EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs J. RUST	**V**	**UNISON**

Heard at: London Central (by video) **On**: 26,27,28 & 29 October 2021

Before: EJ P Klimov, Mrs. C. Buckland, Mr. P. de Chaumont-Rambert

Representation:

For the Claimant: Mr. P. Powlesland (of Counsel)

For the Respondent: Ms. M. Tether (of Counsel)

JUDGMENT having been sent to the parties on 30 October 2021 and written reasons having been requested by the claimant on 1 November 2021, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Issues

1. By a claim form presented on 29 October 2020, the claimant has brought complaints of unfair dismissal, direct discrimination and harassment on the grounds of a religious or philosophical belief.

2. The claimant relies on her belief “in left wing politics and Socialism” as the religious or philosophical belief for the purposes of her complaints of direct discrimination and harassment.

3. The respondent denies all the claimant’s claims. The respondent avers that the claimant was dismissed for a reason related to her conduct and in the circumstances of the case it acted reasonably in treating that reason as a sufficient reason for dismissing the claimant.

4. Although the respondent accepts that in principle a belief in left wing politics and Socialism may amount to a philosophical belief within the meaning of s.10 Equality Act 2010 ("EqA"), it denies that the claimant's belief played any part in the respondent's decision to discipline the claimant, the way in which it conducted the disciplinary process, or its decision to dismiss the claimant.

5. The claimant was represented by Mr P. Powlesland and the respondent by Ms M. Tether. The tribunal is grateful to both counsels for their submissions and assistance to the tribunal.

6. The tribunal heard evidence from three witnesses for the respondent: Ms Sasha Savage (the investigating officer), Ms Maggie Ferncombe (the disciplining officer) and Mrs Maureen Le Marinel (the chair of the appeal panel). The claimant gave evidence. All witnesses gave sworn evidence and were cross-examined.

7. The claimant also introduced in evidence a witness statement of Ms. Linda Durrant. The respondent objected to Ms Durrant giving evidence to the tribunal.

8. The tribunal was referred to a bundle of documents of 416 pages the parties introduced in evidence. In addition the claimant sought to introduce in evidence the Decision of the Assistant Certification Officer under ss.55(1) and 108A of the Trade Union and Labour Relations (Consolidation) Act 1992 on the matter involving the respondent and Ms Linda Perks, the then respondent's Regional Secretary of the London Region, case number D/5-20/17-18 dated 22 May 2017 ("the Report"). The respondent objected to the Report being introduced in evidence.

9. The issue of whether Ms Durrant's witness statement and the Report should be allowed was considered as a preliminary issue. The essence of the respondent's objections was that the claimant should not be allowed to use Ms Linda Perks as a comparator for the purposes of her discrimination claim.

10. The respondent argued that until the exchange of witness statements on 8 October 2021, it was unaware that the claimant intended to use Ms Perks and other unnamed individuals mentioned in Ms Durrant's witness statement as comparators and was taken wholly by surprise by that development. It further argued that when, on 15 July 2021, the claimant sought to include the Report in the hearing bundle, which resulted in an exchange of emails between the claimant's and the respondent's solicitors regarding the relevance of that document, at no point the claimant's solicitors had indicated that the Report was going to be relied upon in relation to any comparator or to show inconsistent treatment of the claimant.

11. The respondent submitted that the claimant had had every opportunity to name Ms Perks as a comparator and because she had failed to do so until the exchange of witness statements, it should not be allowed for the respondent to "*be ambushed in that way*".

12. With respect to Ms Durrant's witness statement, the respondent argued that it was too vague, because, except for Ms Perks, Ms Durrant's statement does not name individuals who she says were treated more favourably than the claimant, nor does it indicate the timeframe of the alleged events. Therefore, the respondent argued, it was impossible for the respondent to make any sensible enquiries. For these reasons, the respondent submitted, it would be contrary to the overriding objective to allow the claimant at that late stage in the proceedings to introduce potential comparators, who were not named and in relation to whom the respondent had had no opportunity to do any investigation.

13. The claimant argued that she should be allowed to use Ms Perks as a comparator, because it was her choice, and the respondent knew as early as her disciplinary process that she considered that the decision to dismiss her was inconsistent with how others were disciplined by the union for their equally serious disciplinary offences. Although she named no names, she specifically referred to being "*treated less favourably as other Unison staff*" in her grounds of appeal and mentioned the former regional secretary as one of such persons during the appeal hearing.

14. Having considered the parties submissions, the tribunal decided that the claimant should be allowed to rely on Ms Perks as an actual comparator. It was her pleaded case that she was treated less favourably than others in the respondent's organisation because of her political belief. The respondent was on notice that the claimant was comparing her treatment to the treatment by the respondent of its other staff found guilty of serious disciplinary offences. At no point the respondent sought further information from the claimant in relation to comparators.

15. Although the claimant's solicitors did not expressly say so, the Certification Officer Report disclosed by the claimant on 15 July 2021 should have put the respondent on notice that Ms Perks was going to be used by the claimant as a comparator. The respondent's solicitors argued that the document should not be added to the bundle because it was "an authority" and not "evidence". However, they did not seek to clarify with the claimant's solicitors the relevance of the content of the document, and whether Ms Perks or anyone else named in the report were intended to be used as actual comparators.

16. The claimant exchanged her and Ms Durrant's witness statements on the agreed date for the exchange, 8 October 2021. There was sufficient time for the respondent to deal with any matters arising from their statements, including, if required, by a way of supplemental witness statements.

17. The tribunal concluded that there was no serious prejudice to the respondent if the claimant was allowed to use Ms Perks as a comparator for her discrimination claim. On the other hand, if the claimant were not permitted to use Ms Perks as a comparator, she would be significantly restricted in advancing her discrimination claim. The tribunal decided that it would be contrary to the overriding objective to restrict her in that way

just because the matter of the actual comparator had not been clarified by the parties before the witness statements were exchanged.

18. The tribunal also decided that it would be in the interest of justice to allow the respondent's counsel to put supplemental questions to the respondents' witnesses at the start of their evidence to deal with issues arising from Ms. Perks being used by the claimant as an actual comparator.

19. Having decided that matter, the tribunal proceeded to consider whether the Report and Ms Durrant's witness statement should be allowed to be introduced in evidence. The Report was disclosed to the respondent on 15 July 2021, well in advance of the hearing. The claimant's witness statement had various references to the Report in support of her claim that Ms Perks was treated more favourably than her. There appeared to be no good reasons why the claimant must not be allowed to rely on the content of the Report, if she wished to do so. Therefore, the tribunal allowed the Report to be introduced in evidence.

20. Ms Durrant's witness statement contained a reference to Ms Perks' disciplinary matter. It contained other references to unnamed individuals committing various alleged disciplinary offences and being treated with leniency by the respondent. It was the claimant's choice to introduce Ms Durrant's evidence in that way. Although, devoid of any useful details of the alleged incidents and treatments, and thus of very limited assistance to the tribunal, it nevertheless was of some relevance, even only in so far as to corroborate the claimant's evidence on the treatment of Ms Perks.

21. If the respondent wished to find out more details in relation to other unnamed individuals it would be able to cross-examine Ms Durrant on the content of her witness statement. For these reasons, the tribunal decided that Ms Durrant's witness statement should be allowed. At the end, the respondent chose not to cross-examine Ms Durrant, and her witness statement was taken as read.

22. There was a further preliminary issue the tribunal had to deal with at the start of the hearing. The version of the claimant's Grounds of Claim included in the hearing bundle referred to paragraph 16(a) (i) – (v) as containing the allegations the claimant pleaded as the conduct amounting to harassment related to her political belief. These paragraphs were missing in the version in the bundle.

23. After making some enquiries, Mr Powlesland confirmed that one page of the claimant's Grounds of Claim containing the relevant paragraphs was missing. The missing page was sent to the tribunal and the respondent.

24. The respondent said that it had received from the tribunal the claimant's ET1 and the Grounds of Claim without that page and had presented its response based on that incomplete version. It appears that the version with the missing page was also used at the preliminary hearing on 23 March 2021 and the omission had not been noticed by either party until the first day of the final hearing.

25. The respondent accepted that the claimant should be allowed to add the missing page to her pleadings. However, paragraphs 16(a) (i) – (v) dealt with the claimant's complaint of unfair dismissal. They read:

> *16. The Claimant claims unfair dismissal under section 98 Employment Rights Act 1996 on the basis that:*
>
> *a. the Respondent did not have reasonable grounds on which to base its decision that the Claimant had committed gross misconduct.*
>
> *i- The incident of breaching Covid rules in Tenerife occurred whilst the Claimant was on annual leave in non-work time and would not be covered by any relevant policy.*
>
> *ii The Respondent did not identify any policy which applied to the Claimant's conduct whilst on holiday outside of work.*
>
> *iii- The Respondent did not provide evidence of any policy obligating the Claimant to inform the Respondent of any arrest or appearance before a court.*
>
> *iv- The Respondent had evidence before it that the Claimant's manager had not directed her to avoid talking to the media on 23 March 2020. Rather, the conversation implied that the media would be contacted after she had consulted with the Unison media team. The management instruction to not engage with journalists or the media was conveyed to her on 1pm on 24 March 2020 after she had spoken to the journalist on the Monday. The Claimant did not engage with journalists or the media after receiving the instructions from Liz Chinchen.*
>
> *v- The Respondent had before it evidence from the Claimant that the social media video was not taken or circulated by her, and she had not divulged her identity to the media.*

26. The tribunal sought to clarify with Mr Powlesland which conduct pleaded in paragraphs 16(a)(i)-(v) was being said to be the conduct that had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading humiliating or offensive environment due to the claimant's political belief in left wing politics and Socialism (paragraph 17(b) of the claimant's Grounds of Claim).

27. After taking instructions, Mr Powlesland said that the reference to paragraphs 16(a)(i)-(v) was a mistake, and the claimant wishes to rely on the grounds (pleaded in paragraphs 17(a)(i)-(v)) of her direct discrimination complaint as the grounds for her complaint of harassment, in the alternative.

28. The respondent objected to that amendment. Ms Tether submitted for the respondent that the claimant must not be allowed to change her harassment claim at that extremely late stage of the proceedings because it would create significant prejudice to the respondent as it had prepared its defence on the basis of the pleadings as it had all along.

29. The tribunal decided that the claimant must not be allowed to amend her pleadings to introduce a claim for harassment on the same grounds as her direct discrimination claim. The tribunal applied the balance of hardship and injustice test (see ***Cocking v Sandhurst (Stationers) Ltd and anor 1974 ICR 650, NIRC***) and decided that it lied in favour of refusing the amendment.

30. The claimant was legally represented throughout the proceedings. It was incumbent on her and her representatives to put her case to the respondent in sufficient detail so that the respondent knew what case it had to meet. Mr Powlesland did not present any good reasons why the claimant or her solicitors could not have realised earlier that the Grounds of Claim contained a wrong cross-reference and there was a missing page, until these omissions had been drawn to their attention by the tribunal.

31. It was not a mere "change of a label" on the pleaded facts, but an introduction of a new claim relying on the grounds which had not be made known to the respondent until the morning of the first day of the hearing.

32. The respondent's case was prepared to meet the claimant's pleaded discrimination case and allowing the claimant to run her discrimination claim on the alternative grounds of direct discrimination and harassment, would put the respondent at a significant hardship of having to deal with the harassment claim presented in that way "on the hoof".

33. In any event, under s. 212(1) of the Equality Act 2010 *"detriment" does not [..] include conduct which amounts to harassment*". Therefore, the claimant's complaints of direct discrimination and harassment in respect of the same conduct were mutually exclusive. Accordingly, the tribunal would not be able to find that the same conduct complained of was a detriment for the purposes of the claimant's direct discrimination complaint and an act of harassment. The claimant's primary compliant of direct discrimination remained intact.

34. For these reasons the tribunal decided that the claimant must not be allowed to amend her harassment claim to rely on the grounds pleaded in paragraph 17(a)(i)-(v). The claimant did not pursue her originally pleaded case of harassment (in reliance on paragraph 16(a)(i)-(v)) and therefore it was dismissed upon withdrawal.

Findings of Fact

35. The claimant was employed by the respondent as a Regional Organiser in the Respondent's Eastern Region from 1 January 2015 until her dismissal on 24 June 2020. She was dismissed for misconduct with three months' pay in lieu of notice.

36. In her role the claimant was responsible for the respondent's branch organisation in healthcare branches in Cambridgeshire.

37. The Claimant is a member of the Labour Party, an elected councillor in Kings Lynn Borough Council and has been Labour's Prospective Parliamentary Candidate for North West Norfolk three times in the General Elections held in 2015, 2017 and most recently in December 2019.

38. The claimant took a week's annual leave from 16 March 2020. She went on holiday to Tenerife, Spain. In the afternoon of 16 March 2020, she was arrested, detained overnight and appeared in court for disobeying the police orders issued to enforce Spain's COVID19 lockdown measures. On 17 March 2020, the Spanish court released the claimant without a charge.

39. The incident, which led to her arrest, involved the claimant using the hotel's swimming pool, closed by the hotel due to the introduced Covid-19 restrictions, and disobeying, first the hotel staff, and then the police instructions to exit the swimming pool, resulting in a police officer having to strip down to his underwear and to enter the pool in order to force the claimant out of the pool. She was then arrested, handcuffed, and taken to a police station, where she spent the night in a cell.

40. The incident was filmed by hotel's guests, and the footage put on the internet. The video footage was subsequently shared on social media over 4 million times.

41. The claimant was made aware that the video with the incident was circulating on the internet when she was still in Spain by a representative of the tour operator. She watched some of the footage in Spain and again after her return to the UK on 22 March 2020.

42. On 23 March 2020 the claimant returned to work. She worked from home on that day. At about 12.30pm she spoke on the telephone with her manager, Ms S. Leigh. Ms Leigh enquired about the claimant's holiday. The claimant said that her and her husband had not indulged as much as they would have normally done. She did not tell Ms Leigh about the incident and that the video footage of the incident was on the internet.

43. Later that day, at about 13:30, the claimant was doorstepped by a journalist from Mail Online. The journalist asked whether it was the claimant who was on the video with the swimming pool incident in Tenerife. The claimant said that her holiday had not gone the way she had planned and asked the journalist to leave her property.

44. At 14:49, the respondent's Head of Media, Ms L.Chinchen, received a text message from the Mail Online journalist asking her to call him back regarding the claimant's arrest while on holiday in Spain. At 14:57 he left a voice mail on Ms Chinchen's telephone asking her to call and take an opportunity to make a comment.

45. Ms Chinchen telephoned the journalist, who explained that he was doing a story about the claimant's arrest in Spain for breaking the Covid-19 rules and gave Ms Chinchen details of the incident.

46. Ms Chinchen called Mr J. Rodie, Press and Media Officer for Eastern Region, to find out what he knew of the incident. Mr Rodie was not aware of the incident. Mr Rodie telephoned Ms Leigh and asked her to call the claimant to find out what had happened.

47. Ms Leigh telephoned the claimant at about 15:30. The claimant confirmed that it was her on the video. The claimant gave Ms Leigh details of the incidents and her reasons for going for a swim in the pool and not leaving it when instructed by the hotel staff and the police.

48. There were further discussions within the respondent, and it was agreed that Ms Chinchen would prepare a statement for the media and the statement would be shared with the claimant in advance of it being released. The respondent thought that the story would not be published until the following day. It was also agreed that Ms Leigh should tell the claimant to refrain from speaking to anyone about the mater.

49. At about 17:45 Ms Leigh telephoned the claimant to tell her that there would be a statement issued by the respondent and that she would be in touch with the claimant about the statement, probably the following day, as it was thought that the story was not going to break until then. Ms Leigh told the claimant not to speak to anyone about the incident.

50. Mail Online decided to publish the story that same evening (it appeared online at 19:27). The respondent released a statement without consulting on its content with the claimant.

51. The online article quoted the respondent's spokesperson as saying: "*There is no excuse for reckless behaviour. We're extremely disappointed to learn that the widely shared video features a member of UNISON staff*".

52. At 20:35 the claimant emailed Ms Chinchen saying that the story had come out and that she would await Ms Chinchen's call, if Ms Chinchen needed to speak with her.

53. On 24 March 2020, at about 8:35am, the claimant spoke to the Sun newspaper and gave her comments about the incident.

54. At approximately 9am, the claimant spoke with Mr C Jenkinson, the Regional Secretary covering Eastern Region. Mr Jenkinson told the claimant that she was being suspended from duties pending a disciplinary investigation. He told her that she should "*bunker down, make no comments and not to talk to people about it*" to let the story work its way through the news cycle.

55. The claimant did not tell Mr Jenkinson that she had already spoken to the Sun that morning or that she intended to speak to other media outlets to give her side of the story.

56. At approximately 9:30am, the claimant spoke to Eastern Daily Press and gave her comments.

57. At approximately 10:50am, the claimant spoke to another local newspaper.

58. At approximately 11:08am, the claimant spoke to Lynn News.

59. During the course of the morning, the Sun, Metro Online, EuroWeekly Online published articles about the incident. Some articles contained the claimant's comments.

60. At about 13:30, the claimant received a suspension letter stating that she was suspended pending an investigation into the following allegations:

    1. *You disobeyed Spain's COVID-19 lockdown, therefore risking public health and potentially putting additional pressures on the Spanish health service.*
    2. *You did not disclose at the earliest possible opportunity (a) details of the incident (b) your arrest and appearance before the Spanish court and, (c) contact you received from a journalist which resulted in numerous stories appearing in the press in which UNISON as your employer was cited. Despite the seriousness of the situation and the expectation on you to tell us, you did not voluntarily disclose the information despite having opportunities to do so, therefore breaching our trust and confidence in you.*
    3. *Your conduct outside work has brought the organisation into disrepute.*

61. The letter stated that should the matter "*proceed to a disciplinary hearing and gross misconduct is proven, this could result in your dismissal*".

62. The letter also said that the claimant should not "*make further comment on this matter to anyone outside the organisation*".

63. Around the same time Ms Chinchen called the claimant and asked her why she continued talking to the media despite the respondent's instructions not to do so. The claimant said that she felt victimised by the press and wanted to put her side of the story. Ms Chinchen told the claimant that she must not talk to the media.

64. After the conversation with Ms Chinchen the claimant contacted BBC Look East and GMTV, who had contacted the claimant earlier inviting her to give an interview, to beg them not to run the story.

65. On 25 March 2020, there was further negative publicity of the incident. The story appeared on the front page of Eastern Daily Press and BBC Look East ran the story as one of their headlines. The respondent's name and logo were featured, and the respondent's comments included in the report.

66. On the same day, the respondent received an email from Labour Link Officer in Eastern Region stating that City Councillors had been contacted by local residents who voiced their displeasure, with one Labour Link member at City Hall saying that she would never vote Labour again after viewing the video of the incident. The letter stated that while the matter

was for the respondent to consider, Labour political opponents were likely to seek to capitalise on this, which was unfortunate.

67. On 26 March 2020, the respondent sent a letter to the claimant adding a further disciplinary allegation to be investigated: "*Once UNISON became aware of the incident, you ignored clear management instruction not to discuss the matter further with the press*".

68. On 9 April 2020, following the investigation, which involved Ms Savage reviewing relevant materials and interviewing the claimant, Ms Chinchen, Mr Leigh, Mr Jenkinson and Mr Rodie, Ms Savage produced a detailed investigation report. She recommended that there was a case to answer on all four allegations.

69. On 1 May 2020, the claimant was invited to a disciplinary meeting to answer the four disciplinary allegations. The letter stated: "*The purpose of the hearing will be to discuss your alleged misconduct or gross misconduct. Depending on the facts established at the hearing, the disciplinary sanction could be up to and including a dismissal, but a decision on this will not be made until you have had a full opportunity to put forward your version of events and the hearing has been concluded*".

70. On 18 June 2020, after a short delay, caused by the respondent negotiating and agreeing with the recognised trade unions a protocol on remote disciplinary and grievance hearings and the claimant being referred to occupational health to establish that she was fit to attend a disciplinary meeting, the disciplinary meeting took place remotely via video.

71. The meeting was chaired by Ms Ferncombe. The claimant attended with her trade union representative. Ms Ferncombe decided that all four allegations were proven, and they were serious disciplinary breaches amounting to gross misconduct.

72. Having considered the mitigation, including the claimant's length of service and the claimant showing some remorse, Ms Ferncombe decided that because there were serious issues of trust and confidence and that the claimant's actions had brought the respondent into serious disrepute, the only appropriate sanction was dismissal with payment in lieu of notice. In reaching that decision Ms Ferncombe considered alternative sanctions, short of dismissal (a final written warning and a disciplinary demotion) but decided that in the circumstances they were not appropriate.

73. On 24 May 2020, Ms Ferncombe sent a letter to the claimant confirming her decision (pages 209- 212 of the bundle).

74. On 6 July 2020, the claimant appealed her dismissal. In her appeal email she identified seven specific grounds of appeal (pages 213-214 of the bundle).

75. On 13 July 2020, the claimant submitted further documents in support of her appeal.

76. Her appeal was heard on 3 August 2020, by a panel of three, chaired by Mrs Le Marinel, by video. The claimant attended together with her union representative.

77. On 4 August 2020, Mrs Le Marinel wrote to the claimant with the outcome of the appeal (pages 269-270 of the bundle). Having considered all seven grounds of appeal, the appeal panel decided to dismiss it.

78. In particular, the appeal panel found that the claimant's actions were "*at a level of such seriousness that it constitutes gross misconduct*".

79. In relation to ground 2 of the appeal (*being treated less favourably than others*), the appeal panel stated that it had "*treated [the] appeal on its own merits. We have not given consideration in relation to this point as each case would have been dealt with on the same basis*".

80. The appeal panel was satisfied that there was no political element in the decision to dismiss the claimant. The appeal panel said that they were not convinced that the claimant had truly accepted the seriousness of her actions and the impact they had.

81. The panel decided to uphold the decision to dismiss the claimant.

The Law

Direct Discrimination because of political belief

82. Under s13(1) of the Equality Act 2010 ("EqA") "*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*". Under s 23(1) EqA, when a comparison is made, there must be no material difference between the circumstances relating to each case.

83. One of the protected characteristics covered by the Equality Act 2010 is '*religion or belief*'. The protected belief is defined in s.10 EqA, which states:

> "***10 Religion or belief***
> *(1) Religion means any religion and a reference to religion includes a reference to a lack of religion.*
> *(2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.*
> *(3) In relation to the protected characteristic of religion or belief—*
> *(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;*
> *(b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief."*

84. In ***Grainger plc and others v Nicholson*** [2010] ICR 360 the EAT held that, to qualify for protection as a "philosophical belief", a belief must be:
    (i) genuinely held;
    (ii) must be a belief and not an opinion or viewpoint based on the present state of information available;
    (iii) must be a belief as to a weighty or substantial aspect of human life and behaviour;
    (iv) must attain a certain level of cogency, seriousness, cohesion and importance; and
    (v) must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others ("the Grainger test")

85. In **Grainger plc and ors v Nicholson** Burton J said: "*As appears from the passage in Hansard, the Attorney General suggested that "support of a political party" might not meet the description of a philosophical belief. That must surely be so, but that does not mean that a belief in a political philosophy or doctrine would not qualify. [ ]. However, belief in the political philosophies of Socialism, Marxism, Communism or free-market Capitalism might qualify. There is nothing to my mind in the make-up of a philosophical belief – particularly against the background of Article 14 of the EHCR referred to above – which would disqualify a belief based on a political philosophy*".

86. In ***Olivier v Department for Work and Pensions ET Case No.1701407/13*** an employment tribunal held that the claimant's belief in democratic Socialism, connected to his involvement with the Labour Party, amounted to a philosophical belief for the purposes of S.10 EqA.

87. In ***General Municipal and Boilermakers Union v Henderson 2015 IRLR 451, EAT***, an employment tribunal held that left-wing democratic Socialism was a protected philosophical belief.

88. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of the protected characteristic. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as she was. (***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285***).

89. Decisions are frequently reached for more than one reason. Provided the protected characteristic or, in a victimisation claim, the protected act, had a significant influence on the outcome, discrimination is made out. (***Nagarajan v London Regional Transport [1999] IRLR 572, HL)***

90. The law recognises that very little discrimination today is overt or even deliberate. Because direct evidence of discrimination is rare, it is often necessary to infer discrimination from all the material facts.

91. Under s136 EqA, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision.

92. Guidelines on the burden of proof were set out by the Court of Appeal in ***Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258***. Once the burden of proof has shifted, it is then for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

93. The Court of Appeal in ***Madarassy v Nomura International plc [2007] ICR 867***, a case brought under the then Sex Discrimination Act 1975, stated:
"The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

94. A false explanation for the less favourable treatment added to a difference in treatment and a difference in [a protected characteristic] can constitute the 'something more' required to shift the burden of proof. (***The Solicitors Regulation Authority v Mitchell UKEAT/0497/12.***)

95. The burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another. (***Hewage v Grampian Health Board [2012] IRLR 870, SC.***)

Unfair dismissal

96. The law relating to unfair dismissal is set out in S.98 of the Employment Rights Act 1996 (ERA).
"*(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
(a) The reason (or, if more than one, the principal reason) for the dismissal; and

(b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it –
…….
(b) Relates to the conduct of the employee;"

97. It is for the employer to prove the asserted reason for dismissal. If it fails to do so, the dismissal will be unfair. A reason for dismissal is "*is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*." (***Abernethy v Mott, Hay & Anderson [1974] ICR 323***).

98. If the employer shows that the reason for the dismissal is a potentially fair reason under section 98(1), the tribunal must then consider the question of fairness, by reference to the matters set out in section 98(4) ERA which states:
"*Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) *shall be determined in accordance with equity and the substantial merits of the case*."

99. Procedural fairness is an integral part of the reasonableness test in section 98(4) of ERA.

100. In deciding whether the adopted procedure was fair or unfair the tribunal must not fall into the error of substitution. The question is not whether the tribunal or another employer would have adopted a different and, what the tribunal might consider a fairer procedure, but whether the procedure adopted by the respondent "*lay within the range of conduct which a reasonable employer could have adopted*" (***Williams v Compair Maxam Ltd [1982] ICR 156***).

101. Just because there is misconduct which could justify a dismissal does not mean that the tribunal is bound to find that this is indeed the true reason for the employer's decision to dismiss. If the employee adduces some evidence casting doubt on the employer's advanced reason, the employer will have to satisfy the tribunal that its advanced reason was in fact the genuine reason relied on at the time of dismissal (***Associated Society of Locomotive Engineers and Firemen v Brady 2006 IRLR 576, EAT***).

102. In a misconduct case, where it has been established that the reason for dismissal was the employee's conduct, the guidance provided by the EAT in ***British Home Stores v Burchell [1978] IRLR 379*** apply. The three elements of the so-called ***Burchell test*** are:

a. Did the employer have a genuine belief that the employee was guilty of misconduct?
b. Did the employer have reasonable grounds for that belief?
c. Did the employer carry out a reasonable investigation in all the circumstances?

103. The relevant conduct could be outside the course of the employee's employment "*so long as in some respect or other it affects the employee, or could be thought likely to affect the employee, when he is doing his work*." (see ***H Singh v London Bus Country Services Ltd [1976] IRLR 176)***. "Conduct" within the meaning of s. 98(2)(b) ERA means "*actings of such a nature, whether done in the course of employment or outwith it, that reflect in some way upon the employer-employee relationship*" (***Thomson v Alloa Motor Company Ltd*** [1983] IRLR 403)

104. The tribunal must then determine whether the employer's decision to dismiss was within the range of reasonable responses which a reasonable employer could come to in the circumstances. It means that the tribunal must review the employer's decision to determine whether it falls within the range of reasonable responses, rather than to decide what decision it would have come to in the circumstances of the case.

105. If the dismissal falls within the range the dismissal is fair: if the dismissal falls outside the range - it is unfair. Further, in looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the tribunal's view, have been appropriate, but rather whether dismissal was within the range of reasonable responses that an employer could reasonably come to in the circumstances. The tribunal must not substitute its view for that of the reasonable employer. (***Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563***).

106. When the employee is dismissed for a reason of his conduct, the "range of reasonable responses" tests applies both to the decision to dismiss and to the procedure by which that decision was reached. (***HSBC Bank plc v. Madden 2000 ICR 1283 CA***). However, the correct approach is not to consider these as two separate questions, but as relevant considerations the tribunal must have regard to in answering the single question posed by section 98 (4) of ERA (***USDAW v Burns EAT 0557/12***).

107. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the employer, the second and third stages of the ***Burchell*** test are neutral as to burden of proof and the onus is not on the respondent (***Boys and Girls Welfare Society v McDonald [1996] IRLR129, [1997] ICR 693***).

108. If the employee is dismissed for gross misconduct, in answering the question posed by section 98(4) of ERA the tribunal must also consider whether it was reasonable for the employer to consider the employee's

conduct as gross misconduct (***Eastland Homes Partnership Ltd v Cunningham ETA 0272/13***).

109. In doing so, the tribunal must have regard that "*gross misconduct is not a fixed concept, capable of precise definition. It will depend on the circumstances*" (see ***Sandwell & West Birmingham Hospitals NHS Trust v Westwood*** UKEAT/0032/09/LA at para 57).

110. Even if the tribunal is satisfied that it was reasonable for the employer to characterise the employee's conduct as gross misconduct, it must still consider whether in all the circumstances it was within the range of reasonable responses for the employer to dismiss the employee for that gross misconduct (***Burdett v Aviva Employment Services Ltd EAT 0439/13***)

111. In assessing the fairness of the decision to dismiss, disparity in treatment is a relevant factor, however, the circumstances of the other cases must be "*truly similar, or sufficiently similar, to afford an adequate basis for the argument*"…. "*The emphasis in [s.98(4) EAR] is upon the particular circumstances of the individual employee's case*", and the "*tariff approach*" is not appropriate (see ***Hadjioannou v Coral Casinos Ltd*** [1981] IRLR 352 paragraph 25).

112. Where there are problems with the disciplinary hearing itself, those can in some circumstances be remedied by the appeal, even if the appeal is not a complete rehearing, however the procedure must be fair overall (***Taylor v OCS Group Limited [2006] IRLR 613***).

113. In reaching their decision, tribunals must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. However, a failure by any person to follow a provision of the Code does not in itself render him liable to any proceedings.

Discussion and Conclusions

114. The tribunal has reached its decision unanimously.

Direct Discrimination because of political belief

115. The claimant claims she was treated less favourably than others because of her political belief in left wing politics and Socialism. She alleges that the less favourable treatment was:

i) The respondent treating the claimant's acts of:
- *a) disobeying Spain Covid rules*
- *b) not disclosing at the earliest opportunity:*

1. details of the incident
2. her arrest and appearance before the Spanish Court,
3. contact from a journalist from Daily Mail

c) ignoring instructions not to discuss the matter further with the press.

as acts of misconduct;

ii) the claimant being subjected to a disciplinary for those matters;
iii) the claimant's dismissal;
iv) the respondent refusing to apply a lesser sanction; and
v) the appeal panel refusing to consider the evidence of the claimant of more senior members of staff who had a much greater impact on company reputation were not disciplined or dismissed.

116. For the purposes of her discrimination claim the claimant relies on Ms Linda Perks as an actual comparator. Mr Powlesland confirmed at the start of the hearing that it was the sole basis upon which the claimant's direct discrimination claim was being advanced.

117. The respondent accepted that, in principle, a belief in left wing politics and socialism could be a protected belief within the meaning of s.10 EqA. However, the respondent submits that on the true analysis, the claimant's case is based on the contention, which the respondent denies, that the decision to dismiss her was influenced by the fact that she supported Jeremy Corbyn and his leadership of the British Labour Party. It contends that support for a particular leader or faction within a political party does not qualify for protection under section 10 EqA.

118. Dealing with this point first we accept that a belief in left wing politics and Socialism is a protected belief (as a philosophical belief) within the meaning of s10 EqA. However, this is different from showing support to a political party or a leader of a political party or being aligned with particular policies of a political party or a leader.

119. We draw this distinction because, in our view, Socialism and left-wing politics in general are based on philosophical ideas and doctrines, which attain the necessary level of cogency, seriousness, cohesion and importance to meet the the Grainger test. Where, on the other hand, support of a political party or a leader is based on individual preferences of that party's or the leader's policies and actions of the day, and therefore is a "*viewpoint based on the present state of information available*" (see paragraph 84 (ii) above). This, in our judgment, insufficient to attain the necessary level of cogency, seriousness, cohesion and importance to meet the threshold of philosophical belief protected under the statute.

120. We accept that the claimant holds a belief in left wing politics and Socialism. That was her evidence, and it was not challenged by the respondent.

121. However, the claimant accepted in her evidence that anyone involved in the trade union movement would also be "*anything but left*

wing" because of the nature of the work involved. Her evidence was that working for a trade union by the very nature makes you a "*socialist*" and the difference lies in individual policy preferences within that left wing-political spectrum. These preferences are reflected in individual's support of a particular political party, or a political leader within the party, or of a set of policies and actions of a political party. She told the tribunal about such groups as "momentum" on the left of the Labour Party and "progressives" – on the right.

122. Ms Perks, being a former Unison Regional Secretary and Labour Councillor in the Royal Borough of Greenwich, on the claimant's evidence, would also "by the very nature of her work" be a believer in Socialism and left-wing politics, albeit, on the claimant's case, more on the right of the Labour party. It is, however, not clear on what basis the claimant places Ms Perks on the right of herself.

123. The claimant admitted that she did not work with Ms Perks personally and had no personal knowledge of her political views. It appears the claimant's assertion that Ms Perks is "on the right of the party" comes from Ms Perks supporting Mr Prentis as a party candidate. The claimant relied on a blogpost (page 346 of the bundle), but that document contains no reference to Ms Perks or indeed Mr Prentis, and it is simply impossible from reading it to say what Ms Perks political beliefs are. In short, the claimant's case falls far short to establish that Ms Perks political views are materially different to the claimant's.

124. In any event, on the claimant's case, both the claimant and Ms Perks, as members of the trade union movement, share the protected belief, that is the belief in left-wing politics and Socialism. Therefore, any less favourable treatment by the respondent of the claimant as compared to the treatment of Ms Perks, cannot be less favourable treatment because of the claimant's protected characteristic.

125. Further, having considered evidence of the circumstances of Ms. Perks' disciplinary process and the sanction applied to her, we find that there are material differences between the two cases.

126. We say that because Ms Perks' case involved very different circumstances of breaching Unison's campaigning rules. It was dealt with by a disciplinary panel composed of members of the NEC, which was a significantly different body to the respondent's disciplinary panel dealing with the claimant's claim. Unlike the claimant, Ms Perks herself had brought matters relating to her misconduct to UNISON's attention promptly. She had accepted full responsibility for her misconduct and had offered a heartfelt apology. She had a very long history of unblemished service.

127. We then proceeded to deal with the claimant's compliant of direct discrimination by considering the reason why the Responded acted in that way and whether that was because of the claimant's political belief.

128. Having analysed each individual allegations, we then stepped back and looked at the entire picture to consider whether the alleged acts and omissions taken together amount to direct discrimination because of the claimant's political belief.

129. We also considered the burden of proof principles under s.136 EqA. However, we did not consider it necessary to apply the burden of proof provisions in this case. The evidence was such that we felt able to make positive findings without going through that exercise.

130. Turning to our conclusions on the direct discrimination claim.

131. With respect to the first allegation of treating C acts of:

a. disobeying Spain Covid rules
b. not disclosing at the earliest opportunity:
    i. details of the incident
    ii. her arrest and appearance before the Spanish Court,
    iii. contact from a journalist from Daily Mail
c. ignoring instructions not to discuss the matter further with the press.

as acts of misconduct.

132. Further to our finding that Ms Perks is not a relevant comparator because, on the balance of probabilities we find that she shares the claimant's protected belief, we also find that Ms Perks cannot be a sensible comparator for this specific allegation, as she was not involved in any of the above matters, and we heard no evidence of any analogous events in her disciplinary process. In any event, it appears that her actions were also treated by the respondent as acts of misconduct, and she was disciplined for them.

133. Furthermore, we see no connection whatsoever between the claimant's political belief and the respondent treating these acts of the claimant as acts of misconduct. We find that the sole reason the respondent treating them as acts of misconduct was because it held a genuine belief based on the evidence available to it that these acts amount to misconduct by the claimant. Whether that belief was held on reasonable grounds will be discussed later in our judgment when we turn to deal with the claimant's complaint of unfair dismissal.

134. In short, we find that the claimant was not treated less favourably than Ms Perks in the respondent treating these acts of the claimant as misconduct and the claimant's political belief played no part in the respondent's decision to treat them as such.

135. For the same reasons we have come to the same conclusion with respect to the second allegation of less favourable treatment of "subjecting the claimant to disciplinary process".

136. Before turning to allegations (iii) and (iv), which to a great extent overlap, and therefore we shall deal with them together, we shall briefly

deal with the fifth allegation of "*the appeal panel refusing to consider evidence of other senior members who had a much greater impact on company reputation were not disciplined or dismissed"*.

137. We heard no evidence whether in the case of Ms Perks the disciplinary panel considered such evidence in contrast with the claimant's appeal. However, in any event, we are satisfied that the claimant's political belief played no part in the appeal panel decision not to consider such evidence.

138. We find that the appeal panel decided that such evidence was not relevant because they considered that each case needed to be treated on its own merits. Whether that was a reasonable position to take in so far as it applies to the overall fairness of the process is a different issue, and we will deal with it later in the judgment. For the present purposes, however, it is sufficient to say that we find that the appeal panel decision not to engage on that point was not motivated in any way by the claimant's political belief. The claimant failed to adduce any credible evidence for the tribunal to infer that the claimant's political belief in any way influenced the appeal panel decision not to consider other cases. It is also notable that the claimant did not argue at her appeal hearing that she was being treated less favourably because of her political belief.

139. Now, turning to the key allegations that the decision to dismiss and not to apply a lesser sanction was because of the claimant's political belief. As explained above, we find that Ms Perks is not a valid comparator.

140. Further, even if Ms Perks' case were to be compared with that of the claimant, we are satisfied for the reasons stated above (see paragraph 126) that her case and was materially different to the claimant's. Therefore, we find that the claimant's dismissal and refusal to apply a lesser sanction, was not a less favourable treatment of the claimant within the meaning of s.13 EqA.

141. We, however, decided that we must also consider whether the claimant's dismissal could be because of her political belief without using any comparator.

142. The claimant admitted that she had no evidence of that and only believed that her left wing views motivated the respondent to dismiss her. She suggested that the choice of Ms Ferncombe as the disciplining officer was somehow arranged or influenced by people in the Labour party who wanted the claimant to be dismissed, and Ms Ferncombe was instructed to do so. We reject this.

143. There was simply not a shred of credible evidence of any sort from which we could reasonably conclude that there was any such collusion or improper influence or motives.

144. This allegation was made by the claimant for the first time in cross-examination. It was not something she raised at the appeal hearing, it was

not pleaded in her Particulars of Claim, it was not in her witness statement, it was not even put to Ms Ferncombe in cross-examination.

145. In making that allegation during cross-examination, the claimant admitted that she had nothing to substantiate it, other than that being how she felt.

146. On the other hand, the respondent's evidence as to why it decided to dismiss the claimant and not to apply a lesser sanction were clear and credible and supported by contemporaneous documents, including disciplinary and appeal meetings notes, from which the tribunal could readily deduce the thought process of Ms Ferncombe and the appeal panel. The documentary records were consistent with the respondents' witnesses' evidence to the tribunal, which we find credible and clear.

147. We accept Ms Ferncombe evidence that she did not know the claimant before the disciplinary matter and had no knowledge of her political beliefs. It was not challenged by the claimant in cross-examination. Ms Ferncombe in her evidence also said that she was a member of the Labour Party for 30 years and has supported every leader of the party, including Jeremy Corbyn. We find no reason not to believe her.

148. Whether the decision to dismiss was fair or unfair is a separate question, which we will answer later. However, we find that the respondent's decision to dismiss the claimant and not to apply a lesser sanction was not in any way connected to or motivated by the claimant's political belief.

149. Stepping back and looking at the entire picture, we find that the respondent did not treat the claimant less favourably because of her political belief. We find that the claimant's political belief played no part whatsoever in the way she was treated by the respondent.

150. In reaching this conclusion we took into consideration that it is possible for a person unconsciously to discriminate against the other person. There might be circumstance when a person may have preconceptions, beliefs or prejudices they themselves might not realise motivate their behaviour. However, on the evidence in front of us, we find that the reasons for the actions of Ms Ferncombe and the appeal panel that the Claimant complains about, were not in any way connected to or motivated by the claimant's political belief.

151. The respondent's witnesses gave to the tribunal their explanations for the actions in questions. We find their explanations honest and logically sound. The claimant's evidence on this point was no more than a speculative suggestion not grounded on any facts and not supported by any credible evidence whatsoever from which an inference of possible discriminatory motive could be drawn without such finding being perverse.

152. It follows, that the claimant discrimination claim fails and is dismissed.

Unfair Dismissal

153. The claimant accepted that the reason for her dismissal was related to her conduct. Therefore, the sole question for the tribunal was the fairness or otherwise of her dismissal under s.98(4) ERA.

Burchell test

Did the respondent have genuine belief that the claimant was guilty of misconduct?

154. In her Grounds of Claim the claimant contended that the respondent did not have a genuine belief of misconduct based on reasonable grounds because:

> *i- Allegations one was not as act of misconduct as this occurred outside of the Claimant's employment whilst she was on holiday abroad.*
>
> *ii- The Claimant was under no obligation to disclose her arrest or appearance before a Spanish court to the employer as this was not something she was obligated to disclose.*
>
> *iii- 23 March 2020 was the first opportunity the Claimant would have been able to discuss the matter with the Respondent in any event which she did.*
>
> *iv The dismissal was motivated by political factors.*

155. We find that the respondent did have genuine belief in the claimant misconduct. Ms Ferncombe was clear in her evidence why she thought the claimant was guilty of misconduct. It was not challenged in cross-examination. The claimant in her evidence did not suggest that Ms Ferncombe belief was not genuine.

156. The fact that the misconduct occurred outside the employment context and in another country does not mean it should be ignored. Ms Ferncombe concluded, and we find it was a reasonable conclusion for her to make, that given the circumstances of the case and the claimant's role in the respondent's organisation, the incident had caused a sufficient impact on the employer-employee relationship for it to be treated as a conduct issue. The other three allegations were related to the conduct which was even more closely and directly linked to the claimant's employment.

157. Turning to the allegation (iii), the claimant did discuss the matter with the respondent on 23 March 2020, but only after the respondent had learned about the incident after being contacted be a journalist, and Ms Leigh then telephoned the claimant. It cannot be sensibly suggested that it was the first opportunity for the claimant to discuss the matter with the

respondent, especially when earlier on the same day Ms Leigh had spoken with the claimant and had asked her about holidays, and the claimant had chosen not to reveal the incident.

158. We have already dealt with the allegation that the claimant's dismissal was motivated by her political belief in disposing her discrimination claim, and there is no need to repeat our findings and conclusions here.

Did the respondent have reasonable grounds for that belief?

159. The claimant in her Grounds of Claim contends that the respondent did not have reasonable grounds because:

> i- *The incident of breaching Covid rules in Tenerife occurred whilst the Claimant was on annual leave in non-work time and would not be covered by any relevant policy.*
>
> *ii The Respondent did not identify any policy which applied to the Claimant's conduct whilst on holiday outside of work.*
>
> *iii- The Respondent did not provide evidence of any policy obligating the Claimant to inform the Respondent of any arrest or appearance before a court.*
>
> *iv- The Respondent had evidence before it that the Claimant's manager had not directed her to avoid talking to the media on 23 March 2020. Rather, the conversation implied that the media would be contacted after she had consulted with the Unison media team. The management instruction to not engage with journalists or the media was conveyed to her on 1pm on 24 March 2020 after she had spoken to the journalist on the Monday. The Claimant did not engage with journalists or the media after receiving the instructions from Liz Chinchen.*
>
> *v- The Respondent had before it evidence from the Claimant that the social media video was not taken or circulated by her, and she had not divulged her identity to the media.*

160. Mr Powlesland in cross-examining the respondent's witnesses and in his final submissions to the tribunal placed a great deal of emphasis on the precise labelling of each allegation of misconduct and cross-referencing them to the misconduct and gross misconduct examples in the respondent's disciplinary policy.

161. He argued that because the respondent did not have a clear policy requiring the claimant to disclose her arrest in Spain, her not doing so, therefore, could not be regarded as an act of gross misconduct. Mr Powlesland draw the comparison with the conduct rules applicable to barristers.

162. We do not accept that contention. Considering the circumstances of the incident in Spain, the claimant's role in the respondent's organisation and her public profile, in our judgment, the respondent had

reasonable grounds to consider that the claimant not voluntarily disclosing the incident was misconduct.

163. The fact that the respondent did not have a specific policy on disclosing misconduct outside work does not mean that it could not have reasonably considered that in those circumstance the non-disclosure was an act of misconduct. Employers' disciplinary policies are not meant to be akin to statutes with elaborate drafting and exhaustive list of possible acts and omissions falling within the qualification of misconduct. They are also not to be measured by the conduct rules for barristers and other regulated professions, which for obvious reasons contain a far greater detail. The respondent's disciplinary policy clearly states that the examples of misconduct and of gross misconduct are just that – examples, and they are not meant to be exhaustive lists.

164. In our judgment, the respondent had reasonable grounds to consider that the claimant was guilty of misconduct in relation to all three original allegations.

165. The evidence spoke for themselves. The respondent saw the video footage showing the claimant disobeying the hotel staff, and then the police orders, being dragged out the swimming pool by a police officer, handcuffed and taken away. The court records show that the reason for the police actions was the enforcement of the Spanish lockdown rules breached by the claimant.

166. The claimant admitted being doorstepped by a Mail Online journalist and not telling the respondent about this until confronted with that information by her manager. Given the circumstances of the case, we find that the respondent had reasonable grounds to believe that withholding that information was an act of misconduct.

167. As Ms Chinchen put it in her investigation interview: "*The pivotal point is the door stepping. Everything up to then is perhaps understandable and at least partially forgivable, but if JR had told someone after the Mail turned up at her home we would have been ahead of the story, better prepared, able to respond in time and not on the back foot*".

168. With respect to the fifth challenge in the Grounds of Claim, we do not see how the fact that the claimant did not film herself swimming in the pool and did not put the video on the internet herself could be said to the reason why the respondent could not have had reasonable grounds to believe that the claimant was guilty of misconduct.

169. We also find that the respondent had reasonable grounds to believe that the claimant's conduct outside work has brought the respondent into disrepute (the added fourth allegation).

170. It was clear that the publicity generated by the claimant's conduct was casting negative light on the respondent, especially in the circumstances where the respondent's efforts were directed at making

members of the public to abide by the Covid restrictions to protect its front-line members.

171. The claimant's subsequent conduct of continuing to engage with the media and trying to put her side of the story only fuelled the negative coverage of the respondent. The claimant herself admitted at the appeal hearing that her action of contacting the Sun "was stupid".

172. We reject Mr Powlesland's submission that because the same incident could have received no publicity but for the misfortune of someone filming it and placing on the internet, and the claimant being recognised and the footage passed to the media, "*Tribunals should ensure that people are not forced to lose their jobs on the chance outcome of an incident an employee is involved in going viral*".

173. The respondent faced the situation as it found it, and in those circumstances, it had all reasonable grounds to decide that the claimant's conduct has brought it into disrepute, and in doing so there was no need for the respondent to consider what would have happened to its reputation if the video had not gone viral on the internet.

174. Finally, it was clearly established that the claimant had been told by her manager, Mr Jenkinson, and Ms Chinchen not to discuss the incident with anyone. The claimant accepted that on cross-examination. She ignored the instructions and continued to engage with the press.

175. In those circumstances, the respondent's belief that the claimant deliberately disobeyed their lawful and reasonable instructions was self-evident.

Was it reasonable for the respondent to consider the claimant's conduct as gross misconduct?

176. Mr Powlesland submits that because the respondent did not tell the claimant under which specific example of gross misconduct in the respondent's disciplinary policy each of the four allegations of misconduct fell the process was unfair.

177. We disagree. Having made her findings in relation each of the four disciplinary charges against the claimant, Ms Ferncombe concluded that they amounted to gross misconduct. In her outcome letter to the claimant, she referred to the definition of gross misconduct in the respondent's disciplinary procedure - "*misconduct serious enough to destroy the employment contract between UNISON and the employee which makes further working relationships and trust impossible*". She went on to point out examples of gross misconduct as "*wilful misconduct or disobedience of lawful and reasonable orders*" and "*serious negligence which causes unacceptable loss, damage or injury*".

178. In our judgment there was no need for Ms Ferncombe to "link" each of the claimant's misconduct to a particular example of gross misconduct.

The list is a mere guide to types of conduct that could lead to summary dismissal. It is not exhaustive.

179. Furthermore, the claimant was not dismissed summarily, but with three months' pay in lieu of notice. Therefore, the question for the tribunal is not whether, looking objectively, the claimant was in fundamental breach of her contract of employment entitling the respondent to dismiss her without notice, but whether in the circumstance of the case it was reasonable or unreasonable for the respondent to treat the claimant's conduct as a sufficient reason for dismissing her.

180. Mr Ferncombe, having analysed all four allegations, gave her overall conclusion that the claimant's conduct, taken as a whole, was serious enough to constitute gross misconduct. In doing so, Ms Ferncombe considered the claimant's mitigation points and provided her reasons for coming to that conclusion.

181. In cross-examining Ms Ferncombe, Mr Powlesland asked her to "link" each of the allegations to a specific example of gross misconduct in the policy and explain why she considered that a particular example applied to a particular allegation.

182. We accept that in answering Mr Powlesland's questions, Mr Ferncombe stretched the meaning of some of the examples. In particular, by suggesting that the claimant's disobeying the hotel staff's orders to leave the swimming pool fell within the example of "*disobedience of lawful and reasonable orders*". We find that, read objectively, the example refers to lawful and reasonable orders of the employer or a party acting on behalf of the employer, and cannot be taken as meaning orders of anyone who might have lawful grounds to give such orders, including in the circumstances not related to the employee's employment.

183. This, however, does not mean that Ms Ferncombe's overall conclusion that the claimant was guilty of serious misconduct, considering the claimant's conduct as a whole, fell outside the range of reasonable responses.

184. We are equally unpersuaded by Mr Powlesland argument that because the respondent did not quantify "unacceptable loss, damage or injury" caused by the claimant's conduct, it could not have reasonably concluded that the claimant was guilty of gross misconduct.

185. It was not a matter of the respondent seeking to recover financial losses from the claimant. It was apparent that the claimant's action caused negative publicity and damage to the respondent's reputation, especially in the circumstances where the claimant's conduct went against the respondent's efforts (which the claimant herself actively promoted) to make the public to abide by the newly introduced Covid restrictions.

186. Mr Powlesland's further submits that the claimant's telling the respondent about the incident and the doorstepping by Mail Online earlier than she had done would have made no difference, because, he argues,

in all likelihood the story would have still been run. He also argues that the respondent has failed to substantiate what it would have done had it been told by the claimant earlier, and therefore it could not have reasonably concluded that the claimant's conduct had caused "unacceptable loss, damage or injury".

187. We reject this submission. In our judgment, in those circumstances, it was reasonable for the respondent to conclude that given the claimant's role and public profile and the nature of the misconduct, she was under a duty to disclose these matters to the respondent and her not doing so until confronted by her manager was a serious lack of judgment, which coupled, with her subsequent conduct has caused the respondent unacceptable reputational damage.

188. Ms Ferncombe had evidence from Ms Chinchen that the claimant not telling the respondent earlier had put the respondent on "the back foot" and created serious difficulties with controlling the events.

189. As Ms Tether pointed out in her closing submissions, relying on the EAT decision in ***Linfood Cash and Carry Ltd v Thomson*** [1989] ICR 518 "*it is for the employer to make an assessment of the credibility of witnesses before it and not for the tribunal to make its own assessment of their credibility*" and the question for the tribunal is "*whether an employer acting reasonably and fairly in the circumstances could properly have accepted the facts and opinions which it in fact accepted*". We accept that.

190. We find it was reasonable for Ms Ferncombe to accept and rely on Ms Chinchen's assessment of the situation without having to embark on a speculative exercise of what would have happened if the claimant had told the respondent sooner.

191. We also reject Mr Powlesland's submission that there was an impermissible "overlap" between the third allegation of "your conduct outside work has brought the organisation into disrepute" and the other three allegations, and that the respondent has failed to particularise under which example of gross misconduct that allegation falls.

192. The allegation 3 deals with the issue of the consequences of the claimant's conduct on the respondent's reputation. For the reasons stated above, we find that it was reasonable for the respondent to conclude that the claimant's conduct has seriously damaged the respondent's reputation, and there was no need to stipulate under which particular example of gross misconduct the claimant's conduct fell.

193. Finally, with respect to the fourth allegation of ignoring the management instructions not to discuss the matter further with the press, Mr Powlesland submits that the claimant's interests and the interest of the respondent "might not be aligned", with the respondent wanting the media storm to blow over as soon as possible, and the claimant not wanting to be portrayed falsely and wanting to give a more detailed and nuanced view of what had happened.

194. He argues that the respondent should have given weight to the "competing interest". He further argues that the respondent had no evidence from which to conclude that the claimant continuing to talk to the media elongated the story. Finally, he draws the tribunal's attention to the fact that the claimant had been told by the respondent that a draft media statement would be shared with her on 23 March 2020, but at the end the respondent released it without discussing its content with the claimant.

195. We do not accept that because the respondent was put into the situation, and put into that situation by the claimant's misconduct, where it had to react quickly and issue a press release without having time to discuss it with the claimant first, the claimant was no longer bound by the respondent's clear, unequivocal and repeated instructions not to talk to the press.

196. The claimant ignored the respondent's instructions. If, in doing so, she considered that because of the "competing interest" she personally would be better off by engaging with the press, even if that was against the respondent's instructions and could make the situation worse for the respondent, that, of course, was her choice. However, having made that choice, the claimant cannot then complain that the respondent treated her actions of talking to the press as wilful disobedience of lawful and reasonable orders and a serious misconduct.

197. We do not accept Mr Powlesland's submission that the respondent had to show evidence that the claimant talking to the media had elongated the story. Ms Ferncombe had evidence from Ms Chinchen on the consequences the claimant's talking to the press had on the continuing media interest in the story. For the same reasons as stated in paragraphs 188-190 above, we find no reason why Mr Ferncombe should not have reasonably accepted Ms Chinchen opinion on that subject.

198. For the sake of completeness, we shall say that until Mr Powlesland cross-examining the respondent's witnesses, it was not the claimant's case that she did not understand what disciplinary charges were being laid against her, or why the respondent considered her conduct as serious enough to constitute gross misconduct.

199. The claimant was supported by a trade union representative throughout the process. She told the tribunal that she herself had experience in representing others in disciplinary hearings. She appealed her dismissal raising seven specific appeal grounds. The claimant's main challenge was that the sanction was too severe, not that Ms Ferncombe had wrongly concluded that her conduct was serious enough to amount to gross misconduct.

200. Neither in her appeal email, nor at the appeal hearing did she raise the issue of not understanding why she had been charged with gross misconduct or requested further explanations under what example of gross misconduct in the respondent's policy her conduct fell. In fact, at the appeal hearing the claimant herself acknowledged that her conduct was "*the breach of confidence even though it wasn't [her] intention*".

Did the respondent conduct a reasonable investigation?

201. We find that the respondent did conduct a reasonable investigation. We find that Ms Savage has done a thorough job in gathering all relevant facts, interviewing relevant witnesses, giving the claimant every opportunity to explain her case and answer all the questions she posed to the claimant, before arriving at her conclusion that there was a disciplinary case to answer, which was reasonable in the circumstances. Ms Savage produced a comprehensive report with her conclusion supported by detailed reasons, which was shared with the claimant well in advance of her disciplinary hearing.

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

202. Looking at the matter in the round, we find that, in the circumstances, it was well within the range of reasonable responses for Ms Ferncombe to conclude that the claimant was guilty of gross misconduct, for which dismissal could be an appropriate sanction.

203. Ms Ferncombe then proceeded to consider whether a lesser sanction could be applied and concluded for the reasons stated in her outcome letter to the claimant that a lesser sanction would not be appropriate. We find that it was within the range of reasonable responses for Ms Ferncombe to come to that conclusion.

204. Ms Ferncombe acknowledged the claimant's clean disciplinary record. She also took into account that the claimant showed some remorse, however noting that the claimant continued to defend her actions, including by denying that her conduct was connected with her employment.

205. Ms Ferncombe considered final written warning, possible demotion or transfer to other duties, but concluded that in the circumstances where the trust and confidence in the claimant had been lost it would not be appropriate. In our judgment, on the facts it was open for Ms Ferncombe to come to that conclusion.

Overall fairness of the process

206. Stepping back and looking at the entire disciplinary process we find that it was within the range of reasonable responses.

207. The claimant was given every opportunity to state her case and provide all relevant evidence and submissions. She fully availed herself to that.

208. The respondent acted in accordance with its disciplinary policy. The process was conducted with sufficient speed and diligence,

accommodating the claimant's and her chosen representatives' availability and requests.

209. The appeal process allowed the claimant to challenge the dismissal decision on any grounds chosen by the claimant. The appeal panel duly considered the claimant's seven grounds of appeal and decided to uphold the dismissal, which decision, in our judgment, was withing the range of reasonable responses.

210. It was made clear to the claimant that the appeal was not a complete re-hearing of her case and was limited to considering the specific grounds of appeal raised by the claimant. The claimant did not raise any issues with the procedure.

211. We also find that the appeal panel's response to the claimant's second ground of appeal of being treated less favourably than other staff was within the range of reasonable responses, because the circumstances of the purported comparator, Ms Emilie Oldknow, was materially different. Ms Oldknow disciplinary matter had been dealt with by the Labour Party and the incident in question had occurred before Ms Oldknow joined the respondent.

212. The claimant did not name any other comparators. She did not name Ms Perks as a comparator. She did not provide any further information to show that there was inconsistent treatment. In these circumstances it was reasonable for the appeal panel to conclude that each case should be treated on its own merits and there was no need for the appeal panel to open an investigation searching for possible similar disciplinary cases from the past, where the claimant did not even give any sensible pointers. That was not an issue she had raised at her disciplinary hearing or at the investigation stage.

213. The appeal panel also took into account the fact that the claimant had not been contacted before the press statement had been released (ground 5) but still decided that it was not sufficient reason for the claimant to disobey the instructions not to talk to the press.

214. The appeal panel accepted that the claimant's ground 4 (comments by Ms Chinchen about the claimant's media training should not have been considered as part of the disciplinary hearing) but found that these comments had not been considered or taken into account by the disciplining officer in making her findings and the decision.

215. We find that there was no inconsistency in treatment of the claimant. For the reasons explained above, we find that the circumstances of the disciplinary matters of Ms Perks and Ms Oldknow were materially different, and the claimant did not present any evidence of any case substantially similar to her own. Therefore, the respondent was entitled to treat the claimant's case on its own merits without seeking to compare it with other disciplinary cases.

216. We also find that the respondent's disciplinary procedure was in line with the ACAS Code on Disciplinary and Grievance Procedures.

Overall conclusion

217. Returning to the key question we need to answer, namely was the respondent's decision to dismiss the claimant in those circumstances fair or unfair, or using the statutory language - "*whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating [the claimant's conduct] as a sufficient reason for dismissing [her]".*

218. For the reasons stated above we find that the respondent did act reasonably in treating the claimant's conduct as a sufficient reason to dismiss her and therefore the dismissal was fair.

219. It follows, that the claimant's complaint of unfair dismissal fails and is dismissed.

Employment Judge P Klimov
London Central Region

Dated : 1 December 2021

Sent to the parties on:

01/12/2021

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For the Tribunals Office

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant (s) and respondent(s) in a case.