meeting with the Claimant,

which took place at midday on 19 March. It is accepted that the Claimant was not provided with any written notification of that meeting, and that Mr Hutchison first contacted the Claimant concerning their proposed meeting by phone at about 5pm on the previous day, March 18. Mr Hutchison then told the Claimant that she was not entitled to representation at the meeting, before phoning her again at about 9am on March 19, when he changed that advice and told her she could be accompanied, if she wished. The meeting had been arranged for 12 noon that day and the Claimant agreed to come on her own, having little time within which to arrange for a companion. Prior to their meeting, Mr Hutchison had sent a list of the questions which he proposed to ask the Claimant to the Respondent's HR department for approval (which was duly provided). The Claimant alleges that Mr Hutchison, when asking the Claimant to go ahead with the planned meeting at noon that day, had told her she had "*nothing to worry about"* and that the meeting would be by way of "*an informal chat*". Mr Hutchison denies both suggestions.

11 In any event, the investigation meeting did go ahead on March 19. Only the Claimant and Mr Hutchison were present, and the meeting lasted from noon until 12:37pm. Agreed notes of what was then said are in the bundle. At the outset, Mr Hutchison recorded that the Claimant had agreed to attend the meeting alone and unaccompanied, and he then read over to the Claimant extracts from her contract of employment and from the Respondent's social media policy, before going on to ask the questions for which he had obtained HR's prior approval. There were about sixteen questions and answers, which I summarise as follows. The Claimant said that she was now aware of the provisions of the social media policy, that she had indeed posted the relevant comment on a friend's Facebook page, and that it had been done in the heat of the moment concerning AB's case. The Claimant went on to say that she appreciated that what she had done was not right, that she had not meant to upset anyone, and was '*gutted*' at having done so. She said that she knew that she had breached the policy by making comments about the kitchen and bathroom at the property rented by AB's family, but that she cared about the Respondent company, was a hard worker who loved her job, and had had no complaints in her thirteen years of service. She believed that she could get another job, but she did not want to do so and was genuinely upset that this matter had arisen. The Claimant went on to say that she was upset, that she did not stand by the recorded comments which were stupid, embarrassing, and not in good taste, and which she wanted to withdraw. She was asked whether she could see how making her comment could bring the Respondent into disrepute and replied '*definitely, and I am truly sorry'.* She said that if given another opportunity, she would not have made the comments and would have thought about doing so before making any comment. The Claimant repeated how embarrassed and sorry she was, that this was a mistake and that she was embarrassed at what the residents might think of her; and that she really did value her job with the Respondent, and did not want to lose it over a silly mistake that was made in the heat of the moment. Mr Hutchison concluded the meeting, having read over and agreed the questions asked and answers provided by the Claimant, by telling her that HR would be in touch with her, and reminding her that she was not to get in touch with or discuss the matter with other staff members.

12 The Claimant was then asked to attend a disciplinary hearing by letter dated 25 March 2019. The meeting was scheduled to take place on 29 March at 3pm at the Respondent's office at Sutton's Wharf South, to be chaired by Mr Abbott, with the

management case presented by Mr Hutchison and Ms Obra attending as an HR representative. The charges the Claimant faced were of an alleged breach of section 3.6 of the social media policy in bringing the Respondent into disrepute through her use of social media in a personal capacity, which also gave rise to alleged breaches of the disciplinary policy and procedure and the code of conduct. Enclosed with the letter was a copy of Mr Hutchison's investigation report and appendices together with further copies of the relevant policies/procedures. The Claimant was informed of her right to be accompanied and also that, if proven, the allegations might amount to gross misconduct and that her employment might be summarily terminated.

13 On 28 March 2019, the day before the disciplinary hearing, the Claimant sent a long Facebook message to Mr Abbott, the manager who was to conduct her disciplinary hearing on the following day. The message was sent at 2:30pm and reads as follows: "*Lee, I am so sorry to have to do this and I am literally clutching at straws here but I just need to ask you as I have nothing to lose anymore my life is pretty much fucked… Do you think the right decision for me is to walk and hand in my notice today? It is the last thing I want to do, it is killing me tbh and I am genuinely sorry for you being in the position you're in… I would never ever mention that I have been in touch with you whatever the outcome is.. I am a loyal person (sometimes too loyal for my own good) and I hope that you trust me enough to know that! I just really can't get fired for gross misconduct it will ruin my whole future and getting another job and that's my main priority here my kids future – if you feel that it is going that way, please please let me know tonight so I can hand my notice in tomorrow morning before the meeting – my representative from the GMB said that a few things we could go in and argue, but ultimately the decision has already been made and that is what I need the heads up on. (it's a lot to ask and putting you in a shit position and I am so not like that, but when it is literally the last option I have no choice but to ask your opinion)".*

14 The Claimant was still suspended and not at work when she sent Mr Abbott that message; and it is common ground between the parties that Mr Abbott did not respond to that or the Claimant's subsequent messages in writing. Mr Abbott's evidence was that he did speak to the Claimant about the possibility of her resigning (rather than any redundancy), but that that was before 28 March. Despite the Respondent's instruction at the time of her suspension, the Claimant had in fact been in touch with her colleague Stacey Hounslow (then in the Respondent's employment). She was and remains a good friend of the Claimant's, they both having had children more or less simultaneously. In March 2019, and like the Claimant, Ms Hounslow's line manager was Michelle Faure, who was in turn managed by Mr Abbott.

15 Ms Hounslow's account is that on the day of the Claimant's initial suspension (13 March), she had followed the Claimant, who was upset, out to the office car park, where the Claimant had told her that she had been suspended for something she had put on social media, and that Mr Abbott had told her that she was in deep trouble and that if she got a chance and was offered redundancy, she should take it. Mr Abbott was also in the car park, apparently to ensure that the Claimant left the premises, and after the Claimant had left, he told Ms Hounslow, in answer to her question as to whether the Respondent was trying to get rid of the Claimant: "*I am trying to get her a slap on the wrist, but somebody else is gunning for her blood and wants her sacked".*

16 Ms Hounslow said that she remained in touch with the Claimant, trying to help her; and that on March 28 she tracked down Mr Abbott at the office, and they both left the building to have a cigarette. She then asked Mr Abbott whether it would be best for the Claimant to resign, which she and the Claimant had decided was the best thing to do in the circumstances. Mr Abbott said that he would investigate and get back to her; and he had subsequently called Ms Hounslow to his office at about lunchtime, when he told her that she needed to inform the Claimant to resign, that she needed to do that by 4pm that day, and that her resignation would be accepted. Ms Hounslow said that both she and Mr Abbott were in tears during their meeting, and that Mr Abbott offered his view as being that, given a free hand, he would simply have suspended the Claimant before allowing her back to work after a week or so. Ms Hounslow said that she phoned the Claimant at about 2pm and told her of her conversation with Mr Abbott, and that the Claimant told her that she would probably resign, but that she needed to speak to her union representative and family before taking a decision. Subsequently, at about 3:30pm, the Claimant had sent Ms Hounslow a text confirming that she had agreed to resign, and that her resignation had been accepted by Ms Obra of the Respondent's HR department. Almost immediately thereafter, Ms Hounslow saw both Michelle Faure and Mr Abbott, both of whom were aware of the Claimant's resignation having been submitted, and that Mr Abbott had said that the matter had been sorted out, and that there was no need for him to come in on the following morning for the disciplinary hearing.

17 Mr Abbott's account of those matters is significantly different. Mr Abbott accepted that he and the Claimant were on good terms, and that he had called her into the office on March 13 under false pretenses (for a non-existent team meeting), but only in order not to upset her. He also accepted that when handing the Claimant the letter suspending her from work he had said something like '*This has come all the way down from the Chief Executive's office*', because that was in fact where the information about the Claimant's alleged breach had originated. Mr Abbott agreed that he had spoken to Ms Hounslow both on March 13 in the office car park following the Claimant's departure and whilst seeing the latter off, and also on March 28, the day before the disciplinary hearing, outside the office building when both of them were having a cigarette; and that on both those and on other occasions on March 28 they had discussed the Claimant and her current predicament. However, Mr Abbott denies that he told the Claimant that she was in deep trouble and that the Respondent was gunning for her (as she alleges), at the time he handed her the suspension letter on 13 March; as well as the conversations alleged by Ms Hounslow concerning the Claimant's possible resignation; or that he offered any advice concerning that possibility and the likely outcome of the forthcoming disciplinary, that he acted as an intermediary in any way, or that he expressed any opinion as to what course he himself would have followed, as well as that he was in tears as Ms Hounslow alleges. Whilst Mr Abbott accepted that he was asked his view about the Claimant possibly resigning, he said that he had answered by saying, in essence, that it was a matter for her, and that he could not advise or assist her. Finally, whilst Mr Abbott confirmed that he believed that the Claimant's second message that day (at 3.48 pm, as mentioned below) related to her resignation, he did not accept that he spoke to the Claimant or anyone else that day giving advice on that subject, or attempting to ensure that it was accepted.

18 What is clear and uncontested is that at 3:48pm on 28 March, the Claimant

sent Mr Abbott a further and much shorter text message than that at paragraph 14 above, which reads: "*thank you – appreciated I really mean that – it is done I have handed it in. Thank you for giving me the chance to save my future xx".* Additionally, five minutes before that message was sent, the Claimant had sent a letter of resignation by email to both Amanda Obra and Michelle Faure. That reads: "*Dear Amanda after having a meeting with my union representative this afternoon I would like you to accept my resignation with immediate effect. I worked at the company for 13 years, right back to the community housing days, and put my heart and soul into my job so it is with a very heavy heart I feel now is the right time to leave so my future is not completely ruined."*

19 On receiving that email, Ms Obra forwarded it to Katie Dent, OHG's Head of HR, at 4.01pm that afternoon. Approximately 20 minutes later, Ms Dent responded. Her email reads as follows: "*Hi Amanda I have spoken to Ria and we are in agreement that the hearing should go ahead tomorrow, whether Sarah attends or not, with the likely outcome that she would be found to have committed an act of gross misconduct and so will be dismissed with immediate effect tomorrow. Therefore, I suggest you write back to her as below".*

20 The response suggested by Ms Dent, which was indeed adopted by Ms Obra, whilst acknowledging the Claimant's '*intention to resign*', stated that '*given the seriousness of the allegations of potential gross misconduct which are under consideration, the disciplinary hearing will go ahead tomorrow to determine whether these allegations are proven*', whether the Claimant chose to attend or not. That was sent in an email to the Claimant by Ms Obra at 4:28pm. At 7:11pm that same day, the Claimant sent Mr Abbott a third and final message as follows: '*Just when we both thought it was all over, looks like I will be seeing you tomorrow. These fuckers are not letting up until they ruin my life',* with a series of tearful emoji's.

21 The Claimant's disciplinary hearing duly went ahead, commencing at 3pm on March 29. It lasted until 4:05pm when Mr Abbott, chairing the meeting, adjourned to consider his decision, which he said would be communicated to the Claimant in writing within five working days, simultaneously reminding her of her right of appeal. Notes of the meeting were subsequently submitted by Ms Obra to the Claimant for agreement, and the final version, agreed by both sides, is in the bundle, the Claimant's additions being included in red ink - the parties also agree that the text appearing in the second paragraph on page 124 was not in fact then said.

22 In summary, the Claimant and Mr Bonner, her GMB union representative, disputed at the disciplinary meeting that the Claimant's comments had in fact or were likely to bring the Respondent into disrepute, and also that she had breached the Respondent's social media policy as alleged, and thereby their code of conduct and disciplinary procedure. It was suggested that the Claimant's comments related solely to the widespread and general public interest in and debate concerning AB's case. Criticisms were raised of the alleged inadequacy of Mr Hutchison's investigation meeting and report which should, it was said, have clarified and contextualised the Claimant's posting on her friend's Facebook page. Whilst it was accepted that the comment related to AB, she was not a client of the Respondent; and overall, the Claimant's comment was described as being innocuous, rather than culpable or in any

way breaching confidentiality. Additionally, Mr Bonner, whilst accepting that the Respondent could and did initiate and circulate new policies, or changes to existing policies, via the company intranet, criticized the Respondent in not ensuring that staff had read and understood policies which the Respondent introduced from time to time, and for failing to provide training in their meaning and implementation, for example the social media policy. That had first been issued in June 2013, but the Claimant's evidence was that she had been unaware of its provisions until the time of her suspension. Mr Bonner disputed that the Claimant had in any way breached any of the Respondent's policies, and contended that, to the extent to which she was found liable and punished for comments she had made about terrorists and supporters, it was the Respondent, rather than the Claimant, that was bringing their organization into disrepute.

23 The Claimant was not in fact notified of the outcome of her disciplinary hearing within five working days, as she had been told, due, Mr Abbott said, to pressure of other work, including the year end accounts. It was only on 8 April that the Claimant was sent his outcome letter by post and email. Mr Abbott upheld and found proved the alleged breaches of the social media policy, the disciplinary procedure, and the code of conduct, which collectively he considered as amounting to gross misconduct. Accordingly, and *'given the seriousness of the situation'*, Mr Abbott decided that the Claimant should be summarily dismissed, and her employment was terminated with effect from 8 April 2019.

24 The Claimant's letter dated 15 April set out her grounds of appeal; and on 26 April, Ms Judge wrote to the Claimant advising her that her appeal would be heard on Friday 10 May by Mr Luke Driscoll, who had confirmed that he had had no previous dealings with the relevant matters or individuals, supported by herself, with Mr Abbott also in attendance to explain his reasons for finding the allegations against the Claimant proved. The Claimant also attended, together with her union representative Mr Bonner, and Ms Abigail Issacs, an HR assistant, took notes. A copy of the agreed notes of the appeal hearing, which lasted from 1:10pm until 2:35pm is in the trial bundle. Both the Claimant and Mr Bonner made representations, the Claimant speaking from a witness statement which she had prepared in advance, and Mr Bonner from a further grounds of appeal document. Copies of both were subsequently provided to Mr Driscoll at his request following the conclusion of the appeal hearing. In broad terms, the grounds of appeal advanced by the Claimant and on her behalf, were (a) alleged failures by the Respondent in adopting and following its own disciplinary procedures; (b) that no or insufficient evidence of any breach of the Respondent's policies and procedures had been established at the disciplinary hearing or was to be adduced at the appeal; (c) that the outcome of the Claimant's disciplinary hearing was predetermined (incorrectly termed "premeditated"); and (d) that dismissal of the Claimant for a first offence after thirteen years of unblemished service was disproportionate and fell outside the range of penalties that could reasonably be imposed.

25 At the conclusion of the appeal hearing, Mr Driscoll adjourned, indicating that his decision would be communicated to the parties within 10 working days. Mr Driscoll duly provided his outcome letter on 23 May 2019. For the reasons given in that letter, Mr Driscoll dismissed the Claimant's grounds of appeal and upheld both the findings

and the sanction of summary dismissal. Inter alia, Mr Driscoll considered that the Claimant's post could have breached the help which the Respondent were providing AB's family in protecting their confidentiality and knowledge of their address/locality, and thereby exposed them to risk. Additionally, he considered that if the Claimant's comments became public knowledge or were shared further, that would expose the Respondent to the reputational risk of being brought into disrepute.

26 In her evidence to the Tribunal, Ms Judge said that this was the first occasion of which she as Head of HR was aware of the Respondent's social media policy giving rise to a disciplinary investigation and hearing. Ms Judge confirmed that Ms Dent and Ms Ria Bailes, an Executive Director of OHG, had spoken together following the submission of the Claimant's resignation email on 28 March 2019. When questioned by the Tribunal about the reasons why that resignation had not been accepted, Ms Judge said that, whilst it was not a case of making an example of the Claimant, resignation in these circumstances was never going to be acceptable to the Respondent because of the message that summary dismissal would send to their remaining workforce. Ms Judge agreed that it would make no immediate difference to the Claimant, since whether she resigned or was summarily dismissed, she would be leaving the Respondent's employment immediately and empty handed.

27 The potentially fair reason for dismissal advanced by the Respondent was misconduct. That was not contested or disputed as not having been the Respondent's reason for dismissing the Claimant, and it was not alleged that any ulterior or hidden motive or reason gave rise to her dismissal. All the evidence I heard points in that direction, and I have no difficulty in finding that the Respondent has proved on a balance of probabilities that their reason for dismissing the Claimant was indeed misconduct.

28 Accordingly, the test classically set out in **British Home Stores v Burchell [1978] ICR 303** applies: did the Respondent genuinely believe, on reasonable grounds and following an appropriate investigation, that the Claimant was guilty of misconduct? In my judgment, all three elements of the **Burchell** test are made out. The genuine nature of the Respondent's belief that the Claimant had breached the terms of their social media policy, and was thereby in breach of the disciplinary policy and of the code of conduct, was never challenged. I appreciate that at the disciplinary and appeal hearings the Claimant together with her union representatives challenged and disputed whether that belief was correct; but that it existed was not in issue. Once again, all the evidence I heard and read, which I have summarised above, confirms that it was solely because of the Claimant's specific Facebook post that she was disciplined and dismissed after thirteen years' apparently satisfactory service.

29 Was the Respondent's belief that the Claimant was guilty of misconduct reasonable in all the circumstances? Manifestly so. The terms of the social media policy are clear and unambiguous: communications on social media by employees, whether made in a personal and private capacity or whilst at work, must not bring the Respondent, its employees or activities into disrepute. That a breach of that policy or of the duty of confidence (as opposed to whether there had been any such breaches) might lead to disciplinary action, and that it might constitute gross misconduct and lead to summary dismissal, was not disputed: rightly so, since the provisions of the

Claimant's contract of employment and of the disciplinary policy and procedure are equally clear. Secondly, in my view it was perfectly reasonable for the Respondent to conclude that the Claimant had as a matter of fact breached their social media policy. The Claimant admitted and accepted that she had posted the relevant comment on her friend's Facebook page. In relation to what the Claimant actually wrote, it was at the very least reasonable for the Respondent to construe it as referring to themselves or OHG, their parent company, and to their tenants, AB's family. As Mr Kibling points out in his closing submissions, most of the closed Facebook group to whom the comment was originally circulated were current or former employees of the Respondent, and would be well aware of its social housing activities and operations, even if they did not know that AB's family were tenants; and the reference to upgrading the kitchen and bathroom facilities provides a clear link to her family as tenants; particularly since, as the Claimant agreed, such an upgrade for their property had in fact recently occurred. To my mind, the Respondent's interpretation of the Claimant's post is a great deal more natural and straightforward, and makes a lot more sense, than the construction placed on it by the Claimant and her advisers at the disciplinary and appeal hearings, namely that her comments related solely to the widespread public interest in and debate concerning AB's case, which strikes me as artificial, particularly in the stated context of improvements to a particular property.

30 Thirdly, the Respondent was entitled to conclude, and I find, that the social media policy did apply to the Claimant. The Claimant had the benefit of experienced union representatives during the disciplinary process, including at both the disciplinary and appeal hearings. Whilst criticism was levelled by them at the Respondent's alleged failure to provide training and/or to ensure staff awareness of new policies and procedures, or amendments to existing provisions, which were introduced via the company intranet, it was not disputed that the Respondent was entitled to and did in fact use that means to bring in new terms and conditions which were binding on their employees, including the Claimant.

31 Finally, there are the clear admissions made by the Claimant during the course of her investigation meeting with Mr Hutchison. The Claimant and Mr Basham on her behalf complain that she was given inadequate notice of that meeting, that there was confusion surrounding whether the Claimant could or could not be accompanied, and that overall she was in no fit state to attend any such meeting, which should not have gone ahead then. I consider and determine those issues hereafter, when focusing on the procedure adopted by the Respondent. The fact remains, however, that it is not disputed that the Claimant both attended and agreed that the investigation meeting should go ahead, and that she then said, clearly and repeatedly, that she accepted that what she had done was wrong, and that her posted comments breached the Respondent's social media policy. I find that the Respondent is entitled to rely on the Claimant's admissions at the investigation meeting in support of their belief in her misconduct being reasonable.

32 Turning to the investigation undertaken by the Respondent as part of the disciplinary process, the Claimant raises a number of criticisms. It is said that Mr Hutchison should have clarified exactly what the Claimant meant by her comments, to have given her the opportunity to make plain that she was only referring to the public debate concerning AB's case, rather than to the Respondent and AB's family.

Secondly, the Respondent's investigation was limited to the Claimant's meeting with Mr Hutchison, which itself was very short, and only about ten minutes of which was taken up with the questions and answers on which the Respondent relies. Lastly, Mr Basham submitted that the questions asked by Mr Hutchison at the meeting were either leading or closed, rather than open, and that this led to the Claimant providing answers which prejudiced her, and on which reliance should not be placed. I reject those criticisms. Given the nature of the alleged breach, and the fact that it was clear from the outset - and the Claimant admitted - that she had posted the relevant comment, it is difficult to see what further investigation could have been undertaken, or what it would have achieved. Additionally, the Claimant had every opportunity to explain what the real meaning or interpretation of her post was and should be, for example when asked whether she could see how her comment might bring the Respondent into disrepute. In fact, the Claimant did not then put forward the case which she adopted at the disciplinary and appeal hearings, or anything like it; but accepted that suggestion as being correct. Whilst the meeting was indeed a short one, in my view it more or less covered all the essential points and issues; which is no doubt why Mr Hutchison had sought prior approval from HR. Finally, and with the sole exception of that particular question (which I find to have been a fair one in any event), all the other questions asked by Mr Hutchison were open questions, and I do not accept that the Claimant was led to incriminate herself in any way. In my judgment, the investigation undertaken by the Respondent was both reasonable and appropriate to the circumstances of the case.

33 The next issue that falls to be determined is whether the disciplinary procedure which the Respondent followed, and which culminated in the Claimant's dismissal, was a fair one. I am reminded by Mr Kibling that the 'range of reasonable responses' test applies not only to an employer's decision to dismiss, but also to the procedure adopted by which any such decision is reached – see **J Sainsbury plc v Hitt [2003] ICR 111**. Mr Kibling submits that the procedure followed in the Claimant's case was broadly in accordance with that set out in the Claimant's terms and conditions of employment, that any deviation therefrom was minor and did not result in any substantial unfairness to her, and that it falls within that range of reasonableness. The criticisms raised by the Claimant or on her behalf were numerous. They include (a) that the Claimant was misled in attending the office at the time she was suspended; (b) that the suspension letter had already determined the Claimant's post as amounting to gross misconduct; (c) that the Claimant's letter of suspension was written and dated the day before it was given to her; (d) that a breach of s.3.6 of the social media policy is not a listed example of gross misconduct; (e) that inadequate notice of the investigation meeting was given to the Claimant, she being told at about 5pm on 18 March of the meeting at noon on the following day, and that she was prevented from having a companion present; (f) that pre-prepared questions were inappropriate, particularly since they had been vetted by the respondent's HR team; (g) that the Claimant was not sent the minutes of the disciplinary hearing within 48 hours, as provided for in the Respondent's procedure, and that those notes were intentionally inaccurate and inadequate; and (h) that the disciplinary outcome letter was not delivered to the Claimant within the prescribed time, and was one day late. There are a number of other complaints which I have already considered and determined, or will hereafter, in particular whether the decision to dismiss the Claimant was predetermined before the Claimant's disciplinary hearing, which seems to me to lie at the heart of this case.

34 Addressing the criticisms enumerated above, in my judgment they do not, either individually or collectively, render the disciplinary process adopted by the Respondent in the Claimant's case unfair or unreasonable, to the extent (if any) to which such criticisms are justified. Mr Abbott explained why he did not tell the Claimant that she must come to the office on 13 March in order to be suspended on disciplinary grounds, since he believed that would worry and upset her. It is virtually impossible in my view to say whether he was right or wrong to do so, but I accept that his use of an essentially innocent deception was not an obviously unreasonable thing to do, and I bear in mind that it was common ground that he and the Claimant were on good terms, and there is nothing to suggest that Mr Abbott was then acting maliciously. Secondly, I do not accept that the mention of the Claimant's alleged breach as possibly amounting to gross misconduct in her suspension letter was either inappropriate or necessarily indicative of any pre-judgment. Since such a breach could, I find, properly be judged to amount to gross misconduct under the Respondent's disciplinary policy and procedure, it would have been wrong and unfair if the Claimant had not been warned of that possibility. There is nothing in the point that the letter of suspension was written and dated the day before it was handed to the Claimant – it is simply indicative of when the letter was prepared and when the Claimant attended the office, and no possible prejudice to the Claimant resulted from that fact. With respect, it is not correct to say that a breach of section 3.6 of the social media policy could not amount to gross misconduct: whilst it is not one of the examples given in the non-exhaustive list in the disciplinary procedure, although a breach of confidentiality is, the social media policy itself makes clear that a breach may amount to gross misconduct.

35 I certainly accept that the Claimant was not provided with very much notice of the investigation meeting, that there was unhelpful confusion about whether or not she could then be accompanied; and that it would have been better had neither occurred. But in fact the Claimant was not entitled to be accompanied at such a meeting under the Respondent's procedure, the Claimant had been provided with copies of the disciplinary procedure, social media policy and the code of conduct six days before the investigation meeting under cover of the suspension letter, and the Claimant specifically confirmed at the commencement of her meeting with Mr Hutchison that she was prepared for it to go ahead then and without any companion. I do not accept the Claimant's evidence that Mr Hutchison duped her into attending by saying that it was simply for an informal chat, or that nothing serious would result: had that been the case, it would have contradicted both the terms of the suspension letter, and also what the Claimant says that she was told by Mr Abbott when he handed it to her; and I would expect the Claimant to have raised the issue during her meeting with Mr Hutchison, particularly in the light of his questions – but she did not. Nor do I accept that the Claimant was bombarded with questions, or so upset and stressed that the meeting should have been postponed. It was a short meeting, with relatively few questions, which were designed to establish whether or not the Claimant had a case to answer; and whilst the Claimant was no doubt understandably upset and concerned, she was able to answer Mr Hutchison's questions clearly and sensibly, and to agree the notes of what had been said when they were read over to her at the conclusion. Finally, there is I find nothing wrong or unfair in pre-prepared questions – if anything, they should help to focus the participants' minds; and whilst the disciplinary notes and the outcome letter were both late, which I accept might have increased the stress the Claimant was under, the delay in both cases was relatively minor and gives rise to no prejudicial unfairness, I find. That the Respondent accepted all the amendments put

forward by the Claimant to the draft notes of the disciplinary meeting, so that I was provided with an agreed document, simply demonstrates that the parties agree what was then said: one note taker may have been better than the other.

36 However, if the Claimant's dismissal had already been decided upon before her disciplinary hearing, resulting in that hearing being a sham, then, if for no other reason, the Claimant's dismissal is in my judgment thereby rendered unfair. It must be an essential part of a fair disciplinary procedure that an employee is entitled to and receives a fair hearing from a decision maker who is free to make up his or her own mind concerning both the employee's guilt and the appropriate penalty. Additionally, if that were the case, then the procedural flaw is so great that it could not be 'cured' by a subsequent appeal hearing, since any such predetermination would be fatal to both. All the Respondent's witnesses, including Mr Abbott, were asked and steadfastly responded that no such predetermination had occurred in the Claimant's case, and in particular that she would be dismissed for gross misconduct following her disciplinary hearing. Both the Claimant and her witnesses (Ms Hounslow and Mr Bonner) contend that her dismissal was decided upon by senior staff within the Respondent and/or OHG before that hearing; and indeed that contention was one of her unsuccessful grounds of appeal.

37 The critical witnesses from whom I heard in relation to this issue are Mr Abbott, the Claimant and Ms Hounslow. There is a measure of agreement between them, in that Mr Abbott agrees that he and the Claimant spoke together about at least the possibility of her resigning from her employment, although Mr Abbott says that was before 28 March. Logically, any such conversation must have been at or after the Claimant's suspension on 13 March in any event. Secondly, Mr Abbott and Ms Hounslow agree that they met and spoke about the Claimant and her situation both on 13 March (in the office carpark) and at least once on 28 March (smoking cigarettes outside the office). Thereafter, there is a direct conflict of evidence. The Claimant and Ms Hounslow say that on 13 March Mr Abbott warned them separately of the serious view being taken by the Respondent about the Claimant's post, indicated that he personally did not share that view, and advised the Claimant to consider resigning; and that on 28 March he both advised in favour of the Claimant resigning and acted as an intermediary on her behalf concerning her resignation. Mr Abbott denies that he ever offered the Claimant advice, either directly or indirectly through Ms Hounslow, about resigning from the Respondent; that he ever expressed any view about what approach he would have taken, given a free hand; and that he ever acted on the Claimant's behalf in trying to ensure that she could resign rather than be dismissed, but in fact said that he could not advise or assist her.

38 In determining whose account I accept, I bear in mind the relevant surrounding evidence and submissions, which I mention hereafter; but in my view the most reliable and ultimately determinative evidence comprises first of all the Claimant's long text message to Mr Abbott, sent at 2.30 pm on 28 March, when she clearly raises her fear and belief that a decision had already been made to dismiss her at the disciplinary hearing on the following day, and seeks Mr Abbott's advice about submitting her resignation as a means of avoiding being dismissed for gross misconduct, with all that would entail for her future employability. Then, a little over an hour later, the Claimant writes once again to Mr Abbott, repeatedly thanking him for 'giving her the chance to

save her future', and saying *'it is done, I have handed it in'*. Five minutes earlier, the Claimant had in fact submitted her resignation to Ms Obra of the Respondent's HR by email.

39 In my judgment, the only possible inference from those documents is that Mr Abbott did indeed act on the Claimant's behalf, providing advice and assistance to her through her friend and colleague Ms Hounslow, and in particular that the Claimant should resign immediately rather than face a disciplinary hearing on the following day, which the Claimant accepted and acted upon. Mr Kibling submitted that it was because of and following the Claimant's seeking and obtaining advice from her union representative, rather than from Mr Abbott, that she resigned, whose advice the Claimant had told Ms Hounslow she would seek that afternoon. Whilst I accept that it is perfectly possible that the Claimant did then speak to Mr Bonner, I do not accept that submission, since it is impossible to see why the Claimant would be writing to Mr Abbott in the terms of her text of 3.48 pm that day unless it was him, rather than Mr Bonner (who in any event was in no position to supply it), who had provided the advice and assistance she was seeking. Secondly, one has to ask why the Claimant would be thanking Mr Abbott warmly, if all he had said to her was that he couldn't give her any advice. Finally, the terms of the third message which the Claimant sent Mr Abbott, during the evening of 28 March, clearly imply that both of them had thought that the Claimant's resignation had been accepted by the Respondent, only for that belief to be dashed.

40 It follows that I accept the evidence of the Claimant and Ms Hounslow, rather than that from Mr Abbott, and that where their differing accounts conflict, I prefer theirs. I also have to bear in mind that it was Mr Abbott who was due to (and did) conduct the Claimant's disciplinary hearing on 29 March: if anyone was in a position to rebut her suggestions that the outcome of that hearing was already decided, it was him. The fact that he did not do so, but instead advised the Claimant to resign and, as I find, took steps to try to arrange for her resignation to be accepted, indicates that the Claimant's fears of a predetermined outcome were well-founded.

41 That is confirmed by the surrounding evidence. I found Ms Hounslow to be a truthful and reliable witness and I accept her evidence, which in my judgment is broadly consistent with the contemporaneous documentation, and in particular that Mr Abbott had alerted her at the time of the Claimant's suspension on 13 March to her perilous position, whilst saying that he would have adopted a more lenient approach. Such inconsistencies as appeared during cross-examination (for example that Mr Abbott was choked up and apparently tearful, rather than openly crying, at one of their meetings on 28 March) were in my view relatively minor and do not undermine the overall credibility of her account, which at least to some extent coincides with that of Mr Abbott. I reject the suggestion in Mr Kibling's closing submissions that Ms Hounslow had some particular animus towards the Respondent because of work related stress whilst in their employment: as he himself points out, Ms Hounslow's evidence was that she was suffering from stress because her daughter was the victim of domestic violence.

42 In addition, it seems clear that the powers that be within OHG and the Respondent formed the view at a very early stage that the Claimant was guilty of gross misconduct, as is reflected in the email dated 13 March from Ms Dent, Head of OHG

HR, who had spoken to both the CEO Mr Hill and to Ms Bailes. It was Ms Dent and Ms Bailes who refused to accept the Claimant's resignation on 28 March, and Ms Dent who told Ms Obra to reject it, and that the disciplinary hearing fixed for the following day should go ahead *'with the likely outcome that* (the Claimant) *would be found to have committed an act of gross misconduct and so will be dismissed with immediate effect tomorrow'.* It could be said that Ms Dent seems to have been sure not only of the outcome of the hearing, but also of the penalty that would be imposed. Ms Obra was instructed to reject the Claimant's proffered resignation *'given the seriousness of the allegations'.* As to that, Ms Judge told me that, whilst the Respondent was not seeking to make an example of the Claimant, her resignation in these circumstances was never going to be acceptable to the Respondent because of the message that her summary dismissal would send to their remaining employees: which seems to me to be a contradiction in terms. Finally, and despite Mr Kibling's best efforts, I still do not understand why the *'seriousness'* of the allegations against the Claimant necessarily ruled out her resignation being acceptable, as he submitted (assuming that it was not simply in order to punish the Claimant). If the Respondent was concerned about potential public perception of such a step, then the Claimant's resignation when facing allegations of gross misconduct would seem, to me at least, to be an adequate explanation. I find the Respondent's alleged reason for rejecting the Claimant's resignation to be unconvincing, and overall I have come to the conclusion that the outcome of the Claimant's disciplinary hearing on 29 March was indeed predetermined, that accordingly she did not receive a fair hearing, and that for that reason her dismissal was unfair.

43 In case I am mistaken in coming to that conclusion, I go on to consider whether dismissal fell within the range of reasonable responses which were open to the Respondent. There can be little doubt that the Respondent's decision fell within that necessarily wide range. I accept that the Claimant was a longstanding employee of the Respondent; that this was a first offence after some thirteen years of service; and that the Claimant explained that her comment was made on the spur of the moment, apparently without thought or malice, and that she expressed regret and contrition at the investigation meeting, albeit that the Claimant and her representative adopted a very different approach at both the disciplinary and appeal hearings. Yet the fact remains that such a breach of the Respondent's social media policy, which the Claimant's comment undoubtedly represented, was certainly capable of amounting to gross misconduct, as was the breach of confidentiality which was also involved; and the evidence is that it did bring the Respondent into disrepute, in that one former employee (like both existing employees and everyone else, a member of the public) was moved to complain to the Respondent's Chief Executive about the Claimant's post. Additionally, the Respondent is a substantial Registered Social Landlord, and no doubt wishes to maintain a good public reputation. Whilst some might regard the decision to dismiss the Claimant as harsh, it cannot be said to fall outside the band of reasonableness, in my view.

44 For these reasons, I find that the Claimant was unfairly dismissed. In the event that I reached that conclusion, Mr Kibling relied on both **Polkey** and contributory fault in relation to remedy, whilst correctly reminding me that the overriding principle in relation to compensation is that it should be just and equitable.

45 The **Polkey** principle can be summarised as an assessment, where such is possible, of what were the chances (if any) in percentage terms of a fair dismissal, had the Respondent undertaken a reasonably fair disciplinary procedure. In my view, such an assessment is not possible in the circumstances of this case. On the one hand, there are the facts that this was a first offence, the first time that a breach of the social media policy had been raised in a disciplinary context, and that no further or additional complaints or concerns were raised with the Respondent, as Ms Judge confirmed to me in her evidence. On the other hand, the Claimant's comment represented a clear breach of the social media policy, as well as a breach of the duty of confidentiality, that it could well have had serious repercussions for the Respondent and significantly damaged their reputation and their standing with their many tenants if publicized, and that the Claimant in effect disavowed her initial admissions and expressions of regret and contested every issue in the disciplinary process. Above all, it is unduly speculative, in my view, to try to assess what would or might have happened, had the person who conducted the Claimant's disciplinary hearing had the freedom to make up their own mind. Whilst Mr Abbott may very well have said what he personally would have done, had he been given a free hand, it is not possible, I think, to say how sincere those remarks were, and to what extent he may have been simply seeking to comfort or sympathise with a colleague with whom he was on good terms. Accordingly, there will be no **Polkey** reduction.

46 Contributory fault is another matter. Under ss. 122 & 123 Employment Rights Act 1996, both the basic and compensatory awards may be reduced where it is just and equitable to do so, and where the Claimant's culpable conduct or actions caused or contributed to her dismissal. In my judgment not only was the Claimant culpable in posting her comment on Ms Nash's Facebook page, breaching confidentiality in essentially AB's family as being tenants of the Respondent, and bringing her employer into potentially serious disrepute, but she was also the sole author or cause of her own downfall. Had the Claimant not posted her comment, there would have been no disciplinary process and no dismissal. Secondly, in what I find to have been the Claimant's genuine and honest remarks and assessment, she openly admitted and accepted, regretted and apologised for her conduct, which she agreed had breached the Respondent's social media policy at her investigation meeting with Mr Hutchison. Thirdly, faced with the prospect of dismissal for gross misconduct and the inevitable impact that might have on her future employment prospects, the Claimant tendered her resignation, and was prepared to walk away from her employment with the Respondent empty handed. In my judgment, it would be wrong and unjust if the Claimant were to profit by recovering compensation simply because the Respondent adopted a manifestly unfair disciplinary process, when had they not done so, there would have been at the very least a good chance that the Claimant would have been fairly dismissed for gross misconduct. Accordingly, both the basic and compensatory awards which would otherwise be payable will be reduced to nil.

47 The Claimant's claim for thirteen weeks' notice pay remains to be determined. Where an employee has been dismissed without notice, then he/she will be entitled to recover the unpaid notice monies due, unless the employer has proved on a balance of probabilities that the employee was in fact guilty of an act of gross misconduct. In my judgment, the Claimant's post or comment was not only capable of amounting to an act of gross misconduct, but actually did so. In coming to that conclusion, I bear in mind that a breach of the social media policy may amount to such, that a breach of the duty

of confidentiality is provided as an example of gross misconduct, and also the terms of the Respondent's code of conduct. Additionally, the fact that no great reputational damage to the Respondent appears to have arisen, and that the disrepute into which the Claimant's post brought them was in fact fairly limited does not really assist the Claimant, since the level of culpability of the Claimant's actions should not be determined by the extent of the damage resulting. Put another way, whilst I can see that an independent decision maker might have decided to exercise leniency in the Claimant's case and not summarily dismissed her, in view of her long and previously unblemished service and the absence of any further complaints or trouble arising from her comment, that would still not alter the fact that her comment amounted to an act of gross misconduct. Accordingly, the Claimant's claim for notice pay is dismissed.

48 Finally, and in relation to the interim rule 50 order which I made at the commencement of the hearing concerning AB and her family, the fact that to date apparently no notice has been taken by the press or others concerning these proceedings, and that AB's family's private life has so far not been disturbed as a result, is not a reason for not extending the protection of their rights under Article 8 of the European Convention on Human Rights; and as requested by Mr Kibling, I make that order permanent or until further order by the Tribunal.

Employment Judge Barrowclough
Date: 18 March 2020