EMPLOYMENT TRIBUNALS

Claimant: **Mrs Anna Hopkinson**

Respondent: **Embark Corporate Services Ltd**

Heard at: **Southampton** **On: 20, 21 22, 23 May 2019**

Before: **Employment Judge Dawson**

Representation
Claimant: Mr Dracass, counsel
Respondent: Ms Farris, counsel

JUDGMENT

1. The claimant's claim of unfair dismissal is well-founded.
2. The basic award is reduced by 40%
3. The compensatory award is reduced by 50%.

REASONS

1. This is a claim of unfair dismissal only.

2. The respondent admits that it dismissed the claimant and asserts that it did so by reason of the claimant's conduct, however, it also asserts a potentially fair reason for the dismissal, namely some other substantial reason under s98(1)(b) Employment Rights Act 1996.

   <u>The issues</u>

3. The parties had agreed a list of issues as follows

   <u>Unfair dismissal</u>

   1. Has the Respondent proved that the reason, or principal reason, for the Claimant's dismissal was the potentially fair one of (i) misconduct and/or (ii) some other substantial reason of a kind

such as to justify the dismissal of an employee holding the position which the Claimant held, namely a loss of trust and confidence in her?

2. As to conduct, at the time the decision to dismiss was taken, did the Respondent hold a genuine belief based on reasonable grounds, having carried out as much investigation into the matter as was reasonable, that the Claimant was guilty of gross misconduct?

3. Did the Respondent act reasonably or unreasonably in reaching the decision to dismiss in accordance with s.98(4) ERA 1996 with particular regard to:

a) The adequacy and fairness of the investigation;

b) The alleged bias of decision makers;

c) The fairness of the sanction of dismissal in all the circumstances; and

d) Consistency with other cases?

4. Was dismissal within the range of reasonable responses which a reasonable employer might have adopted?

5. Further or in the alternative, whether there was a breakdown in trust and confidence sufficient to justify the dismissal of the Claimant as one of the Respondent's principal marketing managers.

6. If the dismissal was unfair:

a) Whether the Claimant is entitled to any uplift for alleged non-compliance with the ACAS Code of Practice?

b) Whether the amount of any compensation should be reduced to reflect the extent to which the Claimant caused or contributed to

her dismissal pursuant to s.123(6) ERA 1996 and if so, by how much?

c) Whether the Respondent would have reasonably dismissed the Claimant in any event (notwithstanding any alleged procedural failures) pursuant to ***Polkey*** and if so, what was the percentage chance or when?

Counsel for the respondent informed me at the outset that the case based on some other substantial reason for the dismissal was different to the misconduct dismissal since all of trust and confidence had gone by virtue of both the Facebook post and the fact that post was a "second offence" taking into account the email of 27th of June 2017.

Findings Of Fact

4. At the date of the dismissal of the claimant was performing the role of SSAS Marketing Manager.

5. Her manager was Christopher Smeaton, who was in turn managed by Mark Hopcroft, managing director of the respondent. He reported to Philip Smith, Embark Group CEO.

6. In July 2016 the claimant was employed by Rowanmoor Group Plc as a group marketing manager. In July 2016 Rowanmoor was acquired by the Embark Group of which the respondent is a member company.

7. In January 2017 the claimant agreed to carry out the role of Head of Marketing for the Embark Group but, by March 2017, she was concerned about the workload and believed that she was being misdirected regarding the work being carried out.

8. Therefore, on 12 March 2017, the claimant sent an email to David Downie, the then managing director, raising various issues and concerns which had led her to conclude that she was not the right person to head the marketing function. She had similar conversations at that time with Mr Downie.

9. The claimant asserts that the respondent unfairly endeavoured to treat that communication and subsequent discussion as a resignation by the claimant. The Grounds of Resistance state that in separate conversations in March 2017 the claimant had told David Downie and Philip Smith, CEO of Embark Group, that she did not wish to continue in her role and that the respondent had encouraged her to reconsider her decision. The response goes on to assert that it was not unreasonable for the respondent to interpret the claimant's clear and repeated message of not wishing to continue in her role as a resignation.

10. I have some difficulty accepting the respondent's assertion at face value. The claimant's email of 12 March 2017 states, in the pre-penultimate paragraph, "these factors… lead me to conclude that I'm not the right person to head up the marketing function of the wider Embark Group. I am fully committed to continuing to support the group in accordance with my terms and conditions of employment".

11. That, contemporaneous, document would suggest the claimant was not intending to resign nor giving that appearance. Having heard the evidence of Mr Smith, my view is that he appreciated that the claimant did not really want to leave her employment with the respondent but that she did want to step down from the job that she was doing. However, it was not possible for her to return to the previous job that she was doing because that job no longer existed. HIs evidence in this respect was that for the claimant to say that the role was not for her and to expect that, "by magic", the previous role could be recreated was not realistic. Whilst that was not a particularly sympathetic view, and whilst there was a dispute as to whether the claimant was simply trialling the job, or had accepted it formally, Philip Smith's position does not, in my judgment, show that he was, at that time, seeking to remove the claimant from her employment.

12. On 5 April 2017, the claimant raised a grievance stating that she was disappointed not to receive any reply to her specific request for reassurance that no steps would be taken with regards to the company's position that the email of 12th March amounted to her resignation.

13. By return email the same day Kay Smith stated that the discussion in respect of resignation was the respondent's theoretical view for the

purposes of the conversation and no clock had been started on a notice period.

14. By letter dated 19th of May 2017 (p128) the claimant's grievance was upheld to the extent that, in respect of the head of marketing job, the claimant's line management should have confirmed her appointment in writing and established a new job description. Vincent Cambonie who heard the grievance went on to state that a large proportion of the stress that the claimant was experiencing was self generated through a combination of lack of confidence and experience overwhelming her.

15. At this stage the claimant's future job role remained uncertain, she had stated that she did not wish to continue with the role in which she was operating but had not been offered an alternative one.

16. The claimant appealed against the grievance decision and her appeal was rejected on 27 June 2016.

17. On 27 June 2016 the claimant emailed Kay Smith, the respondent's human resources director, expressing concerns that redundancy terms being offered to various staff were not in line with previous agreements. She copied that email to a number of other people, some 13 in all. Those 13 had been managers in post at the time that the original redundancy terms had been agreed.

18. The following day she attended a meeting with Mark Hopcroft, and Mr Smith and in the course of that meeting Mr Smith took the claimant to task about what he perceived as unprofessional behaviour in sending the email and copying it to others. He said that he did not believe the claimant had been professional in the process but that he would "let it go… but I won't let it go again. That's the bottom line of it. Okay. So, let's flip into the operating model…" (p161c) He did, however, return to that issue towards the end of the meeting which the claimant was covertly recording. Seen in the context of the overall meeting, the discussions about the email of 27 June 2017 were only a relatively small part and he did make clear that there were proper channels for the claimant to raise such matters which she should use. Following the meeting he sent an email to various members of staff about the same. In that email he said, "at the end I told

her we were able to look forward positively, but that her behaviour had become unacceptable over recent weeks, that I would not hesitate to take a different course should she repeat what I felt unprofessional conduct." (Page 163)

19. In the same meeting it is clear, however, that the claimant was offered alternatives in respect of her position with the respondent. She was told she could remain with the company on the existing terms and conditions acting in the capacity of group SSAS Marketing Manager or on the existing terms and conditions in the capacity as group SSIP Marketing Manager. Alternatively, her notice period could be enacted on Monday, 3 July following her resignation from the role. That position was reiterated in a letter of 28 June 2017. (Page 166)

20. The claimant accepted the role of group SSAS marketing manager.

21. The claimant relies upon the statement by Mr Smith in the meeting of 28 June 2017 that he would not let matters go again as being indicative of the fact that Mr Smith was involved in the decision to subsequently dismiss the claimant in respect of her Facebook post and she was not fairly judged on the basis of the Facebook page alone. I will return to the dismissal process below, but for now, I note that the claimant was offered the 2 alternative roles at the same meeting when Mr Smith made his comment set out above.

22. On 15 November 2017, as is apparent from the email at 193 of the bundle, the claimant discussed with Mr Smeaton that she was suffering from stress. She emailed him on 16 November 2017 stating that she had been given medication to help manage her stress levels and, later in the day, emailed again stating that she had obtained a counselling appointment on 17 November.

23. Mr Smeaton forwarded that email to Mark Hopcroft, who in turn forwarded it to Mr Smith stating "FYI, I need your counsel before progressing"

24. Mr Smith sent an email on 17 November to David Etherington stating "… Material risk that we have linked behaviour in the Rowanmoor senior

cadre unfortunately. Case of can't do, can't cope, let's down tools as we have protected ourselves in policy and contract.…"

25. In evidence Mr Smith explained the context of that email in the following way. He said that it was sent to the head of risk and "I highlight a risk that could be there, not yet materialised, this is group behaviour and the "we" is because others were operating a similar pattern of behaviour." The "we" that he is referring to are staff who had transferred employment to the respondent from Rowanmoor following the purchase of that group. He went on to explain that he perceived amongst those staff there was," a lack of desire to change and accept consequences of acquisition, lack of ability to integrate and then they would reinvent history on decisions that had been made which had led to a couple of occasions taking time out of office on stress". That evidence may or may not show Mr Smith in a particularly favourable light, but I am satisfied that the email was sent in the context of that being his belief. The significance is that the email does not show a specific bias against the claimant

26. However, 3 days later, on 17 November 2017, Mark Hopcroft sent an email to Mr Smeaton asking him to draft a personal improvement programme (PIP) for the claimant. Given the coincidence of timing between the email from the claimant about her health, the email from Mr Smith and the email from Mark Hopcroft I have concluded that the request by Mark Hopcroft was influenced by the email from Mr Smith.

27. However, notwithstanding that finding of fact, I also find that there were issues with the claimant's performance. Mr Smeaton gave evidence that he found the claimants work to be unsatisfactory in some respects. Whilst in some respects Christopher Smeaton's evidence was, itself, a little unsatisfactory, in particular he was reluctant to give answers to questions which might portray the respondent in a negative light, I formed the view that his evidence was generally honest when he gave it.

28. Having been asked to draft a PIP he was, on 23 November 2017, able to give a number of discrete and clear examples as to the claimant performance (page 242). Thus, I find that the intended PIP was a coming together of the claimant raising her illness, pre-existing concerns about her

work and attitude to work and a hard-nosed, perhaps unsympathetic attitude from Mr Smith.

29. One of the points made by the claimant through her counsel, was that the manager's guide only permits a PIP to be used after a personal development performance review. Whilst that is the scenario referred to in the manager's guide, it is clear that none of the witnesses that I heard from for the respondent regarded that as being the only situation in which a PIP could be used and it would be surprising if that was the case. I accept that the respondent's managers genuinely believed they could use the performance improvement programme at any appropriate time.

30. On 7 December 2017 the claimant submitted a fit note from her doctor stating that she was not coping with the demands on her. As a consequence, the PIP was not implemented.

31. Those matters taken together lead me to find that there was no decision, at that time, that the claimant was to be managed out of her employment. Indeed, after the fit note had been received Mr Smeaton sought to, and did, support the claimant. An example of that support is the email that he sent on 8 December 2017 stating "I've now got the hard copy of the fit note and I'm concerned about your stress levels and want to help and support you through this. Let's have another 1: 1 on Monday to go through your latest work log and see where we need to prioritise. In order to understand the fit note better, we suggest a full report from your GP. Martyna – could you send as a GP referral form please?" (page 208)

32. Human Resources, by Martyna Ryder, then sent a consent letter for a GP report however the claimant was reluctant to sign the same because she considered it too general. I find that was unfortunate since it cut off an avenue of support which may have been open to her and, to some extent, displays an unnecessary level of suspicion.

33. As a consequence of the stance taken by the claimant, Ms Ryder emailed on 13 December 2017 stating "… I would suggest we pause for now the GP referral request until you and Chris have completed the return to work form and undertaken the risk assessment…" (Page 206)

34. Nothing more happened in respect of the medical report despite the risk assessment and return to work form being carried out.

35. On 14 December 2017 Mr Smeaton put in place a risk assessment (page 214) and a key part of that was regular one-to-one meetings.

36. In January 2018 there were a series of exchanges between the claimant and Mark Hopcroft about a project called the SSAS collateral project. On 11 January 2018 Mr Hopcroft sought to impose a deadline for completion of the project by the end of the month. That deadline was unrealistic when it became clear precisely what he envisaged being done by the end of the month. The claimant replied on the same day in reasonably brusque (but acceptable) terms stating "for all products? Really? An end of January delivery for all new items is impossible, with current resourcing levels."

37. Mr Hopcroft replied stating "we need to pull the stops out – what is possible…"

38. The claimant replied by sending a lengthy email explaining why the deadline was not realistic and including "I'm not sure if you are aware that I'm currently working under a fit note, relating to an anxiety disorder due to workplace stress. This email chain has really unsettled me today…"

39. Mr Hopcroft replied "Tx Anna there should be no reason to be unsettled – I'm simply trying to understand a high-level timeline. It's important we start with the "end in mind" and at the minute it is unclear to me when we could realistically expect delivery. Assuming the messaging is agreed how long (roughly)? do you feel it would take to write content for one product?"

40. The claimant replied attaching her workplace risk assessment and stating "I'm afraid that these events today have reignited the levels of anxiety I was experiencing before Christmas. I am tearful, feeling physically sick and need to go home"

41. Finally, Mr Hopcroft replied to state "hi Anna sorry to hear you are feeling unwell – clearly this wasn't the intention, I was simply trying to establish a delivery timeframe. It may make more sense to discuss rather than exchanging emails. I'm in London and can find a room to chat through if you would like to call on my mobile."

42. I set out that email chain out in full since, whilst it forms an important part of the claimant's assertion that she was being managed out of the business, I find there was nothing inappropriate in the exchange. As soon as the claimant stated that the deadline was unrealistic Mr Hopcroft began to back away from a firm deadline and started to try and explore what was achievable.

43. The claimant carried on having 1:1 meetings with Mr Smeaton and one took place on 25 January 2018. The claimant's note of that meeting appears at page 233 of the bundle and the claimant wrote "AH explained that she had felt her anxiety levels rise when it was mentioned that 8 items were required by the end of January and was pleased how she handled this. CS said that he thought AH managed the call well." In the same note she wrote "AH said she was feeling much better than she was prior to Christmas. CBT and medication seem to be working and anxiety levels are down. She hopes not to have to extend the fit note and just continue with risk assessment actions.

44. It is apparent that meetings also took place on 8 February 2018 and 12 February 2018. Again, in the claimants note of those meetings she recorded "AMH thanked CS for his ongoing support"

45. On 20 February 2018 the claimant had her annual review with Mr Smeaton. Prior to that review taking place Mr Smeaton had a calibration meeting with Mr Hopcroft to ensure that scores were consistently given across employees. Initially Mr Smeaton's view had been that the claimant should be given an "on target minus" rating but following the calibration meeting he agreed with Mr Hopcroft that the claimant was underperforming in most roles and should be given a "below target" grade. That is the grade that he told the claimant she would be given in the meeting 20 February 2018. It is apparent that it had also been decided that the claimant would now be placed on a PIP and in the same meeting Mr Smeaton told claimant that she would be.

46. She was understandably unhappy with the situation and told Mr Smeaton that she would appeal. Following the meeting the claimant had meetings or discussions with Mr Smeaton on 2 March and 5th of March 2018. On 5 March 2018 she sent the email which appears at page 240 of the bundle.

In that email she again stated that she would appeal and referred to a meeting which took place on 2 March 2018 with Mr Smeaton in which he had stated that the claimant could expect to receive the written review early in the week commencing 5 March. Thus, at that stage the claimant had not received any written confirmation of the meeting, or her written performance development plan (PDP) or the details of the PIP.

47. In the email of 5 March 2018, the claimant also referred to a conversation earlier that day where she had made reference to being managed out and linked to an article in the Financial Times. I will return to that below. She also pointed out that she was still on medication for stress and anxiety.

48. In the meantime, on 21 February 2018, Mr Hopcroft had asked for all relevant one to one and performance review meeting notes for the claimant. On the same day Mr Smeaton sent a selection of material and also, as is apparent from page 407, the written PDP that he intended to give to the claimant which was described as version 2.

49. That PDP was seen by Mr Smith who wrote “Mark I am lost for words on some of the content and manager ratings here. Did you agree the content with Chris before he engaged in communication as agreed? I would like a call between the 3 of us and Chris to go through, as these are not in line with the moderated group view.” (Page 268)

50. Thereafter the PDP (which had not yet been given to the claimant) went through a total of 4 more iterations to make it progressively more negative. It is apparent to me that Mr Smeaton had, therefore, to be reluctantly driven to the place where the final PDP was as negative as it was.

51. The difficult question for me is whether that reflects part of a determined plan on the part of Mr Smith and Mr Hopcroft to remove the claimant from the business or simply a different style of management. It is clear that Mr Smeaton was a supportive manager who sought to use a carrot rather than a stick. I have little doubt that Mr Smith is of the opposite persuasion. I am satisfied that the revisions to the PDP were driven by Mr Smith but there is no evidence, beyond implication and supposition, that his behaviour was with a view to driving out the claimant from the business rather than his insistence that negative views about the claimant should be

recorded properly (as he saw it). Mr Smeaton's evidence was unequivocal that, certainly as far as he was aware, this was not part of a plan to manage the claimant out of the business.

52. Whilst being fully aware that is a tribunal's duty, where appropriate, to draw inferences from the evidence it has, on the present evidence I do not find on the balance of probabilities that Mr Smith was seeking to drive the claimant from the business at this time or that the personal improvement programme or the form of the PDP was a means to achieve that. The same would apply for Mr Hopcroft and Mr Smeaton.

53. On 5th March 2018 the claimant made a Facebook post. She wrote "great article – I am currently in the lead up to managing this – "but in a managing – out scheme [and the post continues to quote from the article I have referred to above]… Always do your job, keep your integrity, know your rights, ask for support, challenge impossible deadlines and ask for evidence for everything stated about you that you know to be untrue" she placed a link to the article which is entitled "how employers "manage out" unwanted staff".

54. Whilst the opening sentence of the claimant's post is not clear to me, the claimant accepted that she was communicating that she felt she was in the lead up to being managed out of her employment. It is apparent from the replies of her Facebook friends that they understood that to be her meaning too. Various conversation ensued and the claimant posted 2 comments in particular. In answer to a post which said, "isn't this basically constructive dismissal?" The claimant replied, "I believe it is Steve but we will need to see how things pan out in my own case." I am willing to accept the claimant's evidence that both she and Steve were meaning that the article that she had linked was talking about a constructive dismissal situation but it is clear that the claimant was linking her situation to the article. Later she states in a reply to Caz Dawson "… I'm ready to stand my ground and will do what it takes to ensure the facts of my own case are clear and can be judged

55. The Facebook privacy settings on the claimant's page were limited to friends only. Approximately 220 people have access to her Facebook page of which 22 to 23 were work colleagues. I accept the claims

assertion that her Facebook page did not identify her employer and noted that the post in question did not identify her employer or any managers. It is of course the case that once a post is made, the maker loses control of that post in that she cannot decide what other people do with the post that she has made. It can be reasonably presumed that the Claimant's colleagues knew who her employer was as did some of her other friends.

56. The respondent has a social media policy and a disciplinary policy. Within the disciplinary policy gross misconduct is defined as including, but not limited to, activity or postings… which are likely to bring the company into disrepute…" (Page 52). The respondent asserts that the claiman'ts post breached this part of its policy.

57. Some time was spent in the hearing on the question of whether the claimant contributed to the social media policy or not. In my judgment it does not matter. The claimant was clearly aware of the policy.

58. The respondent was aware of the post on 5 February 2018 but did nothing about asking the claimant to remove it for at least a week. The claimant says that from that I should draw an inference that the company did not think the post was bringing it into disrepute. Mark Hopcroft's evidence was that he was surprised and disappointed no one had asked the claimant to remove it earlier.

59. I find that the claimant's post could reasonably be considered by a dismissing officer as being a post which was likely to bring the company into disrepute. The respondent, and the group of companies of which it forms part, is engaged in providing financial services. Investors are increasingly concerned about the ethical nature of their investments and part of that is that some (although presumably not all, or possibly even most) are concerned as to how employers treat their staff.

60. Moreover, in considering the severity of the post it is relevant to consider how the claimant's colleagues viewed it. In the course of the investigation by Mr Smeaton he interviewed Sarah Nightingale and Lucy Matthews. The former stated "as a manager there are situations when you are managing the process and if an individual put something out there, there is no opportunity for the manager to reply with their version of events, which

doesn't seem fair on the manager in question. As a manager at her level she should know better and it made me feel uncomfortable" (page 313). The latter said "sad to see a senior member of the team putting comments like that about Rowanmoor and Embark on the public forum. Extremely unprofessional to someone at that level to know full well the impact these comments would have and the damage that social media can do to the brand as a market manager. Couldn't believe our marketing manager would do that to our company and feel betrayed." (Page 316).

61. At the time of making this post the claimant had not read the written PDP and was not aware of any targets she would be given within the PIP.

62. Mr Smeaton was asked to investigate but, even before he had concluded his investigation, Mr Hopcroft had been asked to hear the disciplinary hearing. In that sense his investigation appears, to me, to be have been more about gathering evidence and laying the charges than deciding whether there was a case to answer. Having made that finding the question arises as to whether it was appropriate for the claimant to be interviewed by Mr Smeaton rather than simply being invited to a disciplinary hearing, but that was not a point taken by the claimant and no one has addressed me on it. I find that it was likely that Mr Smeaton was involved in framing the charges which were set out in the invitation to the disciplinary hearing and clearly the evidence he obtained was sent to the claimant under the cover of that letter, however, the evidence does appear to suggest that he did not conclude his formal report until sometime later.

63. A disciplinary hearing took place on 15 March 2018. The disciplinary officer was Mr Hopcroft. He decided to dismiss the claimant but was emphatic that his decision was only based on the Facebook post and nothing else. I accept that evidence.

64. The claimant asserts, now, that Mr Hopcroft was the wrong person to conduct the disciplinary hearing and Mr Smeaton was the wrong person to investigate. She complains that given that her post was, effectively, about those two people, they were too close to matters to conduct the disciplinary hearing. The respondent points out that she did not complain about that at the time. Given the relatively short period of time between the invitation the disciplinary meeting (sent on 12 March 2018) and the

meeting, it does not surprise me that the claimant, as she said, was focusing on the matters such as preparing for the hearing.

65. The respondent also asserts that it did not matter that the complaints were about Mr Hopcroft and Mr Smeaton since the question is simply whether the Facebook post was inappropriate, not whether it was true.

66. In this respect I agree with the claimant. The Facebook post was complaining about the managerial process in which both Mr Hopcroft and Mr Smeaton were involved. Even if they were limiting themselves to the question of whether the Facebook post was appropriate, not whether it was true, they were still likely to feel affronted by the fact that the post had been made at all. In that sense there was a real risk that they would lose objectivity. There was no issue about whether the claimant made the post, there is no doubt that she did, it is a question of her culpability for doing so and the appropriate sanction. Having regard to the size and administrative resources of the respondent and the fact that it clearly operated as a group and could call upon directors from other group companies to be involved in the disciplinary process (as took place in the appeal), it seems to me a different officer should have heard the disciplinary hearing. The criticism in relation to Mr Smeaton is somewhat less, particularly given that I have found that he was not involved in deciding whether there was a case to answer, but a wholly independent investigation would have been better.

67. At the disciplinary meeting the claimant laid considerable emphasis on the stress from which she had been suffering. She said “I hadn’t considered impact and wasn’t of sound mind. I suffer from workplace stress since November 2017 and feel unwanted by the business. I’m still working under a workplace risk assessment… My judgment and state of mind were affected by the state of my health.” (Page 331).

68. I find that Mr Hopcroft paid little or no attention to the question of the claimant’s stress. When asked about it in cross examination he simply said “she had written the post, researched post, posted post. There was time to reflect.” What that is true, it does not answer the question of whether the claimant’s judgment was affected by the stress. This was not a new assertion by the claimant, the assertion of stress went back to the

previous November. The respondent had been intending to get a medical report but not done so. The claimant was a long-standing employee. Whilst the respondent points to the fact that at the end of January the claimant had said she was feeling better, that ignores the events of February and the correspondence on 5th March.

69. In those circumstances I consider it was unfair to ignore the question of stress and further investigation should have taken place. It was relevant to know to what extent the claimant's judgement was impacted by any medical condition from which she was suffering, even if that medical condition did not amount to a disability.

70. In my judgement the appeal in this case made matters worse rather than better. Despite saying that he would consider everything claimant wanted to raise, Mr Downing did not consider a lengthy document which appears at page 254 that the claimant wanted him to consider. In her submissions to the appeal which are at page 374 the bundle the claimant wrote "I began preparation on my review appeal case on 21 February 2018… Please could this be extracted and submitted with this appeal letter, as it demonstrates that I felt bullied and under the threat of being managed out." The claimant assumed that document had been given to Mr Downing, before the appeal. He said to me it was not and he had not seen it at all. I was told by counsel for the respondent during the course of the case that there was documentation to suggest that it was sent to Mr Downing before the appeal. It seems to me whether Mr Downing was given it or not is irrelevant. Either he was given it, in which case he did not consider it, or he was not given it which case, again, he did not consider it. Moreover, in either case he did not fully consider the content of the claimant's submission in respect of the appeal which she gave to him.

71. The claimant raised the point that she felt the dismissing manager was biased. In that respect Mr Downing, in his evidence, made clear that he had not investigated that point. He stated "I'm a senior member of the organisation, I trust those individuals that they would not be collusion. Simple as. I've never seen any evidence of people being forced out in the Embark group." He went on to explain that he did not know what line one would follow to prove or disprove collusion [in referring to collusion he was

referring to the question of whether the claimant was being deliberately driven out of business].

72. As an appeal officer, in taking that stance, Mr Downing abdicated his responsibility. He had, at least, to consider whether there was likely to be any substance in the allegations of bias and, in a case such as this, where it is clear that the post was about the dismissing officer, it would have been reasonable and appropriate for him to have applied his mind to the likelihood of any bias and consider whether there was or could be any truth in the assertion that the claimant was being managed out. If the claimant was being managed out and Mr Hopcroft have been part of the managing out process, he could not have fairly decided the disciplinary matter. Mr Downing did not consider the possibility of bias or an attempt to manage the Claimant out, but simply refused to countenance the possibility of either.

73. Moreover, Mr Downing also failed to consider the issue of stress and the impact it had on the claimant.

74. Around the same time on 2nd of March 2018, a colleague of claimants, two grades junior to her had written her own Facebook post when snow had fallen. She wrote “this is utterly ridiculous… There is black ice everywhere. This is NOT right at all and the only reason they are not officially closing the office is so they can legally expect people to make it up / take as holiday so as not to lose money. Bloody typical of this company but a quick buck is much more important to them than employee safety. Shame shame shame on them…” The writer of that post was subjected to a disciplinary process. She was given a stage I formal written warning. The disciplinary officer, Sarah Nightingale, referred to mitigation that she had bought forward including that she felt the company was not following government advice, she was pregnant and feeling ill and that her comments were a knee-jerk reaction. She had not appreciated the comments would be available to individuals.

75. There are some obvious similarities between the posts, both criticised the company, the post about snow in more trenchant terms than the claimant’s post. Nevertheless, there are also some differences in the 2 cases. The claimant was more senior than the writer of the snow post and her post

was not, in the same sense, a knee-jerk reaction to an incident. The snow post was not a complaint about a particular process targeted at a particular individual. Even taking account of those differences the difference in treatment of the people making the post is stark.

The Law

76. Section 98 Employment Rights Act 1996 provides that it is for the respondent to show the reason for dismissal and that it is a potentially fair reason.

77. Section 98(4) states that "The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)- 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 shall be determined in accordance with equity and the substantial merits of the case".

Misconduct

78. In considering a dismissal for misconduct the tribunal must have regard to the test in *BHS v Burchell* that "First, there must be established by the employer the fact of that belief; that the employer did believe it. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. And, third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case"

79. The test, both in relation to the ultimate decision to dismiss and in relation to the quality of investigation, is the range of reasonable responses test.

80. I was referred by Mr Dracass to ASLEF v Brady [2006] IRLR 576, which held that the question is what was the real reason for the dismissal and that it is for the employer to prove. A potentially fair reason may be the pretext for dismissal in other circumstances, for example if the employer makes the misconduct as excuse to dismiss an employee in circumstances where he would not have treated others in a similar way then the reason will not be

the misconduct at all since that is not what brought about the dismissal, even if the misconduct in fact merited dismissal. Once the employee has put in issue with proper evidence a basis the contending that the employer dismissed out of pique or antagonism, it is the employer to rebut this by showing that the principal reason is a statutory reason.

81. Mr Dracass has also referred me to a selection of 1st instance cases from practical law on social media misuse. I have considered those cases.

82. Both parties referred me to Hadjionannou v Coral [1981] IRLR 352 and I have noticed the guidance of the employment appeal tribunal, as summarised in the head note, that arguments based upon disparity should be scrutinised with particular care and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar or sufficiently similar to afford an adequate basis for argument. Tribunal should not be encouraged to think that a tariff approach to industrial misconduct is appropriate.

Other substantial reason

83. In Perkin v St. George's healthcare [2005] IRLR 934, it was held that a breakdown in trust and confidence between an employer and senior employee which harms the business could potentially suffice as being some other substantial reason for a dismissal.

Loss

84. In circumstances where it is found a decision to dismiss was unfair the tribunal must consider how much compensation to award in accordance with sections 122 and 123 the employment rights 1996.

85. In respect of the basic award, section 122 (2) ERA 1996 provides

"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly"

86. In commenting on that section, Harvey on Industrial Relations states "Where the conduct of the employee before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to do so (ERA 1996 s 122(2)). It is to be noted that the employer may not discover the conduct until after the dismissal, and accordingly it may have had no influence on the decision to dismiss at all."

87. In respect of the compensatory award, s123 ERA 1996 provides

> (1) Subject to the provisions of this section and sections …, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
>
> ...
>
> (6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

Conclusions

88. I will state my conclusions by reference to the agreed list of issues.

89. Firstly, has the respondent proved the reason for the dismissal? I do not find that there was a deliberate decision on the part of the respondent to "manage her out of the business". Whilst there was frustration with the claimant and her work was considered to be unsatisfactory it is my conclusion that the reason, or at least the principal reason, or the decision made by Mr Hopcroft was the fact of the Facebook page. It was not, however, the Facebook page in addition to the email of 27th of June 2017.

90. Given the way the respondent puts its case on "some other substantial reason" and having regard to the way the agreed issue is defined, I find that the respondent has proved that the reason or principle reason for the

dismissal was a potentially fair one of misconduct but not some other substantial reason namely a loss of trust and confidence in her.

91. As to the next issue, I find that Mr Hopcroft did have a genuine belief in the claimant's misconduct that he reasonably believed that she had posted the Facebook post and he genuinely believed that it was sufficiently serious to warrant dismissal.

92. However, the investigation was not reasonable having regard, in particular, to the fact that the dismissing officer should not have been someone who was implicitly criticised in the original Facebook post but somebody more independent. There was not an adequate exploration of the impact of the claimant's stress on her judgment and, therefore her culpability for writing the post. The appeal was inadequate in that it did not consider all of the documents which the claimant wished the officer hearing the appeal to consider, it abdicated its responsibility to consider the claimant allegations of bias against the dismissing officer and it, again, did not consider the question of stress.

93. In respect of the 3rd issue I draw the following conclusions in respect of the subparagraphs set out therein.

    a. For the reasons I have given the investigation was inadequate and unfair

    b. Whilst I have not found actual bias on the part of the decision makers, Mr Hopgood was not sufficiently independent to be an appropriate decision-maker.

    c. It is possible that a different dismissing officer could have considered that the appropriate sanction was dismissal and, if so, that sanction would have been within the range of reasonable responses. In my judgment the post was one which it could be considered was likely to bring the company into disrepute and it was upsetting and offensive to colleagues as set out above.

    d. I do not consider the similarities between the claimant's case and that of the maker of the post in respect of snow to be so overwhelmingly similar that the disparity of treatment, of itself,

makes the decision to dismiss unfair. It does, however, cast light on different ways a different dismissing officer, and perhaps a more independent one, would have viewed the claimants post.

Overall, I consider the respondent acted unreasonably in reaching the decision to dismiss in accordance with section 98 (4) employment rights act 1996.

94. In respect of issue 4 I have already stated that I consider that a different dismissing officer could have reasonably dismissed for the Facebook post and therefore it was, potentially, within the range of reasonable responses.

95. In respect of issue 5, given the way the respondent put its case on some other substantial reason, it has not established a factual basis for the argument. However, as a matter of fact the dismissing officer did not take account of email of 27 June 2017. Whether even if he had done so, I do not consider there was a breakdown of trust and confidence apart from the Facebook post. Whilst the claimant was likely to be under a PIP, before the Facebook post was made there was no suggestion by the respondents that she could not be trusted. This, in reality is a case of dismissal for misconduct, and the respondent must stand or fall on that.

96. In respect of issue 6 (a), whether the claimant was entitled to any uplift due to non-compliance with the ACAS code of practice, I have not heard argument and will deal with this at the remedy stage.

97. In respect of issue 6(c), whilst I consider that a different disciplinary officer might have dismissed for this post (and had he or she done so the dismissal would have been given range of reasonable responses), it is by no means certain that the claimant would have been dismissed by different officer. The Facebook post in relation to snow is of assistance in this respect since it is clear that in respect of a similarly offensive post, a different employee was only given a 1st written warning. Thus, I consider there is only a 50% chance that the claimant would have been dismissed if a fair procedure had been carried out.

98. I am not at all satisfied that the claimant's relationship with the employer would have come to an end for any other reason. Even if she had been

placed on a PIP she may well have complied with it and the relationship continued.

99. In respect of issue 6(b), it seems to me that the claimant was at fault for making the Facebook post. She repeatedly accepted as much in the disciplinary meeting. I have found that the making of the post could amount to gross misconduct. However, I have also taken account, as much as I am able to from the evidence before me, of the stress from which the claimant was suffering which was sufficiently serious for her to have been given a fit note and a stress risk assessment to be implemented and I have taken account of the upsetting circumstances of having received the negative PDP feedback. What I have concluded that the making of the post could amount to gross misconduct, is far from the most serious type of such post and in my judgment the appropriate reduction for contributory fault is 40%.

100. However it is also necessary to take account the principles laid down in *Rao v Civil Aviation Authority [1994] IRLR 240.* In making the calculation, therefore, the Industrial Tribunal should first assess the amount of the loss taking account of *Polkey*, including the chance of employment continuing if the employee had not been unfairly dismissed. Thereafter, and in light of that finding, the Tribunal should decide the extent to which the employee caused or contributed to the dismissal and the amount by which it would be just and equitable to reduce the compensatory award in that respect.

101. Overall, therefore, I find that it is just and equitable to reduce the compensatory award by 50%, taking account both the Polkey and the contributory fault points (in essence I do not consider it is just and equitable to increase the deduction the compensatory award further because of the claimant's contributory fault) but I reduce the basic award by 40%.

Employment Judge Dawson

Date 31 May 2019