



EMPLOYMENT TRIBUNALS

Claimant: Linda Trainer

Respondent: Malhota Group PLC t/a Prestwick Care

Heard at: North Shields

On: 16 March & 9 April 2018

Before: Employment Judge A.M.S. Green

Representation

Claimant: Mr McHugh - Counsel

Respondent: Mr Mugliston – Counsel

JUDGMENT

1. The Claimant's claim that her dismissal was automatically unfair under Employment Rights Act 1996 section 104(1)(b) is dismissed.
2. The Claimant's claim that her dismissal was unfair under Employment Rights Act 1996, section 98 is upheld.
3. The Respondent shall pay the Claimant £350 as compensation for loss of statutory protection arising from her unfair dismissal under Employment Rights Act 1996, section 118. The Respondent shall pay Basic Award of £1,890 under Employment Rights Act 1996 section 119. The Compensatory Award under Employment Rights Act 1996 section 118 is £0 as there is no loss flowing from the unfair dismissal.

REASONS

Introduction

1. The Claimant was employed by the Respondent from 1 July 2012 until she was dismissed on 7 July 2017. She is a Nurse Assistant Practitioner ("NAP"). She worked at Covent House which is a care home. The Respondent relies on gross misconduct as the reason for dismissing the Claimant. The Respondent says that the Claimant breached its Social Media Policy by repeatedly posting offensive and derogatory material relating to it on a Facebook page thereby bringing the Respondent into disrepute. The Claimant alleges that she was automatically unfairly dismissed under Employment Rights Act 1996, section 104(1)(b) (the "1996

Act”) for asserting a statutory right (i.e. the right to receive pay and an itemised payslip) and that her dismissal had nothing to do with her Facebook posts; she also claims ordinary unfair dismissal under section 98 of the 1996 Act.

The issues

2. The issues that I must determine are:
 - a. Was the Claimant dismissed for misconduct or for some other reasons?
 - b. If the Claimant was dismissed for a reason other than misconduct does that reason fall within section 104(1)(b) of the 1996 Act (i.e. asserting her statutory right to pay and an itemised pay slip)?
 - c. Did the Respondent have a genuine belief that the Claimant was guilty of misconduct?
 - d. Did the Respondent carry out as much investigation as was reasonable in all the circumstances?
 - e. Was dismissal a fair sanction in all the circumstances?
 - f. In all the circumstances did the Respondent’s decision to dismiss the Claimant for misconduct fall within the band of reasonable responses?
 - g. If the procedure adopted by the Respondent in dismissing the Claimant is deemed to be unfair; what are the chances that she would have been dismissed in any event had a fair procedure been followed?
 - h. If the dismissal of the Claimant was unfair to what extent was the Claimant’s own conduct a contributory factor to the dismissal?

Documentation and the hearing

3. The parties filed and served their joint hearing bundle in advance of the hearing comprising 188 pages (“HB”). The Respondent’s witnesses adopted their statements and gave their oral evidence first. Thereafter, the Claimant adopted her witness statement and gave her oral evidence. The representatives made closing submissions. I heard evidence from the following people:
 - a. Ms W Dowse – the Respondent’s Operations Support Manager;
 - b. Ms F Payne – The Respondent’s Head of Compliance and who investigated the complaints against the Claimant. She recommended that there should be a disciplinary hearing;
 - c. Ms A Kaura – The Respondent’s Head of HR and who chaired the Claimant’s disciplinary hearing. Ms Kaura is also a solicitor and the Respondent’s in-house counsel.

- d. Mr M Greenwood – the Respondent’s Group Finance Director and who chaired the Claimant’s appeal hearing; and
- e. The Claimant.

Burden and standard of proof

- 4. The Claimant must establish her claim on a balance of probabilities. In reaching my decision I have considered all the oral and documentary evidence, Mr McHugh’s skeleton argument, Mr Mugliston’s written submissions and my detailed record of proceedings.

Chronology

- 5. The Claimant was appointed as a care assistant and promoted to the position of NAP. The Respondent claims that this is a senior position of responsibility in respect of other carers.
- 6. The Claimant made several posts on Facebook in 2017 [HB 43-64]. The Claimant does not dispute that she made these posts. There was an investigation on 15 June 2017 to which the Claimant was invited [HB 122]. The Claimant was suspended pending such investigation on 12 June 2017. It was alleged that the Claimant came to her workplace under the influence of alcohol on 9 June 2017. The Claimant raised a grievance on 14 June 2017 complaining about the fact that the police were called because Ms Dowse was concerned that the Claimant was driving whilst under the influence of alcohol. The police breathalyzed the Claimant in a supermarket car park and found her to be under the drink driving limit. Ms Payne conducted the investigation and recommended that disciplinary proceedings should be instigated against the Claimant.
- 7. By a letter dated 27 June 2017, the Claimant was invited to a disciplinary hearing to be held on 5 July 2017 [HB 141]. The letter set out a charge of misconduct namely:

... Committed a serious breach of the social media policy, serious insubordination and during Annual Holiday attending gate premises of Covent House uninvited whilst allegedly being under the influence of alcohol.

- 8. Ms Kaura conducted the disciplinary hearing was conducted. Following the disciplinary hearing, on 7 July 2017, the Claimant wrote a letter tendering her resignation [HB 148] with effect from 7 July 2017 regardless of the outcome of the disciplinary hearing because she could no longer work at Covent House and “feel in a safe working environment”. The letter was hand-delivered to the Respondent and received at approximately 8 AM on 8 July 2017. Following the disciplinary hearing, the Claimant was dismissed by letter dated 7 July 2017 [HB 149]. The reason given was breach of the Social Media Policy. The charges of insubordination and attending under the influence of alcohol were not upheld. The letter stated that the Claimant’s employment was terminated as of 7 July 2017 although the

Claimant received the letter at approximately 1 PM on 8 July 2017. It was agreed between the parties that the Claimant had been dismissed by the Respondent's letter and the effective date of termination of her employment was 7 July 2017.

9. The Claimant appealed the decision setting out her grounds of appeal [HB 154]. She attended an appeal hearing on 25 July 2017 which was chaired by Mr Greenwood [HB 160-170]. Mr Greenwood upheld the dismissal and notified the Claimant of his decision in a letter [HB 171].

Witness statements and oral evidence

Ms W Dowse

10. The gist of Ms Dowse's evidence in her statement is that the Claimant came into Covent House when she was on leave to discuss her rota. There had apparently been issues concerning the rota between the Claimant and another administrator, Linda Richardson. Ms Dowse thought she smelt alcohol on the Claimant's breath and she asked her colleague, Amy Smirk, if she could smell alcohol. Ms Smirk said she could not. Ms Dowse saw the Claimant walking round the care home. She called her on her phone and told her that she should not be doing this on her day off. She gave the Claimant her rota and challenged her on her suspicion that she had been drinking. The Claimant admitted she had been drinking the night before. There was shouting, and Ms Smirk came into the room. She thought she smelt alcohol on the Claimant. The Claimant was aggressive and intimidating. Ms Dowse reported her suspicion that she smelt alcohol to her line manager, Eve Tierney, and the HR department. She told them that the Claimant had driven to Covent House. Mr Davinder Malhotra, the Respondent's Chief Executive, told Ms Dowse to inform the police of her concerns, which she did. The police came in person and spoke to Ms Dowse. They breathalyzed the Claimant in a nearby supermarket carpark. The Claimant called Covent House later in the day and shouted at the administrator about being stopped and breathalyzed. Ms Dowse telephoned the police who told her that the Claimant was below the drink driving limit.

11. Under cross-examination, I note the following from Ms Dowse's evidence:
 - a. She accepted that there was nothing in the Respondent's policies that prohibited an employee from coming into work on their day off, as the Claimant had done. She accepted that if an employee was to be disciplined for coming into work on their day off, there should be a rule about it.
 - b. She called the police because she believed that the Respondent had a duty of care. She thought the Claimant had been drinking and was driving. The Claimant had been aggressive. She did not accept that she was simply trying to get the Claimant into trouble. She accepted that the Claimant was not over the drink driving limit.
 - c. Even though the Claimant was not at work at the time, Ms Dowse did not expect her to come in smelling of drink. There were health and safety issues. If a person was over the limit, they could have an

accident and the Respondent could be liable.

- d. Ms Dowse knew about the Facebook posts because Linda Richardson had told her. Ms Dowse does not use Facebook. She has not seen the Facebook posts.
- e. Ms Dowse told me that she had been given health and safety training but she was not the designated competent health and safety officer. In the six months that she had worked for the Respondent she had never previously reported anyone for health and safety reasons.

Ms F Payne

- 12. In summary, Ms Payne says in her statement that she interviewed the Claimant and discussed the Facebook posts and the incident with Ms Dowse which led to the Claimant being breathalyzed. She says that she listened to the Claimant's responses to the questions and noted that the Claimant was aware of the Respondent's Social Media Policy. She concluded that the Claimant's position of authority, her knowledge of the Social Media Policy as well as accepting she had made the alleged comments on Facebook justified proceeding to a disciplinary hearing. In her capacity as Compliance Officer, Ms Payne has dealt with other cases relating to breaches of the Social Media Policy. She believes that she has been consistent in her treatment of the breaches of the policy. She was involved with a subsequent disciplinary procedure involving another employee, Kelly Maclean, who was dismissed. That employee had posted threatening and disparaging material on Facebook.
- 13. On examination in chief, Ms Payne was aware that the Claimant had alleged that she had been treated differently than others relating to the Facebook postings. Ms Payne had conducted the disciplinary hearings of seven or eight other staff. Kelly Maclean, was dismissed and the others either received first or second written warnings. Those who received warnings had not been dismissed because the language that they used was not as bad Ms Maclean's and they were in more junior positions. They did not have supervisory roles. Although she had not made a disciplinary decision regarding the Claimant, she understood that she had been treated differently because of her position of seniority and an example needed to be set.
- 14. I have noted the following from Ms Payne's evidence under cross-examination:
 - a. HR told her about the Facebook posts. She did not know how HR got hold of them.
 - b. She knew about the Social Media Policy, but she had not read it before she conducted the investigation. She was aware of most of its contents. She agreed with Mr McHugh that it would have been a good idea if she had read it before performing the investigation given that serious allegations had been made. She accepted that paragraph 1.17 of the policy recognised that employees were entitled to privacy of their own personal communications. She accepted that paragraph 1.18 of the policy allowed the Respondent to monitor an

employee's work computer. She accepted that the Respondent had no right to intercept or monitor communications on the Claimant's own resources.

- c. It was put to her that it would have been important to have spoken to HR to find out how they came into possession of the Facebook posts and to establish whether they were obtained in line with the Social Media Policy. She replied that she had used the available evidence to make her decision. She had not asked further questions. She admitted that in hindsight she would have looked at the Social Media Policy. She had relied on paragraph 1.24.3. It was put to her that this related to responsible posting and did not entitle the Respondent to trawl through their employees' personal accounts to look for incriminating material.
- d. She has not received formal training on the Social Media Policy. She accepted that the Social Media Policy was not part of the Claimant's contract of employment. She was asked how the Claimant could be disciplined for breaching the policy if it did not have contractual force. She replied that the Claimant was disciplined for gross misconduct and had a case to answer. She was asked how this was gross misconduct. Ms Payne took some time before answering and said that her decision was not solely based on the Social Media Policy but she agreed with Mr McHugh that she had recommended disciplinary proceedings because she had found serious breaches of the Social Media Policy [HB 138]. She was asked again how an employee could be disciplined for breaching a policy that was not part of the contract of employment. She replied, "I can't remember". She accepted it was her decision to recommend disciplinary action and that she had not read the policy before carrying out the investigation.
- e. She had accepted that she had not looked at the policy to show that the Claimant was innocent. She had only looked at the policy to see where she had breached it. She had not looked for something that might have cleared her name. She thought it was not her role to do so. She decided on the evidence. She agreed with Mr McHugh that she was only looking for evidence to show that the Claimant was guilty. She had not accepted that she was investigating properly.
- f. She was taken to the Facebook screenshots that she investigated [HB 43-63]. She was asked about the first [HB 43]. She was asked which part of the policy had been breached. Ms Payne had to look through the policy before answering. She could not recall what she had thought 8 months ago. She then said that the posting breached paragraph 1.13.5. She was asked how this defamed or disparaged the Respondent. She replied that she had breached paragraph 1.7 [HB 64]. Mr McHugh put it to the Ms Payne that this was not a rule, merely a statement of the scope of the policy. She agreed with him.
- g. She was asked what she understood by the word "defamatory". She said that it meant "bad-mouthing". She understood that if a person said something defamatory it could lead to them being sued. She accepted that there was a legal point to putting this in the policy.

- h. She was taken to the Facebook post on 22 May 2017 at 9:18. She did not know how it was brought to the Respondent's attention and she accepted that it did not refer to the Respondent by name. She accepted that the Claimant had said that there was nothing on her Facebook profile that identified the Respondent as her employer. It was put to her that the post did not breach the policy. She disagreed because it was implicit that people would know where the Claimant worked. Most of the people who were listed as liking the post or commenting, worked for the Respondent. Ms Payne accepted that the post related to delays in paying the Claimant.
- i. Ms Payne had not investigated the Claimant's complaint that she had not been paid because she thought it was irrelevant. It was put to her that something might be disparaging but not defamatory if it was well-founded. She replied that issue of not being paid was part of her grievance. She was not fully aware of that issue.
- j. Mr McHugh took Ms Payne through the remaining Facebook posts. She accepted that the following did not breach the policy: [HB 44, 45, 47, 49, 50, 51,52 and 57]. It was put to her that 10 posts had been referred to in the disciplinary and relied on as breaches but Ms Payne had only identified one breach. She disagreed because there was a conversation with the Claimant and her friends. It was put to her that the Claimant was only responsible for what she had posted herself. She could not be held responsible for other people's posts. Ms Payne agreed. It was put to her that she was looking for an excuse to get rid of the Claimant. She denied this. She was only interested in those parts of the policy that pointed to the Claimant's guilt. It was put to her that she was looking to blame the Claimant for what other people had said. She was not interested in hearing mitigating circumstances.
- k. Ms Payne did not take advice whilst conducting the investigation.
- l. Regarding Ms McLean's post [HB 56], Ms Payne regarded it as using more serious language than the Claimant's and it was sufficient to dismiss her. Another employee, Barbara Beduch, had received a warning for her posts, [HB 45 & 53]. It was put to her that these posts did not seem to breach the Social Media Policy. Ms Payne said she could not second guess. However, she had disciplined the staff who had breached the policy. It was put to her that the policy stated that people were responsible for their own social media postings and yet Barbara Beduch was guilty for being in a conversation about not getting paid or getting wage slips. Ms Payne disagreed. They were not being disciplined for complaining about not getting paid or not receiving wage slips. It was put to her she was contradicting herself because she had just said that Barbara Beduch was disciplined for being part of a conversation about not getting paid or receiving a wage slip.
- m. It was put to her that the Claimant claimed that another employee, Ms Ainscough had been investigated around the same time because her postings on Facebook referred to the care home as a "shit hole". She was spoken to and no formal action was taken against her. Ms

Payne said she did not know although she accepted that if that was the case, that would be inconsistent treatment.

15. On re-examination Ms Payne confirmed that on the question of social media training, there had been a staff meeting on 20 April 2016. The minute [HB 99] showed that staff had been told not to mention the Respondent on their Facebook pages. Ms Payne had not been to that meeting but she thought that the minute was relevant because the Claimant had been to the meeting and she had also signed the Social Media Policy. Ms Payne had found some of the Claimant's postings offensive [HB 43, 53 & 56].

Ms A Kaura

16. In summary, Ms Kaura says the following in her statement. She chaired the disciplinary hearing. She read the papers in advance and did not pre-judge the case. She asked the Claimant to give her version of events regarding the incident with Ms Dowse on 9 June 2017. The Claimant was aware of the Social Media Policy but could not remember signing it. She acknowledged to Ms Kaura that she had breached the policy and regretted it. She asked the Claimant about the issue with her pay slips. The Claimant confirmed that her posts were about blaming the HR department about the error in her wages. The Claimant did not mention Covent House, but her friends knew where she worked. One post [HB 56] referred to when she had been breathalyzed. The Claimant regretted the comments and said she should not have made them. She was in a bad financial situation which was causing her anxiety and stress. She also raised her good record and positive feedback she received whilst at Covent House. Her companion, Mr Canning, alleged that the Respondent had not followed its own procedure, which Ms Kaura disputed. He alleged the Claimant had been victimised over an earlier allegation of abuse in the care home. Ms Kaura denied that this was ever considered relevant in the disciplinary process. Ms Kaura did not uphold the allegation concerning being under the influence of alcohol. She upheld the complaint of breach of the Social Media Policy. The postings were serious and potentially damaging to the Respondent. Ms Kaura acknowledged that the Claimant did not expressly refer to the Respondent in her postings, but the Claimant's friends knew where she worked. This warranted her dismissal for gross misconduct.

17. When she was cross examined I noted the following:

- a. She did not accept that she had a conflict of interest being the Respondent's in-house lawyer, head of HR and the person responsible for chairing the disciplinary hearing and having the conduct of the litigation.
- b. She accepted that the Respondent had not told the Claimant how it obtained her Facebook postings. She had not asked and Ms Kaura assumed that she knew. Her union representative, Mr Canning, could have raised the point.
- c. She took the Claimant at face value that she had not mentioned the Respondent by name. However, other people knew where she worked and were her Facebook friends.

- d. She disagreed with the suggestion that the Claimant was publicly claiming that she had not been paid her wages. She had breached the Social Media Policy by using offensive language such as “pisses you off”. She suggested that saying the Respondent passed the blame on to everyone else was defamatory or derogatory. Mr McHugh suggested it was neither defamatory nor derogatory. Ms Kaura disagreed.
- e. When the Claimant was referring to her pay slips she breached paragraph 1.24.5 of the policy because she had raised a sensitive business topic. It was put to her that she was not actually referring to pay slips in that post.
- f. She was taken to the minutes of the hearing where she went through the Claimant’s posts [HB 145]. There was a reference to “gone missing”. She accepted that this was not derogatory nor defamatory. The post “well checked” [HB 145] was not derogatory or defamatory but was offensive because the Claimant said that she was pissed off with the Respondent’s actions. Ms Kaura enquired whether the Claimant’s allegations of not getting paid were true but did not think that it made a difference to whether the post was offensive. It was put to her that eight of the posts concerned the Claimant complaining that she had not been paid. The Respondent was annoyed at her complaining. Ms Kaura disagreed.
- g. She acknowledged that other staff who participated in the Facebook conversation about the pay slips had been disciplined. However, because of paragraph 1.24.5 of the policy, it was unreasonable for them to discuss it on that forum. It was implied in that rule. However, she accepted that the Claimant was not posting commercially sensitive information. Although there was nothing in the posts that specifically identified the Respondent it was evidence that they were talking about it. The Facebook profile made no mention of the Respondent. She agreed with Mr McHugh that if she came to this as a stranger and read the posts, she could not know that the Respondent or any of its group companies was being referred to.
- h. It was put to her that all these posts related to not receiving pay slips. How could this amount to sensitive business information? She replied that it was sensitive business information because it referred to pay in their organisation although she had not been dismissed because of that.
- i. The posting “I thought you did well” was potentially defamatory because the Claimant was saying the Respondent was deliberately not paying her. She admitted that she had not asked the Claimant about this. It was put to her that she made her finding without asking for her side of the story. This was a serious flaw in the disciplinary process because she had not given the Claimant an opportunity to defend herself.
- j. She accepted that the post “Thanks hin” [HB 145] did not breach the policy. The post “thank you lasses” [HB 145] was interpreted as being

disparaging against the Respondent although she accepted that they were not specifically mentioned in the post. She was then taken through the comments [HB 52-56] and agreed that the Respondent was not named in them.

- k. Ms Kaura was unaware of whether the Claimant was asked by the Respondent to delete the comments. She was taken to paragraph 1.9 of the policy [HB 65] which states that staff may be required to remove postings which are deemed to breach the policy. Failure to do so could lead to disciplinary action. Ms Kaura did not consider asking the Claimant to delete her posts. Instead, she considered other sanctions.
 - l. It was put to her that four posts that she claimed in her statement had breached the policy, did not actually breach it. Of the remaining six, five related to not being paid. Ms Kaura agreed. This meant that the principal reason for dismissing the Claimant was because she had had complained about not getting paid or receiving pay slips. Ms Kaura disagreed. It was put to her that only one posting was offensive. Ms Kaura disagreed.
 - m. It was put to Ms Kaura that following the incident on 9 June 2017, the Respondent had decided to dismiss the Claimant come what may, regardless of what was found on her Facebook page. She denied this.
 - n. She believed that the Claimant had been disciplined before although there was no evidence in the hearing bundle of that. She said that she made enquiries about the Claimant's record and was not sure if the Claimant had been previously disciplined or investigated. It was put to her that there was no reference to whether she had a clean record in Ms Kaura's dismissal letter [HB 149] nor in her statement. Ms Kaura agreed. However, she had asked for access to her personnel file and had made a judgment call. She agreed that there was no evidence that this was anything other than a first offence. She said that the question of whether the Claimant had been disciplined previously was irrelevant.
18. On re-examination Ms Kaura confirmed that the Facebook posts were available to her when she made her decision. She did not know who had been dismissed first in relation to the Facebook posting issue as she had joined the Respondent after the investigation. Kelly Maclean's disciplinary had not happened at the time when the Claimant was dismissed.

Mr M Greenwood

19. In his witness statement, Mr Greenwood states that he had no prior involvement in the process before he chaired the appeal hearing. He thoroughly reviewed the documents. He did not prejudge the matter. He discussed the Claimant's grounds of appeal with her. He noted that the Claimant was going through bankruptcy and was frustrated with the error in her wages. He noted that she felt that she was being harshly treated in comparison to other staff who had made worse comments. He knew that the Claimant believed that she could have posted worse things on

Facebook and felt she was being scapegoated. He asked her for mitigating circumstances. The Claimant agreed that she could have acted more maturely. Mr Greenwood states that the Claimant's earlier complaint about abuse at the care home in 2014 did not influence his decision to uphold the dismissal.

20. Under cross-examination, Mr Greenwood said the following:

- a. Prior to the appeal, he took advice from several sources, including Ms Kaura and from the internet. It was put to him that it was inappropriate to take advice from her as she chaired the disciplinary hearing. He replied that he wanted to know about the appeal process. It was put to him that this suggested it was a biased process. He replied he wanted help on how to conduct the hearing and not on the outcome, but he agreed with Mr McHugh that it did not look right that if the person who dismissed the employee had also advised the appeal officer on how to run the appeal. It was also put to him that he had not said in his statement that he had taken advice from Ms Kaura. He disagreed and said that his statement gave a fair account of what happened.
- b. He read the full file in advance of the hearing. He read the Social Media Policy. He also spoke to the Mr Malhotra, Eve Tierney and Ms Dowse. He was asked why he had spoken to two people who were not involved with the disciplinary process. He replied that having read the Claimant's staff file, he wanted to understand her employment history. There were undocumented incidents. She had a clean staff file as at 25 July 2017. He did not know the Claimant whereas the other people he spoke to did know her. He wanted to know if there was anything missing from the staff file.
- c. He was unaware that he needed to explain in his decision letter why he had dismissed the appeal [HB 171]. He conducted the appeal to the best of his abilities. There was nothing new or contributory to change the original decision.
- d. He wanted to know if the Claimant was trained regarding the Social Media Policy and was looking for any additional information over and above the documentation and the policy to determine if it was fair and reasonable. None of this produced any new or compelling evidence. It was put to him that the minutes of the hearing did not show that he had considered the individual Facebook posts referred to [HB 163]. Mr Greenwood said that he had considered the Facebook records but if it was not in the minutes, it was a fair record of the hearing. He was asked how he could have concluded that the decision was fair if he had not asked the Claimant about her posts. He replied that the Facebook posts spoke for themselves and they were not disputed by the Claimant. He took them to be correct. It was put to him that the Claimant's representative had argued that she had not breached the policy. How could Mr Greenwood determine this if he had not considered that representation. He replied that he gave the Claimant fair opportunity to answer the points that were raised at the time. He did not think it was necessary to refer to the Facebook posts. It was only the Claimant's opinion that she believed that the

post did not breach the policy.

- e. Mr Greenwood had made a conscious decision not to refer to the posts although he acknowledged that they were in the file pack. Regarding the investigation of other employees' breach of the policy he discovered that there was an investigation. It was put to him that as at 25 July 2017 no one had been dismissed for gross misconduct relating to the Facebook conversation. Mr Greenwood replied that he couldn't remember precisely at the time. It was put to him that from the minutes and his letter he had not considered whether the Facebook posts had breached the policy. He replied that was his main consideration. The Facebook posts were sufficiently serious to warrant dismissal.
- f. Mr McHugh asked Mr Greenwood whether he had, at any time, considered whether any damage had been caused to the Respondent's reputation. Mr McHugh had to prompt Mr Greenwood to answer the question. He eventually said that he was only aware of what he was aware of and that the words were significant and could have caused reputational harm. He said that other people were entering social media comments. However, he eventually admitted that he was not aware of any damage to the Respondent's reputation.
- g. He acknowledged that the Claimant's comments were about not getting paid. He was also concerned about the language that she had used in her posts. It was put to him that this was not set out in the minutes of the appeal hearing or in his letter. He acknowledged that he had not investigated the claim that the Appellant had not been paid. He agreed with Mr McHugh that the Respondent had damaged its reputation by not paying its employees. He agreed that the other people who were commenting on the Facebook posting were asking when they knew they would get paid. He was asked how the Claimant, in answering these questions, was doing reputational harm to the Respondent. He replied that it was more than just about the comments on the wage slips. He was asked how they caused harm to the business to which he replied, "I looked at the whole".
- h. It was put to him that ten posts were the subject matter of the disciplinary action. Eight of them related to pay or wage slips, and most of the comments were about that. He was asked how this harmed the Respondent's reputation. He replied that based on his knowledge at the time, the posts were potentially harmful, and he had to assess whether the decision to dismiss the Appellant was reasonable and justified. He acknowledged that the Claimant was never given an opportunity to delete the Facebook posts. However, once the comments had been posted, the damage had already been done. He did not write the policy which included the reference to deleting posts. He was pressed again on whether he had asked if the Claimant had been required to delete the posts and he replied that he thought that he might have asked but he could not remember.

21. Mr Greenwood told me that he had conducted research on the Internet concerning how to conduct an appeal hearing. This also included visiting

the ACAS site. He could not remember precisely what ACAS said on their site. Prior to conducting the Appellant's appeal, he had been involved with three or four other disciplinary actions. He had also been involved with four or five mediations. He had not received any formal training for conducting appeal hearings. He is a professional accountant. He had learnt his accountancy by experience. He told me that between 1000 and 1100 people worked for the Respondent's organisation.

22. On re-examination about whether there had been a breach of the Social Media Policy he recalled the Claimant saying that she did not think that her comments amounted to gross misconduct. They were made on a closed group on Facebook. However, notwithstanding that, he believed that the Respondent had to protect itself. He had read the disciplinary rules. He recalled that the Claimant had admitted to him that she knew damage that had been done and she had recognised that she had breached the Social Media Policy. However, he also accepted that her Facebook postings did not disclose that she was employed by the Respondent. Other people who had read those posts were either existing or former employees of the Respondent. Former employees could have used the information as ammunition against the Respondent. He was also asked whether the Claimant asked him to go through the Facebook posts with him. She had not, and her representative had not asked to do that either. In terms of steps that he could have taken to investigate whether damage had been done to the Respondent's reputation he thought that this was well-nigh impossible at the time.

The Claimant

23. I have noted the following from the Claimant's witness statement:

- a. She narrates her employment history in her witness statement including a reference to an earlier whistleblowing incident in 2014. In 2015 she was promoted to Senior Carer/Team Leader and in 2016 she was approached by management at Covent House to put herself forward to a new post of NAP and she was appointed. She was told that she would receive a pay rise on completion of her training. It was agreed that she would be paid £9 per hour.
- b. In April 2017 she was required to perform jury service at Durham Crown Court. She gave the letter summoning her for jury service to Linda Richardson. She wanted to know how she would be paid and she did not know the procedure for this. The Claimant duly attended Durham Crown Court and was asked by the staff there if the Respondent was paying her. The Claimant telephoned Ms Richardson who confirmed that the Respondent would pay her. The jury service lasted two weeks. When she received her wages for May 2017, the Claimant saw that she had not paid for the two weeks that she was performing jury service. Ms Richardson had not processed the relevant paperwork for head office. The Claimant telephoned payroll, but they would not speak to her about her wages and told her to go through the administrator. The administrator was on holiday and she was advised to speak to her manager. Her manager had left her position. She had also tried to speak to Eve Tierney, the Head of Care but Ms Tierney would not discuss wages with the Claimant and

she eventually had to speak to HR.

- c. Because of this to-and-fro, the Claimant felt frustrated and abandoned by management and was worried that she could not be able to pay her bills. She already had money problems. The Respondent did not understand her predicament. She went home and posted on Facebook saying that she was pissed off and had worked her arse off and had to fight to get paid and everyone was passing the blame. Her Facebook page was limited to her friends and was not an open page. Her profile and none of the posts say where she works. Several staff wrote on her Facebook page regarding pay slips that had not been received. When the Claimant spoke to HR she also told them about that and she was informed that the pay slips would be sent out a week later.
- d. Payroll agreed to pay the Claimant and would recoup the cost from the courts. HR told the Claimant that they had not received the jury paperwork. This was subsequently found by Lisa Bambling who was working as a standby manager.
- e. She described the incident on 9 June 2017 with Ms Dowse. She claims that she went into work to sort her shifts out. Ms Dowse was in the office but did not look at her. She thought her behaviour out of character as the two women usually got along. She told the Claimant that she should not be in because she was not on duty. The Claimant said she had an issue with her shift that she needed to sort out. She then went upstairs to speak to another member of staff about a personal matter. Ms Dowse telephoned her to ask why she was walking the floors. The Claimant said she had come to speak to her but had been unable to. Following that, the two women had a discussion which involved her being questioned over whether she had been drinking. The Claimant explained that she had been drinking the previous night because it was her birthday and she was on holiday. The conversation took place at approximately 2:45 PM and she was not under the influence of alcohol and she said that she would not have driven in if she was. She then described leaving the building to go to a local shop where she was breathalyzed by a policeman in the car park. The breath test indicated that she was not over the drink-driving limit and police officer apologised if he had upset her. The Claimant was upset because people she knew would have witnessed the incident in the car park.
- f. The Claimant raised a grievance alleging Ms Dowse and Ms Richardson had victimised her on 14 June 2017. Prior to that, on 13 June 2017 she was suspended. She narrated the investigatory meeting with Ms Payne, the disciplinary hearing and the appeal hearing. She does not know how the Respondent could reasonably believe that the comments on her Facebook page could identify the Respondent. She acknowledges that the people involved in commenting on her Facebook page were aware because they worked or had worked for the Respondent. The Respondent did not tell her how they came to view the Facebook posts and she believed that another member of staff was pressured into taking photographs of posts and handing them to the Respondent. She believes that the

Respondent has not shown how she brought it into disrepute. She believes that the Respondent relied upon the Facebook posts when it discovered that she was not over the drink-driving limit.

24. I have noted the following from the Claimant's evidence under cross-examination:

- a. She signed her contract of employment on 22 July 2013 which included her acknowledgement that she not only accepted the contract but also the staff handbook and would comply with any rules, policies and procedures [HB 87]. She was taken to a signature list of the document entitled "Social Media + Networking [handwritten]; Policy Read Document [typed]" [HB 96] and confirmed her signature and the date. There was some speculation about whether she had confirmed receiving the Social Media Policy. She said that she had signed for lots of policies. She had also signed a minute of a meeting dated 20 April 2016 [HB 99] during which Facebook postings were discussed and she was aware of the guidance contained in the minute. She accepted that she knew that it would be an act misconduct to contravene any instructions set out in the minute relating to Facebook usage.
- b. She acknowledged that the Respondent had always intended to pay her for the two weeks jury service but there had been an administrative oversight which caused the delay. She acknowledged that she was paid everything she was owed before the next payroll run.
- c. Regarding the incident on 9 June 2017 she did not accept that she had felt angry when she went in to Covent House. The Respondent had never had problems with her about shifts previously. She accepted that it would have been easy to resolve the matter over the telephone, but she was already on her way in. It was put to her that she had behaved unreasonably because she had come in unannounced at approximately 2:45 PM, Ms Dowse was busy, and it would have been reasonable for her to expect that the matter could be resolved by the end of the day. She accepted that Ms Dowse resolved the problem with her shift. The Claimant found it strange that Ms Dowse did not want her in the building given that they had got on previously. It was suggested to her that this is because she smelled alcohol on her breath. There could be no other reason why she would not engage with her. It was reasonable to conclude that Ms Dowse was too busy to talk to the Claimant, that she had told her not to be in the building and the Claimant had disobeyed her and that she suspected that she was "in drink" at the time.
- d. It was put to the Claimant that Ms Dowse had smelt alcohol on her breath and was concerned about this given they were in the residents' home. It was not appropriate to walk into elderly service users or their families if one was "in drink". The Claimant agreed that if someone was in such a situation as described it would be inappropriate. She acknowledged that Ms Dowse had asked her if she had been drinking and she told that she had. She had been drinking the night before because it was her birthday. She thought

that she had been drinking until she went to bed at approximately 1:30 AM. She had started drinking at about 8 PM. She had been drinking Bacardi and Coke. She did not accept that she had alcohol on her breath as she had come more than 12 hours later. It was put to her that the Respondent disagreed with this. She had come to the premises in her car. She was aggressive and smelt of drink and it was reasonable to contact the police because Ms Dowse was concerned that she was not fit state to drive. The Claimant accepted that was a reasonable thing to do. She was asked whether she was denying that there was alcohol in her system to which she replied "as far as I'm aware, I was not under the influence". She was breathalyzed about five or ten minutes later and she couldn't remember if she was told what her blood alcohol reading was but she was told that she was below the drink-driving limit.

- e. The Claimant said that she had a good relationship with the Respondent and had not had any problems until there had been the whistleblowing incident in 2014. She had not referred to being victimised or the whistleblowing matter in her claim to Eve Tierney because she was afraid to say too much. She was asked about her grievance meeting on 10 July 2017 [HB 151]. By that stage, she had already been dismissed. It was put to her that she had not held back on her concerns at that meeting as she clearly could not have been worried about keeping her job because she had already been dismissed. Furthermore, she had tried to resign. Clearly, she was not interested in getting her old job back and it was recorded in the minutes of the meeting that she had already attended another job interview. She had resigned before the outcome of the disciplinary hearing which clearly meant that she did not intend to continue working for the Respondent even if the original decision was overturned. The Claimant said that she already knew the outcome of the disciplinary. She knew that she would be sacked, and she thought it better that she should leave and that was why she resigned. She did not want the fact that she been sacked for gross misconduct to be on her record. She was asked why she had gone through the appeal process if she had no intention of saving her job. She said that nobody wanted a dismissal for misconduct on their record.
- f. The Claimant thought that she had gone for her first job interview sometime in July. It was put to her that she had said that she had attended an interview the Friday after she was suspended (i.e in June). She denied this. She started her new job on 27 July 2017. She had to wait some weeks for her CRB come through. It was suggested to her that when she attended the grievance hearing the minutes indicated that she already had a job offer in June 2017. The Claimant denied this. She was asked why she had not provided any correspondence from her new employer. She replied that she did not think it relevant because she was now working there.
- g. She was questioned at length about the Social Media Policy.
 - i. She acknowledged that it applied regardless of whether the Respondent's resources were being utilised. She

acknowledged that breaching the policy could lead to dismissal. She acknowledged that making derogatory, disparaging or defamatory remarks about the Respondent could lead to dismissal. She understood paragraphs 1.24.1, 1.24.3, 1.24.5 and 1.26. However, she did not feel that anything that she had posted was either obscene or insulting. She was taken to her posting on 22 May 2017 [HB 44] where she used the word “twat”. It was put to her that using that word about her employer was bad language and that it was offensive, derogatory or insulting. It was suggested that she had written that post when she felt aggrieved after the delay in receiving her pay during the time that she was performing jury service. She agreed with Mr Mugliston.

- ii. The Appellant had been frustrated about not getting paid and she said she had no money in the bank to pay her bills and she was in the process of going bankrupt. Eve Tierney knew about this and her behaviour was wrong. It was put to her that she was ranting when she was posting, and she had used that word herself during the investigatory meeting. She acknowledged that her post “pisses you off” [HB 43] was about the Respondent.
- iii. The Claimant said that she had about a hundred friends on Facebook. She thought that they had all seen her postings. She acknowledged that it was not a private group and that any of her friends could see her postings. She was asked whether it was safe to assume that her friends knew where she worked. She replied that some of her friends worked with her and would know where she worked. She acknowledged that people who did not work with her would also see the posts. She did not think that people who are not her friends would be able to see the posts. She was not technically minded, and she did not know if friends of her friends would see her postings. She knew and acknowledged that she should not have made postings.
- iv. The Claimant said that when she was making her postings on Facebook she was trying to resolve the issue about the non-payment of wages and the failure to provide pay slips. However, it was put to her that she knew at the time that it was a temporary problem and the Respondent had promised to resolve the matter. She was then questioned about other posts. For example, in the same conversation thread there was a post “gone on holidays”. She acknowledged that this was about someone who worked for the Respondent, the administrator. She said that former employees were also friends. Some of them continue to work in the same industry. She acknowledged that when she was posting about the pay slips going missing she was broadcasting that fact. However, she did not think that this would damage the Respondent’s reputation because things could go missing. It was put to her that she was being critical of the Respondent. She was ranting and broadcasting about them and this could damage their

reputation.

- v. It was put to the Claimant that if she was trying to resolve the issue why had she not followed the April 2016 memorandum and put her concerns in a private message rather than using Facebook. Why had she chosen to continue broadcasting on Facebook in a manner that could damage the Respondent's reputation? The Claimant responded that she did not think that she was doing that. She said that everyone was upset about not getting their pay slips and no one knew what was going on. A manager had left. There was no administrator available and no deputy. The Claimant had tried contacting the Head of Care who wanted nothing to do with the wages issue. A lot of people felt frustrated. It was not a rant. The Respondent had made promises about wage slips and had not delivered on them. The Claimant waited for 1.5 weeks before she got paid the money she was owed for her time on jury service. However, she agreed with Mr Mugliston that Facebook was not an appropriate forum for this.
- vi. The Claimant was taken to her posting "well checked my bank" [HB 51]. This related to when she was waiting to be paid. It was put to her that this had prompted comments about the Respondent going into administration and that the conversation was no longer under her control. This damaged the Respondent. The Claimant responded that it was a private conversation.
- vii. Mr Mugliston questioned the Claimant about the incident on 9 June 2017. Within an hour of being stopped by the police, the Claimant was posting and making light of the situation on Facebook. The Claimant agreed but said that she had not been drink-driving. She accepted that she had been drinking until the early hours of the morning because she had been on holiday. It was put to her that if family members of elderly residents at the home had seen a senior member of the care staff and had read the Facebook posts and linked the two, this could damage the Respondent's reputation. The Claimant replied that she was on holiday at the time. She knew that people had seen her being stopped by the police and it was possible that service users' families could have seen her being breathalyzed.
- viii. She was asked about the Facebook posts that described her drinking Bacardi and Coke and a subsequent reference by another friend about "sniffing coke" (i.e. cocaine). In that conversation string she had used language such as "fuck that". She did not think that this was obscene or offensive. It was put to her that as soon Facebook posting started to refer cocaine, she should have deleted it. She agreed that it was possible to delete comments and she knew how to do that. In hindsight, she thought she should have done that. In relation to another posting "that place" by Beth Dickson [HB 65] she agreed that this could be linked to the Respondent.

- h. The Claimant agreed that once the Respondent became aware of inappropriate postings it was reasonable for them to act. She was invited to attend an investigatory meeting and seen the letter [HB 122]. She knew what the allegations were against her. She knew what was being investigated. She knew why she had been dismissed. She had been given all the Facebook posts relied on and had been given an opportunity to explain her side of the story. She confirmed that she had seen the handbook. She accepted that her position included being a role model for other staff. She accepted that she had breached the Social Media Policy. She accepted what “sniffing coke” meant. When it was put to her that she was clearly discussing the Respondent on Facebook she replied that she thought her Facebook page was closed and nowhere had she said for whom she worked. She thought it was closed to her friends and family, but she acknowledged that they would know where she worked.
- i. She accepted that she had been given an opportunity to put her side of the case on 9 June 2017 and that the case concerning her coming to Covent House had not been pursued because of lack of evidence. She acknowledged that she had a companion at the disciplinary hearing. She acknowledged that she had been offered an opportunity to delay the start of the disciplinary hearing because documents had been given to her on the day. However, she had chosen to continue with the hearing. She agreed that her grievance was a separate matter. She accepted that once her postings had gone on to Facebook, everybody could see them.
- j. She remembered Ms Kaura taking her through her Facebook posts at the disciplinary hearing. She acknowledged that people knew where she worked and that some of her friends on Facebook were former work colleagues. She acknowledged that in mitigation she regretted her Facebook postings. She acknowledged that her representative, Mr Canning, had said that “Linda is sorry for your reputation”. She acknowledged that she received the dismissal letter on 8 July 2017 at 1 PM and that she had been dismissed for breaching the Social Media Policy. She also acknowledged that Ms Kaura had considered the Claimant’s contrition. The Claimant fully understood why she had been dismissed but she felt that they should have shown her compassion particularly given the fact that another employee who had posted that the Respondent place of work was a “shit hole” had not been dismissed however, she also acknowledged that she had played no role in the disciplinary action against that employee. The employee in question had telephoned to ask her about what to say. The Claimant had seen the comments. She had not been to that other employee’s disciplinary meeting and did not know the basis upon which the sanction had been imposed. She was relying on what the other employee had told her.
- k. The Claimant acknowledged that she had been through the appeal process. She had no reason to doubt that Mr Greenwood was a fresh pair of eyes and it was the first time that she had met him. He listened to what she said and went through the grounds of her appeal.

- I. In terms of mitigation of loss, I noted that the Claimant has another job. She had called around various people looking for vacancies and she had looked online. Most of the prospective employers required her to do her CV online which he was unable to do. She saw there was a position at Primrose House, where she had previously worked and she knew the manager there. She completed an application form and was offered a job. She is still working at Primrose House. Because they knew her, there was no need for a reference. She started working there in July 2017. She is working a 33 hour/44 hour per week about rota. She occasionally works extra hours to cover sickness absences. She was taken to a job advert and it was suggested that she could do it at the higher rate of £14 per hour [HB 184]. She replied that it was not in her local area. She was referred to another job which was in her area [HB 187]. The Claimant said that she had not seen that job.
25. The Claimant told me that she had been given a contract of employment by Primrose House, but it was not in the hearing bundle. She thought that she had got it in July. She started working there on 27 July 2017; it is a permanent position. She is not in receipt of state benefits.
26. On re-examination she was taken to the job advertisement she had been questioned about [HB 184]. This was for a registered nurse in Halifax. She could not do that job because she was not a qualified nurse. She was taken the job advertisement for a senior healthcare assistant in her area [HB 187]. She was qualified for that work, but it was not appropriate for her to do it as it required her to do night shifts. She needed to care for her partner who was recovering from a stroke. There was a job advertisement for Newcross Healthcare, but she could not do that because it was part-time and less than 30 hours per week. She was asked to clarify what she meant when it was suggested that she had no intention of taking her job back if her appeal was successful. She replied that she would have gone back to work but it would have been very difficult. She did not think that she had done anything wrong and she wanted her character back. She was asked about the meeting in April 2016 when the Facebook policy was discussed. She did not remember precisely what was said because a lot had been going on time. There had been a lot of borderline bullying at the care home and the staff been told to be careful about how they used Facebook.

The Claimant's submissions

27. Mr McHugh submitted that he would be relying upon his skeleton argument. On the issue of automatic unfair dismissal, Ms Payne had been very concerned and it was significant to her that employees had been airing their grievances in public about not getting paid or receiving pay slips. When Ms McHugh and Ms Kaura gave their evidence, he had gone through the ten Facebook posts that were relied upon in the disciplinary process which they believed breached the Social Media Policy. Eight of the posts were about not being paid or spoke of not receiving pay slips. The Claimant was asserting a statutory right and she had been disciplined for doing that. She had not acted in bad faith. Her allegations were true. She had been delayed in being paid and receiving her pay slips. She had tried resolving the problem through the normal channels and had raised the issue with the

Respondent. She had been “sent round the house. Her posts related to statutory rights, and her dismissal was automatically unfair. Even if the Claimant had acted with mixed motives in making her allegations the Tribunal could only disregard her claims if the Claimant had acted for ulterior reasons. There was no evidence to suggest that. Most employees who had been involved with the Facebook conversation had been disciplined. This suggests further that the Claimant was dismissed because she had complained about not receiving her wages and pay slips.

28. On the issue of ordinary unfair dismissal, there were problems with the procedure that had been followed. Ms Payne’s evidence was unimpressive. Despite being the Head of Compliance and being tasked with investigating the alleged breach of the Social Media Policy she had not bothered to read the policy. She had not familiarised herself with it. This was a fundamental flaw in the process. She had been asked whether she was only interested in looking for evidence of guilt. She admitted that was what she did. This suggested that her investigation was neither fair nor balanced. It also hinted at predetermination and it seemed that the Respondent was determined to dismiss the Claimant whatever happened.
29. There were also problems with Ms Kaura. She is also the Respondent’s in-house lawyer. She had given evidence on whether she believed that she had a conflict-of-interest by taking on the role of dismissing officer and legal adviser. She said under cross-examination that she had not advised the Respondent on the process. However, when Mr Greenwood gave his evidence he said that Ms Kaura had advised him on how to conduct the appeals process. This was another fundamental flaw in the procedure and one which the ACAS Code identifies as inappropriate. There was potential bias for the dismissing officer to advise the appeals officer on how to conduct the appeal hearing.
30. On the question of substantive unfairness, the reason for the dismissal had been given as breaching the Social Media Policy because the Claimant had repeatedly posted offensive and derogatory material [HB 149]. However, the Social Media Policy states that it does not form part of the Claimant’s contract of employment [HB 64]. Consequently, it was questionable whether the Respondent could rely upon allegations of misconduct if the policy had no contractual force. I was then referred to the decision in **Smith v Trafford Housing Trust [2013] IRLR 86** which was authority for the proposition that codes and practices forming part of a contractual framework (in the sense that the employee is required to observe and abide by them) must be objectively construed by reference to what a reasonable person with the knowledge and understanding of an employee of the type in question would understand by the language used. Applying this principle, the Claimant did not mention the Respondent by name on her Facebook profile. She did not say that she was employed by the Respondent and none of her posts indicated where and for whom she worked. Under cross examination, the Respondent’s witnesses had agreed that a reasonably well-informed stranger could not identify where the Claimant worked by looking at her posts. Even when one looked at the posts that other people made in the conversation threads, they did not specifically refer to the Respondent either. It was not obvious to anyone who would come across these posts to whom they were referring. It was clear that a reasonable person in the Claimant’s position could not think that the policy had been breached

because the Respondent had not been named. Furthermore, there was no evidence that the posts harmed the Respondent's reputation. This had not been assessed by any of the officers involved in the decision to dismiss the Claimant.

31. In this claim, no reasonable reader of the Claimant's Facebook posts could have concluded that her remarks were disparaging or defamatory. The Respondent could not have held a genuine belief in this regard.
32. Turning to the question of the sanction, the Tribunal had to consider whether it was fair in all the circumstances. The appeal and dismissing officers had asked if the Claimant had a clean disciplinary record. However, they thought that her prior disciplinary record was irrelevant. It was in fact relevant. She had a clean record and had worked for the Respondent eight years. She was not given an opportunity under the Social Media Policy to delete the offending posts and no one had considered that alternative. No reasonable employer would have moved straight to dismissal for gross misconduct. Many of the posts were written to help assist junior colleagues and were largely innocuous. Some of the posts had used bad language but they were not shocking to the reasonable Facebook reader. Under all the circumstances, the dismissal was unfair.
33. On the question of remedy, I was addressed on **Polkey v AE Dayton Services Limited 1988 ICR 142, HL**. There were flaws in the Respondent's procedure that were so substantial that the Tribunal was not in a position to speculate what could have happened if a fair procedure had been followed. The procedure was fundamentally flawed for the reasons given above. The Claimant accepted that she had breached the Social Media Policy, but this was in the context of an employee who had worked for the Respondent for eight years and had a clean service record. If there had been a fair procedure, a sanction short of dismissal would have been applied.
34. On the question of contributory conduct on the part of the Claimant much had been made about her being allegedly "in drink" on 9 June 2017. There was no evidence that she had been under the influence of alcohol. She had been breathalyzed but shown to be below the drink drive limit. Ms Dowse suggested that the Claimant still had drink in her system from the night before and this was based on what a policeman had allegedly told her about the breathalyzer reading. It was submitted that it was not plausible that a policeman would not have disclosed the results of a breath test to third party particularly if a person was under the drink-driving limit. To do so would breach duties under the Data Protection Act and would likely to be a disciplinary offence. Consequently, I was invited to disregard Ms Dowse's evidence. The Claimant did not think that she was under the influence of alcohol and the Tribunal knew that she was below the drink-driving limit. There was no evidence that she had behaved aggressively, and, in any event, the Respondent had dismissed the allegation of being "in drink". Turning to the Facebook posts it was significant that the Claimant had never been offered the opportunity to delete them. The more unacceptable posts had not been made by the Claimant herself. The Respondent had relied on ten Facebook posts. They were relatively innocuous, and they were not malicious. They were the product of a frustrated person who had financial problems and was on the verge of bankruptcy. There was no blameworthy conduct but if I was minded making a reduction to the Claimant's

compensation because of her contributory conduct it should be no more than 25%.

35. I was addressed on the purported resignation. This was relevant in relation to causation and loss. The Claimant had resigned after the disciplinary process because she had lost confidence in the Respondent. Even if the dismissal had not been admitted there would have been a constructive unfair dismissal claim. In her oral evidence, she said that if she had been offered her job back, she would have taken it because she could not afford to do anything else given her financial circumstances. Her resignation did not break the chain of causation.
36. On the matter of mitigation, the Claimant knew about care homes locally. She had rung around and had got a job on a lower salary which started on 27 July 2017. It was for the Respondent to show that the Claimant had failed to mitigate her loss. The Respondent had produced three or four job descriptions which it believed were more suitable and better paid for the Claimant. One of those jobs advertised a rate of £14 per hour but the Claimant was not qualified to do it. The other jobs referred to her either part-time or required shift work. The Claimant could not do the shift work advertised because she had to care for her partner given his condition. The part-time job was for fewer hours than one that she currently had. Her claim for loss of earnings was modest. There was a short period of loss and there was little evidence of better paid work or work at the same level of pay.

The Respondent's submissions

37. Mr Mugliston submitted that he would be relying on his written submissions. In this case, there was a clear policy concerning the use of social media and what the sanctions were if that policy was breached. The Respondent had sent this out when dismissing the Claimant. The Claimant admitted that she had breached the Social Media Policy. She had been a long-standing employee and was in a position of responsibility and she knew about the potential reputational damage that she could cause by the posting. It was reasonable for the Respondent to conclude that the policy had been breached.
38. The Respondent had not dismissed the Claimant because of what had happened on 9 June 2017. That was any relevant to the issue of contributory conduct. The Claimant had never suggested that there was no alcohol in her system. There was evidence that she was below the limit, but Ms Dowse did not know what the limit was. She could only say what she had been told. As for the Claimant's behaviour on the day, people were concerned because they had smelt alcohol and she had been aggressive.
39. The Respondent had a genuine belief in the Claimant's misconduct. Mr Greenwood thought that the Facebook posts spoke for themselves. The posts were easily accessible by the Claimant's friends and their friends. The Respondent's response was within the reasonable range of responses. Furthermore, the Claimant knew that she had breached the policy. Regarding evidence of reputational damage, Mr Greenwood had considered this, and he wondered how it could have been investigated.

40. Ms Payne had said that she understood the policy and there was no need

to read it. The Claimant was represented at the disciplinary and appeal hearings and she acknowledged that she had breached policy.

41. On the question of automatic under fair dismissal there was no dispute that the Respondent had delayed in paying her because of her jury service. The Claimant was relying on the Facebook posts and they were not made in good faith given the way that she had raised them. She had been ranting and she had not attempted to resolve the matter. She had not complained to her employer. Her employer could not have seen the Facebook posts. She was letting off steam by using inappropriate language and there was no evidence that she been dismissed for asserting a statutory right. She had been dismissed because of her manner and it was not open to the Tribunal to consider sanctions imposed on other employees. The Tribunal had not heard evidence from those other employees and it was for the Claimant to establish a different reason. There was no causal connection with the earlier whistleblowing incident and reason to dismiss.
42. The Claimant had resigned because she did not want to work with the Respondent. During the grievance hearing, she had acknowledged that she was looking for other work. She had jumped the gun before she knew the outcome with the disciplinary process. She had admitted to breaching the policy.
43. If I found ordinary unfair dismissal, on the question of **Polkey** I was referred to the fact that the Claimant was in possession of the Facebook posts and she had a representative at the hearings and she acknowledged that she had been wrong. On the question of contributory conduct, I was referred to her behaviour 9 June 2017 and the Facebook posts which were clearly in breach of policy which was why she had been dismissed. This warranted a 100% reduction in any compensation awarded. Finally, in relation to mitigation and remedy, she had not documented her efforts to find work and she had taken few steps to get back to her pre-dismissal earnings. This was sufficient to reduce any award made in respect of future losses. She had also put in a claim for pension loss but had not provided any supporting documentation. It was accepted that it was a very modest claim.

Discussion and findings

44. These are the Facebook posts upon which the Respondent relied in the disciplinary action against the Claimant:

Pisses you off when you work your arse off and have to fight to get paid, and they pass the blame to everyone else, just pay me my money. [HB 43]

I phoned up and they just pass the blame but said they will sort it. [HB 44]

Gone on her holidays but she was paid alright. [HB 45]

Been along the day and they were posted out on 17 so they have gone missing. [HB 47]

Don't know, find out tomorrow when am in. [HB 49]

I thought you did well I have been in touch with the union and I'm going always this time had enough of them getting out of paying the money like. [HB 50]

Well checked my bank and still not paid getting really pissed off now. [HB 51]

Thanks hin best thing I can say is lucky I have more good friends than enemys. [HB 52]

Thank you lasses best thing is that there more nice people then their art at, still can't believe what they done to me but today is another day eh. [HB 57]

It should be noted that these posts initiated conversations with the Claimant's Facebook friends. Consequently, there is a mixture of posts from the Claimant and other people.

45. The Respondent's Social Media [HB 64-69] provides amongst other things:

1.3 This policy does not form part of any employee's contract of employment and it may be amended at any time.

...

1.7 It applies to the use of social media for both business and personal purposes, whether during office hours or otherwise. The policy applies regardless of whether the social media is accessed using our IT facilities and equipment belonging to members of staff.

1.8 Breach of this policy may result in disciplinary action up to and including dismissal. Disciplinary action may be taken regardless of whether the breaches committed during working hours, and regardless of whether our equipment or facilities are used for the purpose of committing the breach. Any member of staff suspected of committing a breach of this policy will be required to co-operate with our investigation, which may involve handing over relevant passwords and login details.

1.9 Staff may be required to remove internal postings which are deemed to constitute a breach of this policy. Failure to comply with such a request may in itself result in disciplinary action.

...

1.13 Social media should never be used in a way that breaches any of our other policies. If an Internet post would breach any of our policies on another forum, it will also breach them in an online forum. For example, employees are prohibited from using social media to:

...

1.13.5 defame or disparage the organisation or its affiliates,

customers, clients, business partners, suppliers, vendors or other stakeholders;

...

1.17 *The contents of our IT resources and communication systems are our property. Therefore, staff should have no expectation of privacy in any message, files, data, document, facsimile, telephone conversation, social media post conversational message, or any other kind of information or communications transmitted to, received or printed from, or stored or recorded on our electronic information and communication systems.*

1.18 *We reserve the right to monitor, intercept and review, without further notice, staff activities using our IT resources and communication systems, including but not limited to social media postings and activities, to ensure that our rules are being complied with and for legitimate business purposes and you consent to such monitoring by your use of such resources and systems. This might include, without limitation, the monitoring, interception, accessing, recording, disclosing, inspecting, reviewing, retrieving and printing of transactions, messages, communications, postings, log-ins, recordings and other uses of the system as well as keystroke capturing and other network monitoring technologies.*

...

1.24 *Protecting our business reputation:*

1.24.1 *Staff must not post disparaging or defamatory statements about:*

- (i) our organisation;*
- (ii) our clients;*
- (iii) suppliers and vendors; and*
- (iv) other affiliates and stakeholders*

Our staff should also avoid social media communications that might be misconstrued in a way that could damage our business reputation, even indirectly.

...

1.24.3 *Staff are personally responsible for what they communicate in social media; remember that what you publish might be available to be read by the masses (including the organisation itself, future employers and social acquaintances) for a long time. Keep this in mind before you post content.*

...

1.26 Respecting colleagues, clients, partners and suppliers:

1.26.1 Do not post anything that your colleagues or our customers, clients, business partners, suppliers, vendors or other stakeholders would find offensive, including discriminatory comments, insults or obscenity.

1.26.2 Do not post anything related to your colleagues or our customers, clients, business partners, suppliers, vendors or other stakeholders without their written permission.

46. The minutes of the staff meeting of 20 April 2016 are exhibited in the hearing bundle [HB 98]. There is a section entitled "Facebook" [HB 99] which states:

No one should have Prestwick Care or Covent House mentioned on their facebook pages. Don't discuss work in an open status for all to see. It's really unprofessional. If you feel the need to discuss the day you've had etc with a colleague/friend inbox them a personal message not a public message for all to see.

47. I am reminded that section 104 (1) (b) of the 1996 Act an employee's dismissal is automatically unfair if the reason or principal reason for the dismissal was that the employee had infringed a relevant statutory right. It is immaterial whether the employee actually had a statutory right in question or whether the right had been infringed, but the employee's claim to the right and its infringement must have been made in good faith (section 104 (2) of the 1996 Act). Furthermore, it is sufficient that the employee made it reasonably clear to the employer what the right claim to have been infringed was. It is not necessary actually to specify the right (section 104 (3) of the 1996 Act).

48. The circumstances under which an employee is dismissed are set out in section 95 of the 1996 Act as follows:

(1) for the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2)...., only if) –

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

...

49. The fairness of a dismissal is set out in section 98 of 1996 Act as follows:

(1) in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

...

(b) relates to the conduct of the employee,

...

(4) Where the employer has fulfilled the requirement of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason) shown by the employer –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee,

(b) shall be determined in accordance with equity and the substantial merits of the case.

50. The employer must show that misconduct was the reason for the dismissal. According to the Employment Appeal Tribunal in **British Home Stores Limited v Burchell 1980 ICR 303**, a threefold test applies. The employer must show that:

- a. It believed that the employee was guilty of misconduct;
- b. it had in mind reasonable grounds upon which to sustain that belief; and
- c. at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

This means that the employer need not have conclusive direct proof of the employee's misconduct; only a genuine and reasonable belief, reasonably test.

51. The Tribunal has to decide whether the Respondent's decision to dismiss the Claimant fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (**Iceland Frozen Foods Limited v Jones [1982] IRLR 439**). For the purposes of that test, it is irrelevant whether or not the Tribunal would have dismissed the Claimant if it had been in the Respondent's shoes. The Tribunal must not "substitute its view" for that of the Respondent.

52. Where the employee admits the misconduct, the employer will not usually have to conduct an investigation (**Royal Society for the Protection of Birds v Croucher [1984] IRLR 425**). However, this will not always be the case. It was pointed out by the EAT in **Secretary of State for Scotland v Campbell [1992] IRLR 263** that the test is whether the employer acted reasonably in all the circumstances, and sometimes this may entail conducting an investigation, for example where new matters come to light.
53. The decision in **Croucher** was considered by the **EAT in CRO Ports London Ltd v Wiltshire UKEAT/0344/14**, a case in which an employee admitted to following a practice in breach of health and safety rules but argued that the employer had known about and effectively condoned that practice. The question for the tribunal was whether the employer had acted within the range of reasonable responses of the reasonable employer when it limited the scope of its investigation in the light of the employee's admissions. The tribunal had overlooked the question of whether, applying the range of reasonable responses test, the apparent conflict of evidence regarding the employer condoning the practice had required further investigation. This question was remitted to a fresh tribunal.
54. Social media or internet misuse may be misconduct amounting to a potentially fair reason for dismissal and may in some cases be repudiatory breach of contract leading to grounds for summary dismissal at common law. Caselaw shows that it is possible for an employer to fairly dismiss an employee for conduct outside of work. The key issue for employers to consider is whether or not the employee's misconduct goes to the employment relationship or affects their ability to do their job. An employer cannot normally take action against its employees for what they do on their own computers at home, provided that their activities do not damage the employer's reputation. The proposition that conduct may damage the employer's reputation, even if it takes place outside of work, is particularly evident when it comes to social media.
55. The following cases are instructive:
- a. In **British Waterways Board v Smith UKEAT/0004/15** an employee made derogatory comments about his employer on Facebook, which included "that's why I hate my work for those reasons its not the work its the people who ruin it nasty horrible human beings" and "on standby tonight so only going to get half pissed lol". The Dismissal was fair. The EAT held that it did not matter that the misconduct had taken place two years before dismissal or that the employer had been aware of the misconduct throughout that period.
 - b. In **Ward v Marston's Plc ET/2600869/13** a part-time employee made a comment on his Facebook page about his employer, stating that an area manager, whom he had never met, "is apparently a c**t". Some of the employee's Facebook friends were colleagues or former colleagues and would have been aware who the employee was talking about. Dismissal was fair. Dismissal for making one highly offensive post was within the range of reasonable responses. Although the ET accepted that the employee had never been provided with a copy of the social media policy and did not know that the employer had such a policy, he could not claim to be unfamiliar

with either the idea or content of such policies. His previous employer and another employer for whom he worked at the time both had social media policies.

- c. In **Whitham v Club 24 Ltd t/a Ventura ET/1810462/10** an employee made derogatory comments about her workplace on Facebook, including "I think I work in a nursery and I do not mean working with plants." Dismissal was unfair. The dismissal of the employee was not reasonable in all the circumstances. The comments were "relatively minor" and there was nothing to suggest that the employer had suffered any embarrassment or that its relationship with a key client had been harmed or jeopardised as a result (even though some of its employees were her Facebook friends). No one other than her friends could see the comments. The employer had failed to take into account the employee's exemplary employment record and mitigating circumstances, which included the fact that she had immediately apologised in writing for her conduct. The compensatory award was reduced by 20% for contributory fault.
- d. In **Mazur v Crediton Dairy Ltd ET/1400995/14** an employee posted on Facebook a photograph of a person in the employer's laboratory, in a laboratory coat with the employer's logo partially visible, wearing a plastic Osama Bin Laden mask. Following an investigation, in which the employee admitted that the photo was of him and that he had posted it on Facebook as a "joke", the employee was summarily dismissed for gross misconduct for bringing the employer or its name into disrepute. The dismissal was both unfair and wrongful. The employer did not have reasonable grounds to conclude that the employee's actions had actually brought the employer into disrepute and it had not carried out any proper investigations to establish whether that was the case. The photograph had been on Facebook for seven months and there was no evidence of any damage to the employer in this time. The employer had failed to consider whether the employee knew or ought reasonably to have known that his conduct was likely to have placed his employment at risk, and it did not take into account the provisions of the staff handbook and the Acas guidelines on social media to which the employee had referred in the disciplinary hearing. The employer had also failed to properly consider the employee's contention that the disciplinary procedure lacked clear rules on the use of social media. The employer had not considered whether to impose a lesser sanction, despite the employee's previous clean record, his recognition that he should not have posted the photograph, his apology, and the fact that he had removed the photograph on the day that he was asked to do so. However, the tribunal reduced the unfair dismissal basic and compensatory awards by 60% because of the employee's contributory conduct. The tribunal held that the employee's actions did not amount to gross misconduct and that dismissal without notice was therefore wrongful. Damages were awarded in respect of the employee's contractual notice period.

56. Exactly what type of behaviour amounts to gross misconduct depends upon the facts of each case. However, it is generally accepted that it must be an act which fundamentally undermines the employment contract (i.e. it must

be repudiatory conduct by the employee going to the route of the contract) (**Wilson v Racher ICR 428, CA**). The conduct must be a deliberate and willful contradiction of the contractual terms or amount to gross negligence.

57. Even where gross misconduct may justify summary dismissal, an employer suspecting an employee of such conduct should still follow a fair procedure including a full investigation of the facts. If an employer does establish a reasonable belief that the employee is guilty of misconduct in question, he must still hold a meeting and hear the employee's case, including any mitigating circumstances that might lead to a lesser sanction. Accordingly, even if the employee has committed an act of gross misconduct, the fairness or otherwise of any subsequent dismissal remains to be determined in accordance with the statutory test.
58. A conduct dismissal will not normally be treated as fair unless certain procedural steps have been followed. Without following these steps, it will not in general be possible for an employer to show that he acted reasonably in treating the conduct reason as a sufficient reason to dismiss. In **Polkey**, Lord Bridge set out these procedural steps as follows: a full investigation of the conduct and a fair hearing to hear what the employee wants to say in explanation or mitigation.
59. When assessing whether the employer adopted a reasonable procedure, the Tribunal should use the range of reasonable responses test that applies to substantive unfair dismissal claims. In **Sainsbury plc v Hitt 2003 ICR 111, CA** Lord Justice Mummery stated that:

The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason.

60. The ACAS Code (the "Code") sets out the basic requirements for fairness that will be applicable in most conduct cases. It is intended to provide a standard of reasonable behaviour in most instances.
61. An employer should normally carry out a full investigation before deciding whether dismissal is a reasonable response in the circumstances unless the employee has admitted guilt (see above). Applying the **Burchell** test, the employer should not act on the basis of mere suspicion. It must have a genuine belief that the employee is guilty, based on reasonable grounds, after having carried out as much investigation into the matter as was reasonable in all the circumstances of the case. The employer's job is to gather all the available evidence. Once in full possession of the facts, the employer will be able to make a reasonable decision about what action to take. It is also important that the employer puts itself into a position of being able to make specific rather than general allegations against the employee. If an employer fails to establish all of the facts it risks a finding that a resulting dismissal was unfair both in respect of a failure to carry out a reasonable investigation and a failure to comply with the Code.

62. The Code states that “a fair disciplinary process should always be followed before dismissing for gross misconduct”. Unless the misconduct is so heinous as to require instant dismissal (e.g. where there is a danger to life or severe damage to the business) even serious conduct cases should be dealt with in the normal way.
63. There is no hard and fast rule as to the level of inquiry the employer should conduct into the employee’s suspected misconduct to satisfy the **Burchell** test. It will depend on the circumstances, the nature and the gravity of the case, the state of the evidence and the potential consequences of an adverse finding on the employee. The Code emphasises that the more serious the allegation, the more thorough the investigation conducted by the employer ought to be. An investigation leading to a warning need not be as rigorous as one leading to dismissal (**A v B 2003 IRLR 2003 IRLR 405, EAT**). There should be careful and conscientious enquiry with the investigator putting as much focus on evidence that may point towards innocence as on that which points towards guilt. The Code stresses that employers should keep an open mind when carrying out an investigation. Their task is to look for evidence that weakens as well as supports the employer’s case. If disciplinary action results in dismissal and there is an indication that the employer has pre-judged the outcome, that can be sufficient to make the dismissal unfair.
64. The purpose of the disciplinary hearing is twofold: it allows the employer to find out whether or not the misconduct has been committed and it allows the employee to explain the conduct or any mitigating circumstances. If the employer fails to ensure that the employee is given a fair chance to refute any allegations of misconduct against him or her, this may lead a Tribunal to conclude that the decision to dismiss was a foregone conclusion.
65. It is a cardinal principle of natural justice that the person conducting the proceedings should not be “a judge in his own cause”. This means that the decision maker should not have a direct interest in the outcome of the proceedings and should not give any appearance of bias or partiality. A common example of bias is where a supervisor or manager involved in the disciplinary proceedings is also involved at an earlier stage in the case and so may already have formed an opinion. In order to minimise the possibility of bias, the procedure should separate the processes of investigation, decision-making and appeal wherever possible. In **Whitbread plc (t/a Whitbread Medway Inns) v Hall 2001 ICR 617, CA**, the claimant’s dismissal was found to be unfair despite his admission of guilt because the manager holding the disciplinary meeting had initiated the investigation and was biased against him, as should really have made up our mind to dismiss.
66. Establishing that the reason for the dismissal relates to the employee’s conduct under section 98 (2) (b) of the 1996 Act is the first stage in the process. While the **Burchell** test is relevant to establishing the employer’s belief in the employee’s guilt and, therefore, to establishing the reason the dismissal, it applies equally to the question of whether it was reasonable for the employer to treat that reason as a sufficient reason to dismiss in the circumstances under section 98 (4) of the 1996 Act (**Foley v Post Office 2000 ICR 1283, CA**). When assessing whether the **Burchell** test has been met the Tribunal must ask itself whether what occurred fell within a ‘range of reasonable responses’ of a reasonable employer. In judging the

reasonableness of an employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. The Court of Appeal has held that the 'range of reasonable responses' test applies in conduct case both to the decision to dismiss and the procedure by which the decision was reached. Furthermore, employers should ensure that any penalty imposed is commensurate to the misconduct committed by the employee.

67. The Code states that the opportunity to appeal against a disciplinary decision is essential to natural justice and that an appeal may be raised on any number of grounds such as new evidence, undue severity or inconsistency of penalty. The conduct of the appeal hearing is important. The principles of natural justice should be observed so far as possible. The person appearing hearing the appeal should be different to those who have handled the prior stages of the disciplinary process and ideally they should not have contact with each other. It is recognised that the person who investigated the offence might need to be present at the appeal hearing to give factual information. However that person ideally should not remain behind after the hearing to discuss matters of the ultimate decision maker. Such behaviour would smack of bias and may be sufficient to render a dismissal unfair.

68. Section 123 of the 1996 Act provides that 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 insofar as that loss is attributable to action taken by the employer.

69. Section 123 (6) of the 1996 Act imposes an absolute duty on the Tribunal to consider the issue of contributory fault in any case where it was possible that there was blameworthy conduct on the part of the employee. Whether or not this duty is triggered will depend on the findings of fact made by the Tribunal and whether those findings reveal proven conduct attributable to the employee potentially caused his or her dismissal or contributed in any way to it. There must be clear findings of fact as to what (if any) blameworthy conduct on the employee's part the employer knew about at the time of the dismissal.

70. For a deduction to be made under Section 123 (6) of the 1996 Act, a causal link between the employee's conduct and the dismissal must be shown to exist. This means that the conduct must have taken place before the dismissal, the employer must have been aware of the conduct, and the employer must then have dismissed that employee at least partly in consequence of that conduct.

71. The Tribunal may not ask whether procedural failings would have made any difference to the decision to dismiss. The employer is unable to argue in its defence that even if it had followed a fair procedure, it still would have dismissed the employee. This was the position that was established in the House of Lords decision in **Polkey**. That case, however, made it clear that the issue of whether a failure to follow a proper procedure made any difference to the decision to dismiss could be considered when calculating the compensatory award at the remedies stage. A Tribunal may reduce

such an award proportionately to reflect the chance that the employee would have been fairly dismissed in any event had a proper procedure been complied with. The burden of proving that an employee would have been dismissed in any event is on the employer (**Britool Ltd v Roberts and ors 1993 IRLR481, EAT**).

72. The duty to mitigate is set out in Section 123(4) of 1996 Act in relation to unfair dismissal. It requires the Claimant to mitigate his/her loss and the Claimant will be expected to explain to the Tribunal what actions he/she has taken by way of mitigation. This includes looking for another job and applying for available state benefits. Where the Claimant is successful in finding alternative work, the salary and any other benefits earned during the damages period must be deducted from the award of damages
73. The Tribunal is obliged to consider the question of mitigation in all cases. What steps it is reasonable for the Claimant to take will then be a question of fact for its determination. The courts have made clear, however, that the standard to be imposed on a Claimant, who has suffered unfair dismissal, should not be overly stringent. The burden of proof is on the Respondent, and it is not enough for the Respondent to show that there were other reasonable steps that the Claimant could have taken but did not take. It must show that the Claimant acted unreasonably in not taking them. This distinction reflects the fact that there is usually more than one reasonable course of action open to the Claimant (**Wilding v British Telecommunications Plc [2002] IRLR 524**). The duty to mitigate only arises after the dismissal.
74. Having considered the evidence in the round, it is very clear that the Claimant was dismissed for misconduct. She had admitted to the Respondent that she had written the Facebook posts. She regretted writing those posts and she also admitted that she had breached the Social Media Policy. There was no question that she was aware of the Social Media Policy. She had signed a “read policy document” to that effect and I was not convinced by the Claimant’s evidence that she did not know what she was signing for. Furthermore, when she signed her contract of employment she also acknowledged that she would abide by the terms of the staff handbook and other policies [HB 87]. She had also been to a staff meeting on 20 April 2017 where Facebook had been discussed where it was made clear that employees should not mention the fact that they work for the Respondent or name the Respondent in their postings. Staff were also encouraged to use inbox messaging service if they had issues or things they want to talk about work. The Claimant acknowledged under cross-examination that she had signed the minutes of this meeting. I am not satisfied that the Claimant was dismissed for a reason other than misconduct. Consequently, section 104 (1) (b) of the 1996 Act is not engaged. The evidence does not support that. The Respondent was concerned about the tone of the Facebook posts namely that they were derogatory, disparaging, defamatory and offensive. The Respondent was not acting against the Appellant over payment of wages or issuing her payslips. Given the sensitive area of the Respondent’s work (care of the elderly) maintaining its reputation was very important to it and it was concerned about what the Claimant had written.
75. I believe that the Respondent had a genuine belief that the Claimant was guilty of misconduct. The Claimant admitted that she breached the Social

Media Policy and she said that she regretted writing the Facebook posts. I am reminded that under the 1996 Act, conduct is a potentially fair reason for dismissing an employee. The Respondent has shown a potentially fair reason for the dismissal.

76. It has been submitted that the investigation by Ms Payne was procedurally unfair because it was unbalanced, and she had not read the Social Media Policy. I disagree because one should not lose sight of the fact that the Claimant admitted that she had been wrong to post on Facebook. The minutes of the investigatory meeting record amongst other things the Claimant said “I was wrong at what I did, I shouldn’t have put anything on” [HB 134]. The caselaw cited above states that where an employee admits the wrongdoing, there is generally no need to investigate the matter. However, I believe that the dismissal was procedurally unfair for the following reasons:

- a. One of the key factors in the disciplinary and appeal hearings that should have been considered was to offer the Claimant the opportunity to delete the offending posts. That simply was not considered at any stage of the process.
- b. Despite claims that the posts were defamatory, there was no evidence of the Respondent’s reputation being damaged by the Facebook posts. There were no complaints from service users or their families, for example. The Claimant had followed the spirit of the recommendation in the minute of the staff meeting of 20 April 2017 and had not named the Respondent in any of the Facebook posts. Furthermore, her profile did not identify her employer. Indeed, Ms Kaura acknowledged in her evidence under cross-examination that a reasonable bystander would not have been able to have identified the Respondent. Mr Greenwood admitted that he had not investigated whether the Respondent’s reputation was damaged. This does not appear to have been considered during the process.
- c. I am also concerned that Mr Greenwood did not consider the Facebook posts during the appeal. In his oral evidence he consciously decided not to. He thought that they spoke for themselves and he assumed that the damage to the Respondent’s reputation had been done but also admitted that he had not investigated whether there was, in fact, any damage done. He was simply speculating. He also seemed to be unaware of the option of simply asking the Claimant to delete the posts. If there was no evidence of damage, then that would seem to be the sensible thing to do – delete the posts.
- d. Unfortunately, Ms Kaura clearly had a conflict-of-interest. She was not only the dismissing officer but also in-house counsel. Despite her evidence to the contrary, I am satisfied on what Mr Greenwood had to say in his evidence. She advised him on how to conduct the appeal hearing. This created the risk of bias and he was not truly independent. On Mr Greenwood’s evidence, the Respondent’s organisation has between 1000 and 1100 employees. It had the resources, for example, to instruct external legal advisors to advise Mr Greenwood on the disciplinary process thereby freeing up Ms

Kaura to conduct the disciplinary hearing without the pressure of being placed in a conflict situation. Instead, Ms Kaura's position was compromised and Mr Greenwood had to rely on her advice and whatever he could glean from the internet. That situation was far from satisfactory and it undermined the integrity of the appeal.

- e. Ms Kaura gave credit for the fact that the claimant was contrite but did not consider her length of service or the fact that she had a clean disciplinary record. In the latter case, she said that it was irrelevant. I am also concerned that Mr Greenwood did not appear to accept the fact that the Claimant had a clean disciplinary record and he started to speak to other people who were not connected with the disciplinary process. He said that he was looking for undocumented incidents which is why he spoke to those people. He had no reason to do that and it suggests bias on his part. He was not prepared to accept that she had a clean record. The Claimant's length of service and disciplinary record was clearly highly relevant to the matter and the failure to consider them further tainted the process with unfairness. It might have led to a lesser disciplinary sanction such as a written warning – something that a reasonable employer would have imposed.

77. Had a proper disciplinary process been followed it is unlikely that she would have been dismissed. The evidence does not suggest a material breach of the policy. The posts were largely innocuous and could not be connected to the Respondent. It was a first offence. I do not think that dismissal would have fallen within the range of reasonable responses that an employer might take.

78. The Claimant clearly contributed to her dismissal. She not only knew of the existence of the Social Media Policy but she admitted that she had breached it by posting on Facebook. She was guilty of culpable and blameworthy conduct which contributed to her dismissal. However, I would put it at 10%. The posts did not name the Respondent. Her Facebook profile did not identify the Respondent. The language used in the postings is largely innocuous, but referring to people as "Twats" is offensive. I do not think that it has been established that the Claimant's behaviour on 9 June 2017 contributed to her dismissal. The Respondent itself dismissed those allegations. It has not been established that the Claimant was aggressive. There was nothing that prevented her from coming into Covent House on her day off. She was not over the drink driving limit.

79. The Claimant has found other employment albeit at a lower rate of pay than she enjoyed when she worked for the Respondent. I accept her evidence as to why she chose that work and I find that she has adequately mitigated her loss. The Respondent has not discharged the burden of proof in this regard.

80. I must also consider the significance of the Claimant's resignation letter relating to loss. She had resigned before the outcome of the disciplinary hearing which clearly meant that she did not intend to continue working for the Respondent even if the original decision was overturned. The Claimant said that she already knew the outcome of the disciplinary hearing. She knew that she would be sacked, and she thought it better that she should

leave and that was why she resigned. She did not want the fact that she been sacked for gross misconduct to be on her record. She jumped before she was pushed. She was asked why she had gone through the appeal process if she had no intention of saving her job. She said that nobody wanted a dismissal for misconduct on their record. This was what she said under cross examination; it was very clear and quite understandable. On re-examination she attempted to row back from that position and stated, quite inconsistently in my opinion, that she would have taken her old job back if the appeal had been successful. That does not sit with what she said under cross examination. I agree with Mr Mugliston's written submission on this point. The Claimant had no intention of continuing to work for the Respondent when she tendered the resignation letter. Despite her claiming to know what the outcome of the disciplinary hearing was, she could not have done because her letter was hand delivered at 8am on 8 July 2017, and she received the letter notifying her of her dismissal at 1pm later the same day. I do not, however, accept that the Claimant had attended an interview as early as the Friday after she was suspended. The losses the Claimant has suffered flow from her decision to leave and not the outcome of the disciplinary procedure. The loss that she claims is not as a consequence of the dismissal. Her loss when assessing the compensatory award is not attributable to action taken by the Respondent. It flows from her action. She has not established her entitlement to pension loss either. It does not flow from the dismissal and in any event it is not supported by evidence of loss. In hindsight, she should have waited to be dismissed rather than writing her letter which very clearly indicated that she had no intention of continuing to work for the Respondent.

81. When assessing the basic award, I am entitled to reduce it to take account of her contributory conduct (section 122 of the 1996 Act). I have decided to do so in this case and have applied a 10% reduction.

Financial Award Schedule

Basic Award

(5 x 1.5 x 280) – 10% **£1,890**

Loss of Statutory Rights

Compensation for loss of statutory rights **£350**

Compensatory Award **£0**

Loss of pension rights **£0**

Total **£2,240**

Employment Judge

Date 13 April 2018