EMPLOYMENT TRIBUNALS

Claimant: Mr A Patel

Respondent: Secretary of State for Work and Pensions

HELD AT: Manchester **ON:** 21 August 2018

BEFORE: Employment Judge Porter

REPRESENTATION:

Claimant: Mr S Brittenden of counsel

Respondent: Mr A Weiss of counsel

JUDGMENT

1. The claimant was unfairly dismissed.

2. The claimant contributed to his dismissal. The tribunal assesses that contribution at 50%.

3. The claimant was not guilty of gross misconduct justifying summary dismissal. His claim of wrongful dismissal, breach of contract, is well-founded.

4. A remedy hearing shall take place on 20 November 2018.

REASONS

1. Written reasons are provided pursuant to the oral request of counsel for the respondent at the conclusion of the hearing.

Issues to be determined

2. At the outset it was confirmed that the parties had agreed a List of Issues.

Submissions

3. Counsel for the claimant relied upon written submissions which the tribunal has considered with care but does not repeat here. In addition, counsel for the claimant relied on some additional oral submissions. In essence it was additionally asserted that:-

3.1. the evidence of the dismissing officer was that she accepted that, at the time the claimant posted the tweets, it was his genuine understanding that his actions were not in breach the Standards of behaviour;

3.2. there was no finding that the claimant deliberately or consciously acted in breach of the Standards of behaviour or guidance;

3.3. neither the dismissing officer nor the investigating officer investigated the claimant's account of what had been said in training;

3.4. the dismissing officer accepted that there was no risk of the claimant repeating this behaviour;

3.5. crucial mitigation was ignored, in particular the point that the claimant was labouring under a misapprehension as opposed to performing a deliberate act;

3.6. The dismissing officer in her witness statement for the first time sets out what particular tweets she found unacceptable and why. This information was not discussed during the disciplinary process, does not feature in the dismissal letter and Ms Smith accepts that she never gave the appeal officer this information. The dismissing officer accepts that she never made a contemporaneous note of this information and that she went through the tweets to prepare her witness statement. This is justification after the event. At its lowest the tribunal cannot be sure that this information was in the mind of the dismissing officer at the time. This was unfair to the claimant, who was not able to address any of these points during the disciplinary process including the appeal;

3.7. The penalty was far too harsh taking into account all circumstances. There should be no Polkey reduction as the dismissal was substantively unfair;

3.8. Any assessment of contributory fault should be nil or very small because the primary responsibility lies with the respondent to ensure that its

policies are implemented and a lot of the claimant's conduct is attributed to what the claimant was told during the 2015 training session

4. Counsel for the respondent relied upon oral submissions which the tribunal has considered with care but does not repeat in full here. In essence it was asserted that:-

4.1. the onus on the respondent to adequately communicate its policies was discharged on a yearly basis with all employees being required to read and understand the Standards of behaviour. The appeal officer examined the claimant's assertion that because of his workload in 2017 he only skim read the material but the appeal officer was satisfied that the claimant's workload was not excessive. The claimant's evidence on this is unsatisfactory. He had reading exercises every year. If something in 2015 was said which was contrary to the written Standards of behaviour then it was foolhardy for the claimant to prefer that over the written Standards behaviour;

4.2. the failure of the respondent to investigate what was said in training in 2015 is a red herring. Mr Lapping made limited enquiry on this point. The decision-maker did not disbelieve the claimant, but to decide that correct guidance had been given since that date was perfectly fair;

4.3. The dismissing officer did take into account all relevant mitigating circumstances even if they did not appear in the decision making template. Ms Smith gave very credible evidence, readily conceding points where appropriate;

4.4. It was obvious to the claimant what the allegations were. He clearly understood them and persuaded the decision-maker that he was not racist. He accepted that his political tweets breached the Standards of behaviour. The failure to identify the specific tweets was not a matter of unfairness;

4.5. Paragraph 50 of Ms Smith's witness statement clearly shows that Ms Smith took into account as mitigation her acceptance of the claimant's assertion that he did not make racist comments, was not a racist;

4.6. the dismissing officer held the honest belief that the claimant was guilty of the conduct and had reasonable grounds to support that belief having conducted a reasonable investigation. There were clear and admitted breaches of policy;

4.7. dismissal fell within the bands of reasonable responses;

4.8. if there were any errors of procedure, these were minor. Following a fair procedure would have made no difference to the outcome;

4.9. Contributory fault. The claimant was very foolhardy. He had a duty to read and understand the Standards of behaviour on a yearly basis and therefore bears a large share of the blame. Contributory fault should be 75 – 100 percent;

4.10. wrongful dismissal. There were clear breaches of the Standards of behaviour. The claimant ought to have known that he was obliged to abide by them

Evidence

5. The claimant gave evidence.

6. The respondent relied upon the evidence of Emma Smith, Senior Business and Planning manager.

7. The witnesses provided their evidence from written witness statements. They were subject to cross-examination, questioning by the tribunal and, where appropriate, re-examination.

8. An agreed bundle of documents was presented. Included in the bundle were two witness statements, presented by the claimant, of two former work colleagues, Mr O'Hare and Mr Mulla. Neither of those witnesses attended to give evidence. The respondent did not have the opportunity to cross-examine those witnesses. The tribunal has not relied on that evidence in reaching its decision. References to page numbers in these Reasons are references to the page numbers in the agreed Bundle.

Facts

9. Having considered all the evidence, the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

10. The claimant has worked for the respondent in the Department for Work and Pensions (DWP) since 18 December 1991. He has performed numerous different roles but most recently was employed in the role of Work Coach in the Blackburn job centre.

11. All employees of the respondent are required to comply with the Standards of Behaviour policy (p354) and the Civil Service code. All employees are given regular training in the application of these policies. The respondent operates a

mandatory reading policy whereby each year each employee is required to read the policies and confirm that they have read them and understood them. The policy includes the following:

11.1. 5. The consequences of failing to comply are serious and attract penalties up to and including dismissal;

11.2. 29. As Civil Servants we are (of course) free to use social and other digital media in our own time. But we always need to be mindful of our duties not to disclose official information without authority, you should bear in mind the unique position you occupy as a Civil Servant, and you should not take part in any political or other public activity which compromises, might be seen to compromise, or potentially compromise our impartial service to the government of the day or any future government.

11.3. 30. We must take care about commenting on government policies and practices or any other information relating to the government and should not do so without the proper authorisation. We should avoid commenting altogether on politically controversial issues and avoid making any kind of personal attack or tasteless or offensive remarks to individuals or groups – i.e. anything that would cause offence to a reasonable person. This applies irrespective of whether you can or cannot be identified as an employee of the Department. In the circumstances, if posts/comments are considered inappropriate, disciplinary action will be taken that could lead to dismissal.

11.4. 31. Civil servants are expected and required to behave with the utmost integrity at all times and to be ambassadors for the Department and Government generally. This applies even if you are communicating online with other civil servants;

11.5. 32. It is important that we are all aware that posting any content that is considered inappropriate – whether in an official or personal capacity – may result in disciplinary action which could lead to dismissal.

12. The Civil Service code includes provision relating to activities in a period of purdah, that is, in the period prior to any election. The Civil Service code includes the following:

Particular care will need to be taken during this period to ensure that Civil servants conduct themselves in accordance with the requirements of the Civil service code…. Care also needs to be taken in relation to the announcement of UK government decisions which could have a bearing on the elections. In particular, civil servants are under an obligation:

……..
not to undertake any activity that could call into question their political impartiality. It is important to remember that this applies to online communication such as social media, in the same way as other activity.

13. By letter dated 24 October 2017 (p41) the claimant was notified that the respondent was conducting an investigation into an alleged breach of the respondent's Standards of behaviour policy and procedures relating to social media, in particular, relating to tweets/retweets sent from the claimant's personal Twitter account.

14. The claimant attended an investigation interview on 27 October 2017. He was accompanied by a trade union representative. The interview was recorded and a transcript provided (p177). During the investigation interview:

    14.1. The claimant asserted that at a previous training session on the use of social media there was a question and answer session when the trainer indicated that as long as there was nothing on your social media account to associate you with DWP then it did not matter, the Standards of behaviour did not apply;

    14.2. there was nothing on his Twitter account which could associate the claimant with the DWP;

    14.3. the claimant accepted that the applicable Standards of behaviour did say that they applied to a personal Twitter account irrespective of whether the employee could or could not be identified as an employee of the DWP. However, the claimant said he did not see that part of the Standards when he read them – he was certain that as long as he did not associate himself with the DWP the Standards would not apply;

    14.4. the investigator, Mara Simic, indicated that there was only one Twitter account in the claimant's name and the claimant accepted that;

    14.5. It was noted that the Twitter account did not contain a photograph of the claimant;

    14.6. The claimant confirmed that 12 of his work colleagues were followers on his Twitter account;

    14.7. the investigator provided the claimant with copies of all the entries on the claimant's Twitter account between March and October 2017. The investigator picked out nine of the entries as examples of what was in breach of the Standards of behaviour and invited the claimant to comment on them;

    14.8. the claimant denied that any of his comments were racist, asserting that these had to be read in context;

14.9. The claimant accepted that some of his comments were offensive, some were derogatory of the current government, and that he had shown allegiance to a particular political party;

14.10. The claimant expressed extreme regret at his actions, asserting that he was mortified by being investigated for misconduct, and confirmed that if he had realised that this was in breach of the Standards then he would not have tweeted or retweeted on Twitter in the same way.

15. The investigator prepared an investigation report which confirmed that:

15.1. a referral was received by the Government Internal Audit Agency alleging that a member of staff, the claimant, had used inappropriate and offensive language and had made his strong political views clear, on his public Twitter account;

15.2. when a search was made on Twitter against the claimant's name only the claimant's profile came up;

15.3. the Twitter account was examined for the period between March and October 2017. The examination established comments that could be seen as tasteless, offensive, racist and political;

15.4. on 25 October 2017 the Twitter account was examined for any further comments posted. The examination showed that access had been changed to private, allowing only confirmed followers access;

15.5. the claimant was interviewed and could not provide any legitimate reason for making the entries on his Twitter account;

15.6. during interview the claimant stated that he had recently attended a security presentation and following a question and answer session his understanding was that if there was nothing on the social media account relating to the DWP, guidance on the applicability of the Standards of behaviour was not clear-cut;

15.7. the claimant was aware of the applicable Standards of Behaviour policy;

15.8. the claimant had confirmed that previously his understanding of the Standards of behaviour policy was that if he did not mention DWP on social media it was okay. He did not see the part which states the rules apply irrespective of, if a person can be identified as a DWP employee;

15.9. the claimant stated that now being aware of the Standards of behaviour in relation to social media he had enormous regret.

16. The investigation report included all of the entries on the claimant's Twitter account from March – October 2017 and a transcript of the investigation interview with the claimant.

17. Emma Smith, Customer Service leader at Blackburn Job centre, was appointed as decision maker. It was her understanding that following an anonymous complaint the claimant had been interviewed by Mara Simic from the Counter Fraud and investigation team. Ms Smith did not see a copy of the complaint at any point during her involvement in the investigation process. She had no idea where the complaint came from originally as this did not feature in the information presented to her from the Counter fraud and investigation team. She did not carry out any further investigation of the complaint before reaching a decision to dismiss.

18. Ms Smith contacted the claimant's line manager requesting:

    18.1. confirmation that the claimant had undertaken the annual mandatory reading of the Standards of Behaviour and Acceptable Use Policies;

    18.2. the dates when the Higher Executive Officers (from Blackburn job centre, essentially the site leadership team) held a meeting on the same topic and whether the claimant was in the office that day; and

    18.3. a copy of the claimant's security checklist from his mid-year review.

19. The claimant's line manager replied:

    19.1. providing Ms Smith with an email from the claimant dated 2 May 2017 confirming he had read the Standards of Behaviour Policy and Security Code of Conduct and had ticked a security code checklist showing that he was familiar with and understood a number of policies including the Civil Service Code, Standards of Behaviour, Social Media guidance, Standards of Behaviour that apply when on-line (p218);

    19.2. confirming that a Communications meeting had been held on 26 April 2017. The purpose of that meeting was to reinforce the mandatory reading and summarise the key points of the Standards of Behaviour policy, including Civil Service Code. This was an opportunity for staff to discuss and ask any questions about the policies. The claimant had been in work on that day.

20. By letter dated 16 November 2017 (p212) the claimant was invited to a disciplinary hearing to consider the allegation that he had brought the Department into disrepute, and breached the Standards of Behaviour policy

and procedures, and the Civil Service code, by posting defamatory comments on a social media site, namely Twitter. The claimant was advised that dismissal was a possible outcome, and of the right to be accompanied by a trade union representative or work colleague. The claimant was provided with a copy of the investigation report.

21. A disciplinary hearing was held on 27 November 2017. The claimant was accompanied by his trade union representative. During the disciplinary hearing:

21.1. the claimant asserted that:

21.1.1. he was not fully aware of the guidance when he had posted the tweets and retweets although he was aware now that he was in breach of the policies;

21.1.2. there had been a meeting with security where someone had asked about Twitter and the meeting was told that you could express your opinions on your Twitter account if it was not associated with the DWP;

21.1.3. his Twitter account was not associated with DWP, there was no evidence that he did work for DWP, no indication on his Twitter account of where he worked;

21.1.4. he refuted any allegation of racism and he could explain the context in which any of the short tweets or retweets had been made to show that he was not racist because Ms Smith should not read the tweets out of context;

21.1.5. he could not apologise enough for his actions. He was extremely upset with the accusation that he had brought the department into disrepute because he was proud to work for the Department and he would like to take on an ambassador role to make sure that all of the staff were aware of the effect of the guidance;

21.1.6. he had learnt his lesson in a very painful way

21.2. The claimant expressed extreme regret at his actions and confirmed that if he had realised that this was in breach of the standards he would not have tweeted or retweeted on Twitter in the same way;

21.3. Ms Smith did not review every tweet with the claimant. She asked him if there was anything he wanted to comment on, noting that from 22 April 2017, a period of purdah, she could not see tweets about the government but there were tweets about personal support to a party;

[Ms Smith now denies saying that. Ms Smith cannot recall how this part of the conversation went and points out that there were clearly tweets about the Prime Minister and the government within the claimant's Twitter account in a period of purdah. However, the tribunal accepts that the note at page 221 is an accurate note of what was said at the hearing. This note was given to Ms Smith to review before it was confirmed as an accurate note of the meeting]

19.4 there was a brief discussion about a small number of tweets including a tweet about Tommy Robinson from the British National party, a comment about Donald Trump and white male Christians using guns;

19.5 Ms Smith did not highlight each of the tweets which she found offensive or otherwise in breach of the Standards of behaviour, did not give the claimant the opportunity to comment on each of the particular tweets which she had in mind when reaching the decision to dismiss.

22. Ms Smith took advice from the Human Resources Department before reaching her decision. She did not carry out any further investigation. She did not:

22.1. look at the original complaint, did not investigate whether it was from a member of the public or one of the claimant's work colleagues who was a follower on the claimant's Twitter account;

22.2. interview any of the claimant's work colleagues who were followers on the claimant's Twitter account, did not ask the claimant to identify any of those colleagues;

22.3. investigate what had been actually said at the training sessions on the use of Social media;

22.4. investigate the claimant's assertion as to what had been said about the use of a twitter account in a Question and Answer session which formed part of a training event

23. In reaching her decision Ms Smith:

23.1. took into account the fact that
:

23.1.1. at the meeting the claimant said that he understood the charge of bringing the Department into disrepute by his actions;

23.1.2. The claimant's Twitter account was public and he used his first name and surname which made him easily searchable;

23.1.3. a complaint had been made against the claimant which demonstrated that a member of the public could identify him as an employee of DWP and had taken offence to the comments which the claimant was posting;

23.2. decided that the fact that the complaint had been received provided sufficient evidence that a linkage could be made between the claimant's Twitter account and his employment with the DWP;

23.3. considered the impact of the claimant's comments on his work colleagues who were followers on his Twitter account;

23.4. accepted the claimant's explanation that he was not being racist when he tweeted or retweeted;

23.5. made no express decision as to whether or not the claimant had deliberately and with intent made derogatory offensive comments relating to race. It was her understanding that it was not for her to say whether the claimant was racist or not;

23.6. decided that the claimant had learnt his lesson and held the belief that the claimant would not do this again;

23.7. accepted that it was the claimant's genuine understanding that it was okay to post on his Twitter account so long as it did not identify the DWP;

23.8. accepted that the claimant's twitter account did not identify the claimant as an employee of the DWP, contained no reference to or derogatory/critical comments relating to the DWP

23.9. did not reach a finding as to whether or not the claimant had deliberately and with intent breached the Standards of Behaviour

24. Ms Smith became the claimant's line manager in December 2015. From that time the claimant's impartiality had not been questioned, no concern had been raised about the claimant making inappropriate comments contrary to the Standards of Behaviour or other applicable policies.

25. No evidence was presented to Ms Smith that the claimant had previously knowingly acted in breach of departmental policies.

26. The evidence before Ms Smith showed that the claimant had 25 years' service and had a clean disciplinary record.

27. Ms Smith made the decision to dismiss the claimant and confirmed her decision by letter dated 1 December 2017 (p229-231). Extracts from that letter read as follows:

> I am writing to confirm the outcome of your meeting with me on 27 November 2017 to discuss the gross misconduct case brought against you.
>
> During the meeting we discussed the allegation that you have breached the Standards of Behaviour policy and procedures and the Civil Service Code by posting defamatory comments on a social media site, namely Twitter. These comments could be viewed as being tasteless, offensive, racist and political
> ….
> In your interview with the investigator you have accepted that comments you posted on Twitter are a breach of the Department's Standards of Behaviour and procedures. You have agreed that they, and the quotes you have retweeted, are derogatory of the current government.
> ….
> The period of the investigation included a period of purdah which began on 22 April 2017 and ran up to the UK general election which took place on 8 June 2017.
>
> Having examined screenprints of your twitter account during this time, I note you have made numerous comments and re-tweeted images and statements which make clear your political allegiance, thus putting into question your impartiality. These are also clearly uncomplimentary against the current Government and its policies.
>
> You do not accept you have made racist comments on Twitter and at our meeting offered explanation as to why you believe this to be the case. You stated you have *reacted to* racist comments as opposed to *proactively making them*. I accept this, and have taken this mitigation into account when making my decision. However, as you confirmed yourself when we met on 27 November, without the supplementary explanation of the context within which you made the comments, they could be viewed as having racist connotations, with the potential to cause offence.
>
> Within both your investigation and disciplinary meetings you inferred you were not fully aware of the implications of both the Standards of behaviour and the Civil Service code in relation to social media activity. We discussed at our meeting the steps that are in place within your Jobcentre to ensure staff undertake mandatory reading and that such policies are read.
>
> I have an email from yourself dated 2 May 2017 which you sent to the East Lancs Mandatory Reading shared inbox, in which you confirmed have undertaken that month's reading, namely, DWP Standards of Behaviour and Security Code of Conduct. In addition, a communications meeting was held at Blackburn Jobcentre on 26 April 2017 whereby this subject matter was also covered, and which you attended.

The investigation has concluded the comments you have made on Twitter between March and October 2017 are in breach of the behaviours and actions expected of a Civil Servant.

After considering all the relevant factors it has been decided that your employment with DWP has been terminated. This will take effect immediately, without notice and without pay in lieu of notice. Therefore your last day of service is 01/12/2017

You have a right to appeal against this decision as long as you do so in writing within 10 working days.

28. The claimant appealed the decision. In his appeal he raised a number of points including :

    28.1. a request for a copy of the complaint which led to the investigation;

    28.2. an assertion that he was not the only Ayub Patel with a twitter account as indicated by his username ayubpatel 123;

    28.3. a rebuttal of the allegation that the claimant posted tweets that could be perceived as racist. The claimant provided an explanation of the context for a number of the comments made by him, asserting that the rise in Islamophobic rhetoric and anti-Islamic action hurt him and other Muslims greatly and that it was his right in a free and democratic society to use means to challenge this. He explained that his tweets were as a response to the increasing rise in Islamophobia and directed towards outspoken and known and active Islamophobic individuals such as Tommy Robinson, Katie Hopkins and Donald Trump, who the claimant described as being active in preaching unfounded criticisms of Islam and Muslims

29. Mr Ian Lapping heard the claimant's appeal. He has not been called to give evidence to explain his reasons for upholding the decision to dismiss. No satisfactory evidence has been led of any investigation conducted by Mr Lapping of the claimant's grounds of appeal, in particular, the assertion that he was not the only Ayub Patel with a twitter account as indicated by his username ayubpatel 123. A reasonable investigation of that assertion would have revealed that there was more than one account with that name.

    [The tribunal accepts the unchallenged evidence of the claimant that a search of the name Ayub Patel would have uncovered over a dozen Ayub Patel twitter accounts.]

30. The claimant was provided with a redacted copy of the anonymised complaint (p40). It is not possible to identify from that whether the complainant was a member of the public or a work colleague. No investigation took place as to

the identity of the complainant, whether he or she was a member of the public.

31. By letter dated 11 January 2007 Mr Lapping advised the claimant that he was unable to uphold the appeal against dismissal. Extracts from the letter read as follows:

> A large part of your appeal is taken up by your rebuttal of the allegation that the tweets you posted could be perceived as racist…
>
> I think it is important to state that at no stage has either the investigator or the DM accused you of being racist. The point under consideration has been whether some of your tweets could be perceived as such, irrespective of your motivation in posting them. Several tweets of this nature were pointed out to you by the investigator Mara Simic… As you rightly said yourself, read within their proper context, the tweets both individually and collectively, demonstrate your repulsion of any form of racism. That said, without knowledge of this context the investigator and DM were right to point out that there was a danger of misinterpretation…
>
> Although the possibility for misinterpretation exists, the DM has accepted your mitigation for posting these tweets i.e. that you acted in reaction to what you perceive to be provocative racist comments motivated by blatant Islamophobia. Given the nature of these tweets and the degree of Islamophobia demonstrated within them, I believe she was right to accept this mitigation
>
> The consequence of this is that the decision to dismiss you was based primarily on the political nature of those many tweets or retweets you posted, which were free of any racial connotation.
> …
> You also state that there was no link or possibility that your twitter account could be linked to the Department or your role as a civil servant. Social media is a public forum and the complaint received in connection with your activity on Twitter demonstrates that such a link between you and your role as a civil servant could in fact be made

Additional Facts relating to Contributory Conduct

32. The claimant believed that he could use his personal Twitter account, expressing his own personal opinion on a wide range of topics, without being in breach of the Standards of behaviour or Civil Service Code, provided that there was no reference to the DWP on his twitter account, provided that he could not be identified as an employee of DWP.

> [On this the tribunal accepts the evidence of the claimant. The tribunal accepts that this topic was discussed in a question and answer session following training in 2015. No satisfactory evidence has been led to counter the claimant's evidence that there was such a discussion and that a trainer gave this incorrect information. No satisfactory evidence has been provided to state that any subsequent training given

to the claimant, for example the training in May 2017, countered the information given to the claimant and others in the training session in 2015]

33. The comments made by the claimant on his public twitter account were offensive, some were derogatory of the current government, and showed allegiance to a particular political party.

34. The claimant had not made any reference to his employer on his twitter account. There was no identifiable link between himself and the DWP. The claimant did not provide his own photograph, did not provide his location.

35. The claimant was required on an annual basis to read the Standards of Behaviour and confirm he had read and understood them. He only skim read them and did not, prior to the investigation of the complaint, notice that the Standards specifically said that they applied to a social media account whether or not the account holder could be identified as an employee of the Department. If the claimant had fulfilled his obligation, if he had read and understood the Standards of Behaviour, then he would have realised that the training given in 2015 was inaccurate, or at the very least he could have questioned whether the policy had changed.

Additional Facts relating to Breach of contract

36. The claimant did not deliberately and wilfully contradict the Standards of Behaviour or Civil Service Code. He was negligent in failing to read properly the Policies as part of the mandatory annual reading. However, this was not gross negligence. The claimant relied on the training given to him in 2015.

The Law

37. An employer must show the reason for dismissal, or if more than one, the principal reason, and that the reason fell within one of the categories of a potentially fair reason set out in Section 98(1) and (2) Employment Rights Act 1996 ("ERA 1996"). It is for the employer to show the reason for dismissal and that it was a potentially fair one, that is, that it was capable of justifying the dismissal. The employer does not have to prove that it did justify the dismissal because that is a matter for the tribunal to assess when considering the question of reasonableness.

38. Misconduct is a potentially fair reason for dismissal. **British Home Stores Ltd v Burchell [1980] ICR 303** provides useful guidelines in determining this question. It sets out a three-fold test stating that the employer must show that:

    - he genuinely believed that the conduct complained of had taken place;

- he had in mind reasonable grounds upon which to sustain that belief; and

- At the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

The Tribunal notes and takes regard of the fact that the guidelines set out in **Burchell** are guidelines only and that the burden of proof on the question of reasonableness does not fall upon the employer under this head, and is a question for the Tribunal to decide, when appropriate, in determining the question of reasonableness under Section 98(4) ERA 1996, under which the burden of proof is neutral. **Boys and Girls Welfare Society v McDonald [1997] ICR 693**. as confirmed in **West London Mental Health Trust v Sarkar [2009] IRLR 512,** which was not disturbed on this point by the Court of Appeal. As HHJ Peter Clark and the Employment Appeal Tribunal in **Sheffield Health & Social Care NHS Foundation Trust v Crabtree** UKEAT/0331/09 observed in paragraph 13, **British Home Stores Ltd v Burchell** was decided before the alteration of the burden of proof effected by section 6 of the **Employment Act 1980**. At paragraph 14 the Employment Appeal Tribunal held:

> "The first question raised by Arnold J: did the employer have a genuine belief in the misconduct alleged" goes to the reason for dismissal. The burden of showing a potentially fair reason rests with the employer."

At paragraph 15 the EAT held:

> "However, the second and third questions, reasonable grounds for the belief based on a reasonable investigation, go to the question of reasonableness under section 98(4) Employment Rights Act 1996 and there the burden is neutral."

39. Once the employer has shown a potentially fair reason for dismissing, the Tribunal must decide whether that employer acted reasonably or unreasonably in dismissing for that reason. The burden of proof is neutral. It is for the Tribunal to decide. Section 98(4) ERA 1996 states:-

> "The determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend upon 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 that question shall be determined in accordance with equity and the substantial merits of the case".

The test of whether or not the employer acted reasonably is an objective one, that is, Tribunals must as industrial juries determine the way in which

a reasonable employer in those circumstances in that line of business would have behaved. There is a band of reasonable responses. The Tribunal must determine whether the employer's action fell within a band of reasonable responses. **Iceland Frozen Foods Limited v Jones [1983] ICR 17**. (Approved by the Court of Appeal in **Post Office v Foley**, **HSBC Bank plc (formerly Midland Bank plc) v Madden [2000] IRLR 827**. The range of reasonable responses test (the need for the tribunal to apply the objective standards of the reasonable employer) must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed**. Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23.** The tribunal bears that in mind and applies that test in considering all questions concerning the fairness of the dismissal. In determining the reasonableness of an employer's decision to dismiss, the tribunal may only take account of those facts (or beliefs) which were known to the employer at the time of the dismissal.

40. The reasonable investigation stage has been subjected to refinement in two judgments, which are relevant here. First, **A v B** [2003] IRLR 405, a judgment of Elias J (President) and members, indicates that there is to be a standard of investigation which befits the gravity of the matter charged. If what is sought to be sanctioned is a warning, the standard of investigation will be lower than where dismissal is concerned. Elias LJ, now in the Court of Appeal, reinforced that position in **Salford v Roldan** [2010] EWCA Civ 522, indicating that where the circumstances of a dismissal would create serious consequences for the future of an employee, such as deportation, particular care must be given to the investigation.

41. Whether or not the employer acts fairly depends on whether in all the circumstances a fair procedure, falling within the range of reasonable responses, was adopted. The form and adequacy of a disciplinary enquiry depends on the circumstances of the case. What is important is that, in the interests of natural justice, the employee can be given a chance to state his or her case in detail with sufficient knowledge of what is being said against him or her to be able to do so properly. **Bentley Engineering Co Limited Mistry [1979] ICR 2000**.

42. In deciding whether the dismissal is fair the Tribunal must consider whether summary dismissal falls within the band of reasonable responses, taking into account all the surrounding circumstances, the employer's practice, the contract of employment and any definitions of gross misconduct contained therein, the knowledge of the employee, the seriousness of the offence. What conduct amounts to gross misconduct will depend on the facts of the individual case. Generally gross misconduct is conduct which fundamentally undermines the employment contract, is a deliberate and wilful contradiction of the contractual terms or amounts to gross negligence. The current ACAS code gives examples of gross misconduct which includes theft or fraud/physical violence or bullying/deliberate and serious damage to

property/serious insubordination/serious misuse of an organisation's property or name/deliberately accessing internet sites containing pornographic, offensive or obscene material/unlawful discrimination or harassment/bringing the organisation into serious disrepute/serious incapability at work brought upon by alcohol or illegal drugs/causing loss, damage or injury through serious negligence/a serious breach of health and safety rules/a serious breach of confidence.

43. The tribunal has considered the current ACAS Code of Practice and the six steps which an employer should normally follow when handling disciplinary issues, namely:

- Establish the facts of each case;
- Inform the employee of the problem;
- Hold a meeting with the employee to discuss the problem;
- Allow the employee to be accompanied at the meeting
- Decide on appropriate action
- Provide employees with an opportunity to appeal.

The tribunal notes that the Code states that it is important to deal with issues fairly including dealing with issues promptly and without unreasonable delay, acting consistently carrying out any necessary investigations, and giving the employee the opportunity to state their case before any decisions are made.

44. The tribunal has considered and applied Sections 118-124 Employment Rights Act 1996. The tribunal notes in particular:-

a. Section 122(2) under which a tribunal may reduce a basic award where the employee's conduct before dismissal makes a reduction just and equitable;

b. Section 123(1) whereby the tribunal is directed to make a compensatory award in such an amount as it considers just and equitable in all the circumstances;

c. Section 123(6) whereby a tribunal should reduce the compensatory award by such proportion as it considers just and equitable where the dismissal was to any extent caused or contributed to by any action of the claimant.

45. In **Nelson v BBC (No2) [1979] IRLR 346** the Court of Appeal said that three factors must be satisfied if the tribunal are to find contributory conduct:-

    - the relevant action must be culpable and blameworthy
    - it must have actually caused or contributed to the dismissal
    - it must be just and equitable to reduce the award by the proportion specified

46. In **Gibson v British Transport Docks Board [1982] IRLR 228** Browne-Wilkinson stated that what has to be shown is that the conduct of the claimant contributed to the dismissal. If the claimant has been guilty of improper conduct which gave rise to a situation in which he was dismissed and that conduct was blameworthy, then it is open to the tribunal to find that the conduct contributed to the dismissal.

47. In **London Ambulance Service NHS Trust v Small [2009] IRLR 563** the Court of Appeal confirmed that, in deciding whether a dismissal was fair or unfair, the tribunal must confine its consideration to facts relating to the employer's handling of the dismissal, the genuineness of the employer's belief and the reasonableness of the grounds of its belief about the conduct at the time of the dismissal. The tribunal must guard against substituting its own view for that of the employer, for substituting its own findings of fact about the claimant's conduct. It was acknowledged that the tribunal was bound to make findings of fact about conduct for the purpose of deciding the extent to which the claimant's conduct contributed to his dismissal. The tribunal must not use those findings in deciding whether the dismissal was fair and unfair. As a general rule it might be better practice in an unfair dismissal case for the tribunal to keep its findings on the issue of unfair dismissal separate from its findings on disputed facts that are only relevant to other issues such as contributory fault*…..”Separate and sequential findings of fact on discrete issues may help to avoid errors of law, such as substitution, even if it may lead to some duplication.”*

48. The House of Lords in **Polkey -v- A E Dayton Services Limited [1988] ICR 142,** held that failure to follow a fair procedure renders a dismissal unfair except in limited circumstances where following a fair procedure would have been utterly useless or futile. Whether following a fair procedure would have made any difference to the outcome should be considered at the stage of assessing compensation.

49. The tribunal notes that there will be circumstances where the nature of the evidence is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. However, the tribunal should have regard to any material and

reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been: a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

50. In a claim of wrongful dismissal the issue is whether the employer breached the terms of the contract of employment by dismissing with no or inadequate notice. Any employer is entitled to summarily dismiss an employee guilty of gross misconduct, as defined by the contract of employment or as determined in accordance with common law principles.

51. The tribunal has considered and where appropriate applied the authorities referred to in submissions.

Determination of the Issues

(This includes, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence)

52. The claimant was dismissed and the effective date of termination was 1 December 2017.

53. The reason for the dismissal was the claimant's conduct. The dismissing officer held the honest and genuine belief that the claimant had brought the department into disrepute and had breached the Standards of Behaviour Policy and procedures, and the Civil Service Code, by posting defamatory inappropriate and offensive comments on a social media account, twitter. Conduct is a potentially fair reason for dismissal within s98 (1) and (2) Employment Rights Act 1996.

54. The tribunal has considered all the circumstances of this case, including those matters referred to in s98(4) Employment Rights Act 1996, to determine whether, in all those circumstances, the dismissal of the claimant for the reason stated was fair or unfair. In deciding whether the decision to dismiss was fair or unfair the tribunal reminds itself that it is not for the tribunal to substitute its view for that of the employer. The question is whether the respondent acted fairly within the band of reasonable responses of a reasonable employer in concluding that this employee was guilty of gross misconduct and dismissing him.

55. The tribunal has considered whether the respondent carried out a reasonable investigation of the alleged misconduct and whether the respondent had reasonable grounds to support its belief. The tribunal notes in particular as follows:

55.1. in deciding that the claimant had brought the DWP in to disrepute, the dismissing officer relied on the fact that a complaint had been made against the claimant which, in the dismissing officer's honest and genuine belief, demonstrated that a member of the public could identify the claimant as an employee of DWP and had taken offence at the comments which the claimant was posting. The dismissing officer did not investigate whether the individual who made the complaint about the twitter account was a member of the public. The dismissing officer made that assumption without making a reasonable enquiry. She knew that the claimant had work colleagues as followers on twitter account. The claimant accepted that his name was on the account, which was public. The claimant did not on his twitter account use his own photograph, did not give any indication that he was an employee of the DWP. A reasonable investigation would have shown that there was more than one twitter account under the name of Ayub Patel. Without any investigation of the complainant, whether that complainant was a member of the public, how he or she identified the claimant, the respondent did not have reasonable grounds to support its belief that the claimant had brought the DWP in to disrepute;

55.2. in deciding whether the claimant had breached Standards of Behaviour, the Civil Service Code, the dismissing officer did not investigate the claimant's assertion that he had been told in a training session in 2015 that the posting on twitter did not fall foul of the Standards of Behaviour Policy so long as the twitter account did not identify the twitter account holder as an employee of the respondent, and no association with the respondent could be made from the twitter account. However, the dismissing officer accepted the claimant's evidence on what he had been told at the training session in 2015 without the need for further investigation. Having been told of the transgression the claimant admitted the misconduct;

In all the circumstances the tribunal finds that the respondent did conduct a reasonable investigation of the alleged misconduct of breach of Standards of Behaviour, the Civil Service Code and had reasonable grounds to support its belief : the breach was admitted.

56. Having considered the procedure adopted by the respondent the tribunal notes and finds that:

56.1. the specific allegation of misconduct was put to the claimant who was given full opportunity to state his case both during the investigation and at the disciplinary hearing; The claimant understood the case he had to meet. The investigating officer gave 9 examples of the breaches of Standards of behaviour;

56.2. the respondent followed a fair disciplinary procedure in that

the claimant was advised of his right to be represented at the disciplinary hearing, the claimant was given full opportunity to state his case and the matters put forward on behalf of the claimant were considered by the dismissing officer before reaching her decision;

56.3. however, the dismissing officer did not, during the course of the disciplinary hearing, identify which particular tweets she found offensive, did not discuss with the claimant her decision that the claimant had posted tweets contrary to the Standards of Behaviour during the period of purdah. It is clear that the dismissing officer had not thoroughly examined the tweets prior to the disciplinary hearing. The claimant was therefore not given the opportunity to comment on this aspect of the dismissing officer's decision making;

56.4. The dismissing officer did not in the letter confirming the decision to dismiss, fully explain the reason for her decision, did not identify the specific breaches of the Standards of Behaviour which had led to her decision to dismiss, as now set out in her witness statement. The letter did not express her finding, stated in tribunal, that it was the claimant's genuine understanding that it was okay to post on his twitter account so long as he did not identify the DWP;

56.5. the claimant was advised of his right of appeal and exercised that right. However, the fairness of the appeal was affected by the failure of the dismissing officer to:

56.5.1. identify the particular tweets which she relied on in reaching her decision that the claimant had breached the Standards of behaviour; and

56.5.2. to express her finding that she accepted that the claimant had acted at the time under a genuine misunderstanding that his activity on twitter was not a breach.

The claimant was unable to address each particular finding of the dismissing officer and challenge them. No satisfactory evidence has been led as to whether each of the points of appeal were investigated. The appeal officer obtained a redacted copy of the complaint and provided the claimant with a copy. There was no investigation as to whether or not the complainant was a member of the public. There was no investigation of the claimant's assertion that there was more than one twitter account with his name.

In all the circumstances the tribunal finds that, viewed overall, the procedure adopted was unfair.

57. In deciding whether, in reaching the decision to dismiss, the respondent acted within the band of reasonable responses of a reasonable employer faced with similar circumstances the tribunal notes in particular that:

57.1. the dismissing officer has failed to provide a satisfactory explanation as to how she decided that the claimant was guilty of an act of gross misconduct. The tribunal has not been referred to any particular definition of gross misconduct within the respondent's disciplinary policy. The tribunal notes that in her dismissal letter the dismissing officer starts with a reference to the disciplinary hearing held to discuss "the gross misconduct case". The dismissing officer did not in her dismissal letter set out on what grounds she had decided that the claimant was guilty of gross misconduct, bearing in mind in particular that:

57.1.1. she accepted the claimant's assertion that he was not guilty of making racist comments;

57.1.2. she found that, following the training session in 2015, it was the claimant's genuine understanding that it was okay to post on his twitter account so long as he did not identify the DWP;

57.1.3. she did not make a finding that the claimant had deliberately breached the Standard of Behaviours;

57.1.4. she accepted that the twitter account did not identify the DWP;

In light of those findings of the dismissing officer there was no satisfactory evidence before her that the claimant had committed an act of gross misconduct, even if the activity on the twitter account had taken place repeatedly over the period of investigation. The dismissing officer has not asserted that this was an act of gross negligence justifying summary; dismissal;

57.2 the claimant was a long serving employee with a clean disciplinary record;

57.3 the claimant admitted that he had made a mistake and expressed contrition;

57.4 the dismissing officer was satisfied that that the conduct would not be repeated;

In all the circumstances the dismissing officer has failed to provide a satisfactory explanation as to why dismissal was the appropriate penalty and the tribunal finds that dismissal did not fall within the band of

reasonable responses

58. Taking into account all the circumstances the tribunal finds that the dismissal was unfair.

59. Contributory conduct. The claimant did contribute to his dismissal. He was guilty of culpable and blameworthy conduct which actually contributed to the dismissal. The comments made by the claimant on his public twitter account were offensive, some were derogatory of the current government, and showed allegiance to a particular political party. They were, as he admitted, in breach of the Standards of Behaviour and Civil Service Code. He had the obligation to read the Standards of behaviour and confirm that he had read them. The tribunal accepts his evidence that he only skim read them and if he had read them properly he would have adjusted his behaviour on his twitter account. This was not a deliberate failure to observe the standards of behaviour, the Civil Service Code. However, the claimant was wrong to confirm that he had read and understood the procedures when clearly, he had not. Had he done so, he would have known that he was in breach and altered his conduct on his twitter account accordingly. The tribunal assesses contribution at 50%

60. Breach of contract. The claimant was not guilty of gross misconduct justifying summary dismissal. The respondent breached the terms of the claimant's contract by dismissing him without notice.

Employment Judge Porter

Date: 6 September 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

26 September 2018

FOR THE TRIBUNAL OFFICE

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