EMPLOYMENT TRIBUNALS

Claimant: Mrs J McColm

Respondent: Serco Limited

Heard at: Manchester **On:** 4 June 2018

Before: Employment Judge Humble

REPRESENTATION:

Claimant: In person
Respondent: Mr B Gil, Counsel

JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant was not unfairly dismissed.

2. The claim is dismissed.

REASONS

The Hearing

1. The hearing took place at Manchester Employment Tribunal on Monday 4 June 2018. The claimant represented herself and gave evidence on her own behalf. The respondent was represented by Mr Gil of Counsel. For the respondent, witness evidence was provided by Lucy Worthington, an Area Manager, Wayne Roberts, Senior Partnership Manager, Simon Dorset, Service User Operations Manager and the dismissing officer, and Sarah-Jane Taylor-Dayus, a director of the respondent who dealt with the appeal.

2. There was an agreed bundle of documents which ran to 439 pages. The claimant confirmed during the hearing that she had received the documents in the bundle, but she had also prepared her own bundle. The documents which were contained in her own bundle were either duplicates of those in the main bundle or were additional documents which related to remedy. Some of the documents in the

claimant's bundle were appended to the main bundle for ease of reference at pages 440-452.

3. The evidence and submissions were concluded on the afternoon of 4 June 2018 and judgment was reserved.

The Issues

4. The claim was for unfair dismissal. The issues were identified at the outset of the hearing as follows:

4.1 It was for the respondent to show that the dismissal was for a potentially fair reason under section 98(1) and (2) Employment Rights Act 1996 ("ERA 1996"). The potentially fair reason relied upon by the respondent was conduct.

4.2 If the respondent could show that the dismissal was for a potentially fair reason, the tribunal would go on to assess whether the respondent acted reasonably under section 98(4) ERA 1996 having particular regard to:

4.2.1 whether the respondent had a genuine belief in misconduct on reasonable grounds having conducted a reasonable investigation;

4.2.2 whether the respondent followed a fair procedure having regard to the ACAS Code of Practice; and

4.2.3 whether decision to dismiss was within the band of reasonable responses of a reasonable employer.

The Law

5. The tribunal applied the law at Section 98 of the Employment Rights Act 1996. By sub-section 98(1) ERA:

"*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 sub-section (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."

Then by sub-section (2):

"*A reason falls within this sub section if it:*

b) relates to the conduct of the employee…"

Then by sub-section (4):

"*Where the employer has fulfilled the requirements of sub-section (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."

6. In considering this alleged misconduct case, the tribunal applied the long-established guidance of the EAT in British Home Stores v Burchell [1980] ICR 303. Thus, firstly did the employer hold a genuine belief that the employee was guilty of an act of misconduct; secondly, did the employer have reasonable grounds upon which to sustain that belief and thirdly, at the final stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances.

7. The burden of proof in establishing a potentially fair reason within Section 98(1) and (2) rests on the respondent and there is no burden either way under Section 98 (4). Thus, as confirmed by the EAT in Sheffield Health and Social Care NHS Foundation Trust v Crabtree UK EAT/0331/09, this means that the Respondent only bears the burden of proof on the first limb of the Burchell guidance (which addresses the reason for dismissal) and does not do so on the second and third limbs where the burden is neutral.

8. The tribunal reminded itself that it must not substitute its own view for that of the employer as to what is the proper response on the facts which it finds (Iceland Frozen Foods Limited v Jones [1982] IRLR 439, EAT) as confirmed in Post Office v Foley/HSBC Bank v Madden [2000] IRLR 827, CA). It was held in the case of Iceland Frozen Foods that:

"*It is the function of the [employment tribunal] to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside the band it is unfair.*"

There may be occasions where one reasonable employer would dismiss, and others would not, the question is whether the dismissal is within the band of reasonable responses.

9. The band of reasonable responses test applies to the investigation and procedural requirements as well as to the substantive considerations see Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, CA, Ulsterbus Limited v Henderson [1989] IRLR251, NI CA.

10. The tribunal must take in to account whether the employer adopted a fair procedure when dismissing having regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures. If the tribunal hold that the respondent failed to adopt a fair procedure the dismissal must be unfair (Polkey v A E Deighton [1987] IRLR503, HL) and any issue relating to what would have happened with a fair procedure would be limited to an assessment of compensation (i.e. a Polkey reduction). The only exception to Polkey is where the employer could have reasonably concluded that it would have been utterly useless to have followed the normal procedure (it is not necessary for the employer to have actually applied his mind as to whether the normal procedure would be utterly useless, Duffy v Yeomans [1994] IRLR, CA).

11. On appeals, in Taylor v OCS Group Limited [2006] IRLR 613, the Court of Appeal stated:

"*What matters is not whether the internal appeal was technically a rehearing or a review but whether the disciplinary process as a whole was fair.*"

12. The tribunal also had regard to Thomson v Alloa Motor Company [1983] IRLR 403, EAT, which is authority for the principle that a reason relates to conduct if the actions of the employee are such that, whether they are done inside the course of employment or outside it, they reflect in some meaningful way on the employer-employee relationship and affect the employee's capacity to do his or her duties.

Findings of Fact

The tribunal made the following findings of fact on the balance of probabilities (the tribunal did not make findings upon all the evidence presented but made material findings of fact upon those matters relevant to the issues to be determined):

13. The respondent is a subsidiary of Serco Group plc. It operates contracts for the provision of accommodation and associated support services for asylum seekers. On 9 February 2015 the claimant commenced work for the respondent as a Housing Officer based in the Manchester region. The claimant's role for the respondent was to support asylum seekers in connection with their assigned accommodation. This involved ensuring the accommodation was safe and habitable, assisting them with the use of the accommodation and its services and appliances, and showing them how to access local facilities and support services.

14. When the claimant commenced employment with the respondent she was issued with policies and procedures which included a Code of Conduct Policy (342-423), a Social Media Policy (page 91-93), and disciplinary procedures (424-439).

15. On 22 June 2017 an employee of the respondent notified the respondent about concerns they had over posts which the claimant had apparently shared on Facebook. These posts were reproduced at pages 85-90 of the bundle. They were made during the period from 28 May 2017 to 6 June 2017 and the allegations can be summarised as follows:

15.1 The claimant shared a tweet, made on an unknown date, from a Colin Denby in response to a report that Muslims had allegedly demanded that locals should not walk dogs in public. The tweet stated, "*Yeah, right. Go and live in a Muslim country then you ungrateful gits*".

15.2 The claimant shared a comment apparently made by "Britain First", which was said by the respondent to be a far right organisation, and which stated, "*Try it, barbarians! We will fight you all the way*". This comment was apparently made in response to a posted picture which stated, "*Islam will dominate the world*".

15.3 On 28 May 2017 the claimant shared a video from a Paul Golding, who was said by the respondent to be the leader of Britain First and a former BNP councillor, which stated "*Shocking! Imagine if this was the other way around and a white man was screaming racial abuse!*". The tribunal did not have sight of the

video clip, but it was implied that it contained a video of a person of ethnic minority background who was apparently shouting racist abuse.

15.4 On 28 May 2017 the claimant shared a post she had received from a third party with a picture of military planes and aircraft, which was captioned, "*Hey Isis, look up in the sky*".

15.5 On 2 June 2017 the claimant shared a post, which it appeared she had received from Britain First, about an Islamic march in Leicester and which was entitled "*Islamic show of strength in Leicester!*" to which the claimant had made a comment, "*I don't take much notice of what I see and hear on the news but please, please tell me this is NOT England! I am not racist but this is just not the place I was born!*".

15.6 On 6 June 2017 the claimant shared a post from a third party who referred to him or herself as "Funny Cunt" and which stated, "*30 days in prison for kissing in public in Dubai…taking you clothes off on a mountain in Malaysia straight to jail…because you should respect other countries' cultures and beliefs…Come to the UK and burn our flag, piss on our beliefs, murder our soldiers, scrounge and scam our system, spread all your hatred towards us…and we won't do shit in case you pull out the racist card…it's fucked up! Like and share if you agree!*".

16. On 23 June 2017 the claimant was called to a meeting by Lucy Worthington at which she was informed that she was suspended because of inappropriate posts and sharing of posts on social media. The claimant responded, "*I can sometimes share things on Facebook that I don't agree with and some things that I share may be seen as racist. I never comment on things, I just sometimes share them*". The claimant initially denied that she used those exact words but conceded in cross examination that she had made a comment to that effect. Following the suspension and later that same day, the claimant telephoned the respondent and said that she believed her Facebook page had been "*hacked*" following the loss of her mobile telephone "*a couple of months ago*". She said that she should have changed her Facebook settings but did not think anything of it at the time. She offered this as an explanation for the posts which had been made or shared on her Facebook page.

17. On 5 July 2017 the claimant attended an investigation meeting with Mr Roberts. At that meeting the claimant said, by way of explanation for the posts on her Facebook account, that her account had been hacked following the loss of her mobile telephone in March 2017. She said that from around that time she started receiving posts from organisations such as Britain First. She admitted that she had taken no steps to change her Facebook settings to prevent that activity but denied that she had shared five out of six of the posts which she said must have been done by someone hacking her account. The claimant did admit sharing and commenting on one of the six posts, the video clip from 2 June 2017 in which she remarked "*please, please tell me this is NOT England!*".

18. By a letter dated 18 July 2017 the claimant was invited to a disciplinary hearing (page 104). The letter stated that the hearing was to discuss the claimant's conduct relating to allegations of inappropriate posts being shared on social media. The claimant was warned that the allegations were considered serious and could amount to gross misconduct.

19. The claimant's explanation at the disciplinary hearing was that, whilst she admitted commenting on one post, she denied the other five and suggested that her Facebook account had been hacked. She said that her Facebook account had been accessed from multiple locations, including in Syria. Mr Dorset adjourned the hearing to give the claimant an opportunity to gather and present evidence to the effect that her Facebook account had been hacked since this was, aside from with one post which she admitted, the explanation which she offered for the posts.

20. The hearing was reconvened on 18 August 2017. At that time the claimant presented some evidence of the activity on her Facebook account, but she did not produce any evidence in respect of her activity for the period between May and June 2017, which was the relevant period. She said that this information had been "deleted", with a suggestion that it had been deleted by a third party. At the reconvened hearing there was increased ambiguity as to the basis of the claimant's defence. At times she flatly denied making the posts, but in response to questioning she appeared to admit that she may have made them. For example, in respect of one question which was put to the claimant about the posts, she replied, "*Yes, probably I shared - they are anti-terrorist*" (page 124) and in respect of whether these posts were the sort of thing that a Housing Officer should share she responded, "*No, I was caught up with the aftermath of the bombing. I don't know what I am defending myself against…*" This was a reference to the terrorist bombing in Manchester which had taken place on 22 May 2017.

21. Mr Dorset gave some consideration to the matter and made the decision to dismiss. He formed the view that the claimant had shared the posts and made the comment accompanying the post of 2 June 2017, the latter being admitted. His rationale for reaching that conclusion was that, firstly the posts were on the claimant's Facebook page and there had been no attempt on her part to alter her password or settings after the date when she said that her phone was lost. Secondly, the post which the claimant admitted sharing was in keeping with the other posts which were made only a few days either side the admitted post. Thirdly, the claimant was in all other respects accessing and using her Facebook account during the relevant period. Fourthly, the claimant had admitted at the suspension stage that she shared things on Facebook "*that may be seen as racist.*" Given those points, Mr Dorset reasonably formed the view that the claimant had made all of the posts and he then turned his mind to the appropriate sanction. He decided that the claimant's employment should be terminated for gross misconduct since she had published or commented upon what he regarded as "*extremist right wing posts*" on Facebook and had associated herself with "*extremist groups*". His view was that this behaviour was not compatible with employment in the role of a Housing Officer with responsibility for supporting asylum seekers, many of whom were Muslim. He also formed the view that the claimant was not been truthful when she denied that she sent all the posts.

22. Mr Dorset therefore wrote to the claimant on 7 September 2017 advising her that her employment was terminated with immediate effect and giving her a right of appeal (pages 130-131). The dismissal was said to be for the sharing of "*inappropriate posts on your Facebook account, namely six posts from a right wing extremist organisation called Britain First.*" The dismissal was categorised as gross misconduct, but the claimant was nonetheless paid in lieu of notice.

23. On 8 September 2017 the claimant submitted an email to Scott Ross, who was originally assigned to the role of appeal officer, which outlined the basis of her

appeal (132-133). The claimant maintained in that letter that her Facebook account had been hacked. She also, however, apparently sought to justify the posts by saying, "*Only one post originated from Britain First (not 6). All shared posts were anti-terrorist and not intended against Muslims. The posts were sent six days after Manchester bombing (my home town) showing the outpour of grief felt not just by Mancunians but all over the world, and such sharing of posts I believe is quite common after such tragic events*". This appeared to be an attempt to explain posts which she claimed not to have made.

24. The claimant had in the meantime carried out some investigations of her own and established that her lost, or stolen, mobile telephone had been traced and was used in Braithwell, Rotherham, on 31 March 2017. The details of this were reproduced in the bundle, from pages 440 onwards and in particular 449-450. The claimant's position was that this was something which should have been investigated by Mr Dorset when she had first raised the lost telephone and the hacking explanation during the disciplinary stage. There was no evidence to show that her Facebook account was accessed between 28 May and 6 June 2017, or to support her account that her Facebook account was accessed from multiple locations including Syria.

25. At the appeal hearing the claimant's position was again somewhat inconsistent. She continued to maintain that her mobile telephone was stolen and initially said that she would not have made the posts, but later appeared to seek to justify them saying, in response to a question about the posts, "*I did not know they were there, these are Isis, Isis are not a race, my service users are fleeing from Isis*". She also said "*these should not be on my Facebook – this should be a warning not gross misconduct. Gross misconduct is fighting, dishonesty, stealing, I should have had an opportunity of a second chance*".

26. Mrs Taylor-Dayus said to the claimant that the mobile telephone was stolen in March, and for the period when the posts were made the claimant had not provided any evidence that posts were made on her Facebook site from that phone, which led her to the view that it was the claimant who had shared the posts. The claimant responded, "*If I have, it was because I was bombarded*". During cross examination the claimant explained she meant that she was bombarded by posts of this nature following the Manchester bombing. Her responses, both during the appeal hearing and in cross examination, suggested at best that the claimant could not say for certain whether or not she had shared the further posts. At the conclusion of the appeal hearing, Mrs Taylor-Dayus gave the claimant a further period of five days to submit evidence relating to the relevant period from her Facebook activity log, but the claimant did not submit any further evidence.

27. On 3 November 2017, Mrs Taylor-Dayus wrote to the claimant confirming that the decision to dismiss was upheld. Her view was that the misconduct did take place, a sufficient investigation had been carried out, and that the penalty imposed was appropriate.

Conclusions

28. The Tribunal was satisfied that the respondent had a genuine belief in the claimant's misconduct. There was a suggestion on the claimant's part at the appeal hearing and during evidence before the tribunal, that there may have been a

conspiracy on the part of one or more other employees to make inappropriate posts on her Facebook account perhaps with the aim of having her dismissed. However, there was no evidence to substantiate that suggestion and no indication as to whom this other employee might be. No other motive was apparent for the claimant's dismissal.

29. The tribunal was satisfied that the respondent followed a fair procedure. There were different managers at successive levels of seniority who dealt with the suspension, investigation, disciplinary, and appeal hearings. The claimant had a full opportunity to respond to the case and the allegations at four separate meetings. There were no specific complaints about procedural unfairness save that there was a suggestion by the claimant that she was not given an opportunity to have a colleague present at the appeal hearing. The tribunal preferred the evidence of Mrs Taylor-Dayus on this point who said that the claimant did have an opportunity to have a witness present, either a work colleague or a trade union representative; that was reflected in the correspondence and in the notes from the meeting. Accordingly, the tribunal was satisfied that a fair procedure was followed in line with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

30. As to the reasonableness of the investigation, there were two points with which the claimant took particular issue: the first was that the respondent did not investigate the IP addresses relating to the posts which were put on the claimant's Facebook site. However, the respondent was unable to investigate these for the relevant period since on the claimant's own evidence the posts for the periods May to June 2017 had been "deleted". The claimant was able to establish through her own investigations that someone had accessed her Facebook account on the mobile telephone, which she said was stolen, on 31 March 2017. This did not, however, establish whether her Facebook account had been accessed by a third party to make posts between 28 May and 6 June. The absence of the relevant records for that period did not amount to a failure in the respondent's investigation. The claimant was given a full opportunity to produce the evidence herself and she did so for an earlier period. A reasonable investigation did not require that the respondent carry out a forensic investigation of the claimant's Facebook account or appoint any external investigator to assess IP addresses in the manner suggested by the claimant. Secondly, the claimant said that the respondent should have approached service users to obtain their views upon whether they believed she was racist and whether she dealt with them in an even-handed manner. The respondent took a reasonable view that this was not relevant to the allegations before them. Having regard to the principles in Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, CA, the tribunal were satisfied that the respondent conducted a reasonable investigation.

31. The tribunal held that the respondent had reasonable grounds to conclude that the claimant made all the posts. The main factors which led the tribunal to this view were essentially the same factors weighed up by Mr Dorset: the claimant admitted making one of the comments which was consistent with those made a few days either side of that comment, which could be categorised as being anti-Islamic; her explanation in respect of the loss of her mobile telephone was not greatly relevant since she later appeared to concede that she may have sent the posts and there were inconsistencies in the claimant's version of events which led both the dismissing and appeal officers to the view that she was not been truthful in her

denial; and there was the concession which the claimant made at the suspension stage that she may have made posts which "*may be seen as racist*". The suggestion that someone was hacking her account and making posts in a similar vein to the one made by the claimant on 2 June was not convincing. In all the circumstances of the case, the tribunal held that the respondent reasonably took the view that the claimant did make the all the relevant posts between 28 May and 6 June 2017.

32. Having concluded that the respondent had a genuine belief in misconduct, and that it was a reasonably held view based upon a reasonable investigation, the tribunal was required to go on to assess whether the decision to dismiss was within the band of reasonable responses of a reasonable employer. In general terms an employee is entitled to hold opinions or political views which differ from those of his or her employer, even if the employer finds those views to be objectionable. That would not normally form any grounds for a dismissal. One exception to that general principle is where it impinges upon the claimant's work or, in line with Thomson v Alloa Motor Company [1983] IRLR 403, EAT, the actions of the employee are such that, whether they are done inside or outside the course of employment, they reflect in some meaningful way on the employer-employee relationship and affect the employee's capacity to do his or her duties. In this particular case, the respondent formed a reasonable view that it did impinge upon the claimant's work. She was engaged as a Housing Officer and required to provide support to asylum seekers, many of whom were Muslim. Her Facebook page had six posts which could be viewed as anti-Islamic. The claimant's Facebook page was open to the public at the point at which they were posted, and the claimant accepted that she was responsible for the settings on her Facebook page irrespective of whether or not her account had been accessed by someone else.

33. The respondent did take account of the claimant's previous work record, of which there was no criticism, but nevertheless formed the view that she ought to be dismissed. Mr Dorset explained that he believed the claimant's role was incompatible with the posts she had made on her Facebook account, particularly as it was something which could be accessed by service users many of whom were Muslim. He said that it put the service users "at risk", it was not explained whether he meant at risk of been treated less favourably by the claimant or simply at risk of viewing the posts but either way it was not an unreasonable view to take. The claimant appeared to accept, at the appeal stage at least, that her actions warranted a warning though not a dismissal. A different employer may have taken a similar view and issued a warning or final warning, but it is not for the tribunal to substitute its view for that of the employer. The tribunal held, having regard to Iceland Frozen Foods Limited v Jones [1982] IRLR 439, EAT, that the decision to dismiss fell within the band of reasonable responses.

34. Accordingly, the Tribunal finds that the decision to dismiss was not unfair. The claim is therefore dismissed.

35. As a footnote we should record that the claimant was genuinely upset by her dismissal and in particular by what she regarded as allegations of racism. She pointed out that members of her family are of non-white ethnic origin and that her granddaughter is of mixed race. She said that racism was very much against her principles and she was at pains to ask each of the respondent's witnesses whether they regarded her as racist. None of the respondent's witnesses did say that they regarded the claimant as racist; that was not the reason relied upon for her

dismissal. The reason relied upon for her dismissal was that she had made inappropriate anti-Islamic comments which could be accessed by members of the public and by service users. This was in breach of the respondent's social media and Code of Conduct policies and the views expressed by the claimant were not compatible with the work which she was employed to undertake. It was in that context that the decision to dismiss was taken and, having applied the relevant law, held to be fair by the tribunal.

Employment Judge Humble

Date 12 June 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
16 July 2018

FOR THE TRIBUNAL OFFICE

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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