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EMPLOYMENT TRIBUNALS

Claimant		*Respondent*
Mr S E Keable	v	**London Borough of Hammersmith and Fulham**

FINAL HEARING

HELD AT: **London Central** **ON:** **20 - 24 May 2019**

BEFORE: Employment Judge Brown (Sitting alone)

Representation:

For Claimant: Mr I Sram, Counsel
For Respondent: Mr S Cheetham QC

JUDGMENT

The Judgment of the Tribunal is that:

1. The Respondent unfairly dismissed the Claimant.

2. There was no likelihood that the Respondent acting fairly would have dismissed the Claimant fairly.

3. The Claimant contributed to his dismissal in the order of 10%.

REASONS

Preliminary

1. The Claimant brings a complaint of unfair dismissal against the Respondent, his former employer. In his original claim, presented to the Tribunal on 30 August 2018, he also brought a complaint of religion and belief discrimination. He withdrew that discrimination complaint at a Preliminary

Hearing on 31 January 2019 and was clear, throughout the Final Hearing, that his only complaint was of unfair dismissal.

2. The Respondent helpfully drafted a list of issues relying on the Claimant's contentions and the Claimant agreed that this list broadly reflected the issues in the claim. The issues, as drafted by the Respondent, were as follows:

Unfair dismissal

1. Did the Respondent carry out a reasonable investigation?

(i) Was there any evidence that the investigator either unreasonably relied upon or that he unreasonably excluded? C will say:

(a) Mr Smith should not have relied upon the transcript without further investigation into its accuracy and extent; and
(b) there is other evidence that he should have taken into account (Mr Grossman, Mr Hands).

(ii) Should the investigator, as part of his investigation:

(a) have made findings about whether C personally held views that were anti-Semitic; and, if so,
(b) in light of those findings, gone on to make findings about whether the Claimant's remarks were actually offensive and/or could still be deemed offensive?

(iii) Was the investigation influenced by political pressure, such as to make its conclusions unreliable?

(iv) Was it open to the investigator to conclude, on the information available before him, that the Claimant had a case to answer in respect of (a) making comments that were inappropriate and likely to be offensive, and (b) likely to bring R into disrepute?

2. Did the dismissing officer Mr Austin hold a genuine belief that C was culpable in respect of the alleged conduct, (a) making comments that were inappropriate and likely to be offensive, and (b) likely to bring R into disrepute?

3. Did the conduct amount to misconduct. Relevant factors would include:

(a) that this conduct occurred outside the workplace;

(b) whether or not it was in breach of R's policies; and

(c) the relevance of any freedom of expression arguments.

4. If so, did he have reasonable grounds on which to base that belief?

(a) Was it reasonably open to him on the information before him to find that the Claimant had made comments that had caused offence and were insensitive?

(b) Was it reasonably open to him to conclude that this amounted to serious misconduct and that it had brought R's reputation into disrepute?

5. C will say:

(a) Mr Austin was influenced in his decision by orchestrated political pressure; and
(b) he applied the wrong tests.

6. Did R follow a fair procedure? C will say:

(a) he did not get " a proper hearing", in other words the opportunity to put his case;
(b) Mr Austin should not have chaired the disciplinary hearing; and
(c) the appeal hearing was also unfairly conducted, because it should not have been chaired by Mr Grimley.

7. In all the circumstances, was the sanction of dismissal one that was reasonably open to the dismissing officer?

8. If the dismissal was unfair, should any adjustments to compensation be made whether because of C's contributory conduct or under the principles in *Polkey v AE Dayton Services Ltd* [1988] ICR 142, HL?

3. The Respondent agreed that the relevant factors to be taken into account in deciding issue 3 (whether conduct occurred outside the work place, whether it was in breach of the Respondent's policies, and the relevance of freedom of expression) were also relevant to the question of whether dismissal was a reasonable sanction in the case.

4. There was a bundle of documents and a supplementary bundle of documents. Page numbers in these reasons refer to page numbers in the bundles.

5. I heard evidence from the Claimant and I read the witness statements of Professor Moshe Machover and of Hillary Russell. The Respondent did not cross examine those witnesses, nor challenge their evidence.

6. I also heard evidence from Peter Smith, the investigating officer in the case; Nicholas Austin, the dismissing officer; and Mark Grimley, the appeal officer.

7. Both parties made written and oral submissions.

Findings of Fact

8. The Claimant commenced employment with the Respondent on 19 March 2001 and worked for the Respondent for over 17 years until his dismissal on 30 May 2018.

9. The Respondent is a Local Authority. The Claimant was employed as a Public Protection and Safety Officer in the Respondent's Environmental Health Department. He was good at his job and had, before the matters in this claim, an entirely clean disciplinary record. Mr Austin, the ultimate Head of Service in which the Claimant worked, had known the Claimant for 10 years before the Claimant's dismissal. In evidence to the Tribunal, Mr Austin described the Claimant as, ".. good, thorough, dogged in pursuit of landlords in trying to improve housing conditions. His disciplinary record was never an issue."

10. The Claimant was a member of the union Unison and took an active role in union activities. He had been a member of the Labour Party, but had been expelled from it because he was a member of Labour Party Marxists, an organisation which was not affiliated to the Labour Party, nor a unit of it.

11. The Respondent has a number of policies which apply to its employees. The Claimant accepted that these applied to him. He accepted that the Respondent is subject to the Public Sector Equality Duty.

12. The Respondent has an Equality, Diversity and Inclusion Policy. It provides as follows:

"The purpose of this policy is to provide a clear statement on the Council's commitment and approach to equality, diversity and inclusion in the areas of employment, service delivery and procurement…

7.5 Council staff, contractors and voluntary partnerships.
All staff, contractors and those in voluntary sector partnerships are expected to ensure that there is no discrimination, bullying, harassment and victimisation and accept personal responsibility for the practical application of this Equality, Diversity and Inclusion policy.
In particular every employee is required:
- Promote equality, diversity and inclusion and treat everyone with fairness, equity, dignity and respect.
– Recognise and value the diversity of staff and residents taking into account diverse needs when providing services.
– Ensure their behaviour and/or actions do not amount to discrimination or harassment in any way.
– Report any discriminatory, bullying or harassment acts or practices." Pages 141-146.

13. The Respondent's Handbook contains a section, "Terms and Conditions of Employment, page 154. This states,

"In this section we set the expected standards of behaviour for all employees in order to provide a framework that will help you to maintain and improve standards and protect you from misunderstanding or criticism. Failure to follow them could result in disciplinary action …

You must: …
- Never make remarks that are racist, sexist or otherwise inappropriate
– Never harass or discriminate against any member of the public, employee or anyone you meet in the course of your work …
- Avoid any conduct inside or outside of work which may discredit you and/or the Council …" page 154.

14. The Respondent's Code of Conduct for Employees provides,

".. This Code of Conduct complements the Disciplinary Procedure and also sets out the standards of behaviour expected from all our employees. You should understand that breaches of the Code of Conduct may result in disciplinary action being taken against the employee. Some breaches of the code are so serious that they are considered to be gross misconduct, which if proven can result in the employee's dismissal from the Council's service …" page 158.

15. The Code of Conduct includes sections such as, "Respecting your colleagues", "Working for your manager", "Use of electronic and other communications in the work place", "Working honestly" and "Working with integrity". In its section, "Working with integrity", the Code of Conduct states, "We expect you to do whatever is needed to protect your own reputation and standing with the public and build respect for the Council. There should be no reason to suspect that any of us are seeking opportunities for private gain ….

Ensure that you:
Avoid any conduct or associations inside or outside of work which may discredit you or the Council.
Do nothing away from work which might damage public confidence in the Council or make you unsuitable for the work you do.

16. The Code of Conduct also contained provisions regarding politically restricted posts: "The effect of including a local authority employee on the list of "politically restricted posts" is to prevent that individual from having any active political role either in or outside the workplace …. the effect of these restrictions is to limit the holders of politically restricted posts to bare membership of political parties with no active participation within the party permitted". Page 168

17. It was agreed that the Claimant was <u>not</u> the holder of a politically restricted post. Mr Austin specifically agreed that the Claimant was free to be politically active, with all that that entailed, attending political meetings and

demonstrations and discussing his political views there, and stating his opinions.

18. The Code of Conduct contains a section, "Working with the media". It provides,
"The Council expects staff to promote the policies and reputation of the Council … ensure that you
– refer all approaches from the media to communication officer
– do not speak to a journalist on behalf of the Council without prior permission from the director of communications and policy …
- never bring the Council into disrepute by publicising internally or externally material which is confidential or against the issues at the interest of the Council …
- Do not bring the Council's name into disrepute in any other way through the press or media". Page 170

19. The Respondent's Disciplinary Procedure has, as one of its guiding principles, the following, "The Council's procedure on disciplinary matters is focused on helping and encouraging employees to improve their conduct and behaviour; not just with applying disciplinary penalties in all cases. It aims for an outcome which is fair and constructive and is in pursuit of the Council's delivery of excellent services to the community". Page 554.

20. The Disciplinary Procedure contains provisions relating to suspension, pages 561, 562 and 572. At page 562, the procedure provides that the suspending manager is normally one with authority to do so, ie a third tier senior manager or above, however if such a manager is not available, the most senior manager on duty may send the employee home pending discussions with the relevant senior manager. The procedure also provides that suspension is the right course of action if, having given careful consideration to the matter, the manager is clear that it is unsuitable for the employee to continue at their normal workplace pending completion of the investigation and any disciplinary hearing.

21. The Disciplinary Procedure provides for sanctions as follows: Warnings, including first written warning, second written warning, final written warning, demotion, final written warning that may never be removed; and dismissal page 567. It gives examples of misconduct including acts of discrimination, harassment and bullying, breach of the Code of Conduct for Employees or the Employee Handbook, page 568.

22. It also gives examples of gross misconduct, which include, " Serious breach of the Code of Conduct or the Employee Handbook", page 569.

23. The facts of the matter which gave rise to the Respondent commencing disciplinary action against the Claimant and, ultimately, to these Employment Tribunal proceedings, are not significantly in dispute.

24. On 26 March 2018 there was a rally outside Parliament which concerned the issues of anti-Semitism in the Labour Party. The rally was organised by a

group called “Enough is Enough” and was attended by the Board of Deputies of British Jews and the Jewish Leadership Council, amongst others.

25. At the same time, a counter-demonstration was held by an organisation called Jewish Voice for Labour which describes itself as a socialist, anti-racist, anti-Zionist organisation of Jewish members of the Labour Party. It is supportive of Jeremy Corbyn as leader of the Labour Party and it considered, at the time, that the Enough is Enough demonstration was part of a campaign to remove Jeremy Corbyn as leader of the Labour Party.

26. The Claimant attended the Jewish Voice for Labour counter-demonstration. He did so out of work hours, in his personal capacity, and not wearing any clothing which would identify him as an employee of the Respondent.

27. Representatives of the media were present. Alleged anti-Semitism in the Labour Party is and was a contentious issue, which had garnered much media attention.

28. During the demonstration and counter-demonstration, attendees of both demonstrations exchanged views.

29. The Claimant spoke to an attendee of the Enough is Enough rally. His conversation with that attendee was, in part, filmed. It was not filmed by the Claimant.

30. It does not appear to be in dispute that the Claimant was not interviewed specifically by a representative of the media. The Claimant noticed that he was being filmed, or photographed, by a mobile telephone camera. He did not specifically give permission for a film to be taken of him.

31. Part of the footage which had been filmed was later posted on the Twitter account of David Grossman, a BBC Newsnight journalist, with the caption, “Anti-Semitism Didn’t Cause the Holocaust and Zionists Collaborated with the Nazis”, page 102. The part of the exchange which was posted on the Twitter feed was as follows, at pages 100-101 of the bundle:

“Claimant: You have totally missed the interpretation.
Man: But you say…
Claimant: He has got a life long history of anti racism.
Man: But you say, you say it is unreasonable to extrapolate the fact that you commented in that way on that mural and the fact that that mural reflects kind of traits which have existed for hundreds of years that really resulted in the anti-Semitism that resulted in the holocaust.. there is a connection between.
Claimant: I don’t think that is what caused the holocaust, no.
Man: You don’t think it was anti-Semitism which caused the holocaust.
Claimant: Well obviously the Nazis used anti-Semitism.
Man: No it was anti-Semitism that caused the holocaust. Are you really, are you suggesting it was not anti-Semitism?

Claimant: No, no I am not saying that. I am saying that the Nazis were anti-Semitic. The problem I have got is that the Zionist movement at the time collaborated with them.
Unseen person: That's a lie. (laughing) That's a lie.
Claimant: well, you laugh, you laugh..
Unseen person: No man. You're an idiot.
Claimant: Look, the policy of Germany at that time, was to have a Germany that was unified.
Unseen woman: Don't give him the time of day!
Claimant: No but the – no but the..
(inaudible – various voices)
Claimant: Oh stop trying so hard! You are trying to stop the discussion. You are trying to stop the discussion.
Unseen man: (inaudible)
Claimant: The Zionist movement from the beginning was saying that they accepted that Jews are not acceptable here. He is answering someone else. I'm giving a .. I'm giving a.. I'm I'm I'm
[End of recording]

32. The Twitter feed of David Grossman, the Newsnight journalist, attracted comments, page 103, including:

Dave Miller: "I don't believe I just heard what that man said: that the "Zionists" conspired with the Nazis to send six million of their own people to their deaths. Are these the twisted perverted people who aspire to govern this country? If they are, God help the Jews.

LabourAgainsttheWitchhunt (LAW): Um he didn't say that #fakenews.

Jewish Voice: He said that the Nazis used anti-Semitism and that the "Zionists" collaborated with them. Both are demonstrable lies.

Metal_Resistance: How is it a lie that the Nazis used anti-Semitism?

Lucas Claerhout: Maybe it's Ken Livingston in disguise …

33. One of the MPs for the Hammersmith and Fulham local authority area, Mr Greg Hands MP, shared David Grossman's Twitter post on Mr Hands' own Twitter feed, p104. Mr Hands said, "Many reports that this is Sam Keable, the local Momentum organiser in Hammersmith & Fulham. If so, will (the Labour MP for Hammersmith and Fulham) and (the Labour leader of London Borough of Hammersmith and Fulham) investigate & urge action?" That Tweet was on 27 March 2018. Mr Hands posted a further Tweet on 27 March, "Not a peep out of anyone in (Hammersmith and Fulham Labour Party) about the anti-Semitism crisis or from (the Hammersmith and Fulham Labour MP) or Council leader –despite their reportedly leading activist telling Newsnight here that "Zionists" plotted with Hitler & the Holocaust wasn't anti-Semitic", p 104.

34. It appears that the Claimant was identified on social media in Twitter comments as an employee of the Respondent. At some point, the video

came to the attention of Councillor Steven Cowan, the Labour leader of the Respondent Council. It also came to his attention that the Claimant was an employee of the Respondent.

35. At 10:22 on 27 March 2018 Cllr Cowan sent an email to senior Council officers, including Mark Grimley, Director of Corporate Services, entitled "LBFH employee Stan Keeble making antisemitic comments", page 81. He said, "I'll let Mr Keeble's words speak for themselves. I believe he has brought the good name of LBFH into disrepute and committed gross misconduct. Please have this looked at immediately and act accordingly and with expediency … Please advise me at your earliest opportunity what action you have taken".

36. Mr Grimley told the Tribunal, and I accepted, that Mr Grimley was away on holiday at the time although he did receive Cllr Cowan's email. Mr Grimley told me that Mr Rogers was acting Head of HR at the time and took responsibility for handling the matter.

37. Cllr Cowan's email was passed to the Respondent's Legal Department and a decision was taken to suspend the Claimant and investigate Cllr Cowan's allegations. Nicholas Austin, Director of Residents' Service at the time, handed the Claimant a letter of suspension on 27 March 2018, pages 82-83. In evidence to the Tribunal, Mr Austin agreed that the Claimant was suspended without having a Trade Union representative present and before the Claimant had had a chance to state his case. Mr Austin said that the Head of HR was looking for a Union representative at the time, but could not find one. Mr Austin said, however, that if the investigating officer had later decided that the Claimant could return to work, the Claimant would have been permitted to do so. Mr Austin said that the Claimant was suspended because of media and social media attention and that the Respondent wanted to take the heat out of the situation.

38. Mr Grimley conceded, in cross examination, that Mr Austin's delivery of the suspension letter to the Claimant was in breach of the Respondent's Policy, in that a Service Director should have delivered it, instead.

39. The suspension letter said that the Claimant's suspension related to, " .. the following serious allegation(s) which, if substantiated could constitute gross misconduct… (1) that you made inappropriate comments concerning the holocaust which have subsequently been circulated on social media which are deemed to be insensitive and likely to be considered offensive; (2) that these comments have the potential to bring the council into disrepute".

40. The letter said that the allegations might change during the course of the investigation and that an investigator would be appointed. It said that, if the allegations were substantiated at a formal disciplinary hearing, "… this may be viewed as gross misconduct and could result in your dismissal from the Council's service". The letter made clear that suspension was a neutral act, page 83.

41. Mr Peter Smith, Head of Policy and Strategy, was appointed as investigating officer. Mr Smith invited the Claimant to an investigatory meeting. In his invitation, he modified the first allegation to be investigated, adding that the Claimant's comments had also been potentially in breach of the *Equality Act 2010*. He sent the Claimant documents, including the Respondent's Disciplinary Policy, a transcript of the video clip and Mr Grossman's Twitter account, and other relevant policies, page 84.

42. In advance of the investigatory meeting the Claimant wrote to Mr Smith, pages 87-88. He said that it would help him prepare for the meeting if he was told precisely which comments were relevant to the allegations against him. The Claimant said that nothing that he had said in the conversation had been intended to offend and that the conversation had simply been an exchange of political opinions carried on willingly between two people. The Claimant also said that the transcript used the term "interviewer" and "interviewee", whereas the conversation had not been an interview, but was a private conversation between two individuals. He said that the filming of the conversation was done by an unknown person, without the Claimant's permission, and consisted of a 105 seconds part of a longer conversation. The Claimant also said that the video clip had been tweeted on social media without the Claimant's permission and that the Claimant had complained to the BBC about it, page 88.

43. The investigatory meeting proceeded on 10 April 2018, page 133. In the meeting, Mr Smith said that the allegations centred on the Claimant's discussion with David Grossman. The Claimant responded that he had not met David Grossman, who, as far as he understood, was middle aged with dark hair and not like the man that the Claimant was talking to, nor like the one who had taken the video clip. The Claimant provided an email from his ex-wife, Hilary Russell. In the email, Ms Russell said that she and the Claimant had been married and had a daughter to whom they both remained close. Ms Russell explained that she is, herself, Jewish. She said of the Claimant, "I can say absolutely confidently that he is no anti- Semite … it is not anti-Semitic to be opposed to Zionism, as many Jews are, or to criticise the government of Israel". Page 109.

44. The Claimant told the investigatory hearing that he had been walking among the demonstrators, handing out leaflets. Mr Smith asked him how he had become identified as a Hammersmith and Fulham officer. The Claimant replied, "By my picture, it was put online… In tweets it is identified that I am the person, I have been abused in comments and tweets and some people identified me," page 135.

45. Mr Smith asked whether the transcript was an accurate representation of the Claimant's comments. The Claimant replied, "As far as I can make out it is a reasonable reflection of the 105 seconds in the video clip. I said a lot more, so did the other chap … " page 136.

46. The Claimant said, "I have to say that I am anti-Zionist and that is a political position."

47. Mr Smith asked the Claimant whether his comments complied with the Staff Handbook's requirements that employees "never make remarks that are racist, sexist or otherwise inappropriate" and that employees must "avoid any contact inside or outside work which may discredit you and/or the Council." The Claimant said, "I am a lifelong anti-racist and anti-sexist …". He denied that his comments were offensive.

48. Mr Smith asked the Claimant about the "Nazi link" in the transcript. The Claimant said that his comments about the Nazis related to the Haavara Agreement. Regarding his statement that "The Zionist movement from the beginning was saying that they accepted that Jews are not acceptable here," the Claimant said, "The fact they did that is offensive. Anti-Semitism said you don't belong here, get out. Zionists accepted that. The Balfour Declaration – leading Jews argued against it". The Claimant said that he accepted the right of the Hebrew nation to exist, since 1947," pages 133-139.

49. The Claimant also produced an article from a Labour Party Marxists publication, which defended the Claimant's comments. The article said that anti-Semitism, on its own, did not cause the Holocaust. It also stated that the Claimant's comments that the Zionist movement collaborated with the Nazis referred to, ".. the Haavara agreement of 1933 between the Zionist movement and the Nazis which broke the non- Zionist Jewish led call for an economic boycott of the Nazi regime," pages 105 – 108.

50. Mr Smith produced his investigation report on 19 April 2018, pages 92-139. He included, as an appendix to that report, a letter from Greg Hands MP to the Leader of the of the Respondent Council, dated 9 April 2018. Mr Smith received this after his investigation meeting with the Claimant and did not seek the Claimant's comments on it. In the letter, Mr Hands said that the Claimant's comments did not meet the Council's Code of Conduct regarding respect for others. Mr Hands referred to the Claimant's recent membership of the Labour Party, Momentum and a Union and asked what efforts had been made to ascertain whether the Claimant was operating individually "or if he is part of a wider cell of individuals with these abhorrent views?". Mr Hands said that Cllr Cowan should carry out "a root and branch investigation of the whole Council". Page 132.

51. Mr Smith's investigation report concluded that a disciplinary hearing should take place into the following allegations, page 98,

> (1) That, in attending a counter demonstration outside the Houses of Parliament on 26 March 2018, Stan Keable knowing increased the possibility of being challenged about his views and subsequently preceded to express views that were in breach of the Council's Equality, Diversity and Inclusion Policy and the Council's Code of Conduct ("Working with Integrity" and "Working with the media").
> (2) That Stan Keable made inappropriate comments which have been subsequently circulated on social media which are deemed to be insensitive and likely to be offensive and potentially in breach of the

Equality Act 2010 and/or the Council's, Equality, Diversity and Inclusion Policy.
(3) That these comments contravene standards of behaviour required of all staff as set out in the Terms and Conditions of Employment, in particular, that all staff must "avoid any contact inside or outside of work that may discredit you or the Council".
(4) That these comments have brought the Council into disrepute and that they contravene the Council's Code of Conduct for Employees."

52. Mr Smith said, in his report, that the reaction on social media to the Claimant's comments suggested that they were deemed to be insensitive and offensive by some people. He said, "If Zionism constitutes a belief under the terms of the Equality Act then the statements made by the Claimant that the Zionist movement collaborated with the Nazis and that it accepted that "Jews are not acceptable here" might be deemed to have breached the Equality Act", and "do not promote inclusion nor treat everyone with dignity and respect and.. have breached the Council's Equality, Diversity and Inclusion Policy," pages 95 and 96.

53. Mr Smith confirmed, in cross examination at the Employment Tribunal, that the two comments of the Claimant which he considered to have been offensive in his report were (1) that Zionists colluded with the Nazis and (2) that Zionists agreed that Jews are "not welcome here". He said the use of the word "colluded" was offensive.

54. Mr Smith's report also concluded that, in attending the counter demonstration at Westminster on 26 March and in making the comments which subsequently appeared on social media, the Claimant had failed to avoid any conduct outside of work which might discredit him with the Council. Mr Smith said that the Claimant had breached the Code of Conduct and, thereby, its requirement that the Claimant did not bring the Council's name into disrepute in any other way through the press or media. Mr Smith said that he accepted that the Claimant may not have considered that he was being interviewed, but said that, ".. his discussion took place in public at a busy demonstration and was filmed on a camera phone and then posted on social media". He said that the Claimant was subsequently identified as an officer of the Council. Mr Smith also referred to Mr Hands letter to the Council suggesting that the expression of the Claimant's "abhorrent views" might be part of a "wider problem" which might require "root and branch investigation of the whole Council". He said that the letter was published on Mr Hands' Twitter feed and that the Claimant's comments might be deemed to have brought the Council into disrepute.

55. Mr Smith exhibited the following documents to his report: The transcript of the discussion between the Claimant and the other man; Mr Hands' Tweet dated 27 March 2018; the Labour Party Marxists article; the letter from Hillary Russell; a Mail online article and an Evening Standard article; the email from the Claimant sent to Mr Smith before the disciplinary hearing setting out the Claimant's case and asking questions; the letter of 9 April 2018 from Greg Hands MP and the notes of the preliminary investigation meeting.

56. The Mail online article said that the Claimant had been suspended and quoted the Claimant as saying that Zionists collaborated with the Nazis. It quoted the following words of the Claimant, "The Nazis were anti-Semitic. The problem I have got is that the Zionist government at the time collaborated with them. They accepted the idea that Jews are not acceptable here".

57. The Evening Standard headline was, "London Council officer suspended after claiming Zionists collaborated with Nazis". It used the same quotes as the Mail online from the Claimant. It also said that the Claimant had been contacted by the Standard and that the Claimant had said, "I am sorry for any offence I may have caused but the Nazi regime and the Zionist Federation of Germany collaborated through the Havaara Agreement in the emigration of 60,000 Jews to Palestine between 1933 and 1939." The Evening Standard quote the Claimant as saying he did not insinuate that Jews collaborated with the Nazis.

58. Nicholas Austin, Director of the Respondent's Residents Service, was appointed chair of the disciplinary hearing. On 1 May 2018 he wrote to the Claimant, inviting him to the disciplinary hearing to be held on 10 May 2019. He said that the hearing would consider the allegations set out at the end of Mr Smith's report. He told the Claimant he had the right to be accompanied and said, "The allegations above constitute either gross misconduct or misconduct and this substantiated in part and/or jointly and/or individually may lead to the termination of your employment without notice," p171.

59. The Claimant submitted a response to Mr Smith's investigation report, page 174. This was drafted by a union representative of Unison in Brighton and Hove, Mr Tony Greenstein. The response was highly critical of Mr Smith's report and described it as "indigestible gobblede gook.. pitiful verbiage.. spurious nonsense". It said that Mr Smith has lost the ability to process thoughts and concepts rationally and had displayed an attitude that was akin to fascism. The response said that there was no relationship between the Claimant expressing an opinion on College Green and the Council's duties and said that the logic of the report was that employees of the Council should not go to demonstrations for fear of opening their mouths, page 181. The response quoted the European Convention of Human Rights: Article 9 Freedom of Thought, Conscience and Religion; Article 10 the Right to Freedom of Expression; and Article 11, the Right to Freedom of Peaceful Assembly, page 184.

60. The Claimant also submitted a written statement from Emeritus Professor Moshe Machover, who described himself as a dissident Israeli citizen. Mr Machover said that the Claimant had been accused of a disciplinary offence in connection with the statements to the effect that, "..the Zionist movement collaborated with them, that is the Nazis.." and ".. the Zionist movement from the beginning was saying that Jews are not acceptable here." Mr Machover said that both statements were factually correct, and were known to serious researchers of the history of Zionism. He set a brief history of the Havaara Agreement and the opinions of the Jewish

community in Britian at the time of the Balfour Agreement, in support of his assertions, pages 189-190. The Claimant also submitted a statement from Mike Cushman, chairperson of Free Speech on Israel, page 200.

61. The disciplinary hearing took place on 10 May 2018, page 204. At the start of the hearing, Mr Austin said that he wanted to note the harshness of the comments in the Claimant's response to Mr Smith's report.

62. During the hearing, the Claimant said that he was not in a politically restricted post and that going to a demonstration should be acceptable for him. He repeated that he was an anti-Zionist. He said he was trying to explain the Zionist movement and its history to the person in the video clip. Mr Austin asked, "But do you understand how it could have been misinterpreted?" The Claimant replied, "I can see how it caused offence," p210. He said, "They were quick 'off the cuff' remarks … people could be offended if they assumed I was talking about Jews and not Zionists".

63. The notes of the hearing recorded that, at the end of the hearing, Mr Greenstein said that the Human Rights Act stated that a person has a right to express his views in any way he wishes.

64. The notes were not agreed and the parties agreed that they were far from a complete record of the hearing. The Claimant told the Tribunal, and the Tribunal accepted, that he was not sent the notes of the disciplinary hearing until disclosure in these Tribunal proceedings and, therefore, he did not have a chance to correct them at the time.

65. On 21 May 2018 Mr Austin wrote to the Claimant, dismissing him, p212. He recorded the Claimant's submissions at the disciplinary hearing as including, "That the Human Rights Act gives a right to freedom of assembly and freedom of expression including a qualified right to offend when expressing your beliefs".

66. He said that the Claimant had contended that the Claimant's assertion that the Zionist movement collaborated with the Nazis is well founded in history. Mr Austin said that he had found that when public authorities carry out their functions they are governed by the Equality Act and that the Council had commitment to social inclusion. He acknowledged that the Claimant was not in a politically restricted post and had a right to attend a demonstration in his own time and express his own opinions.

67. Mr Austin referred to the Council's Code of Conduct, which was binding on all employees, and breach of which could result in disciplinary action. He quoted its provisions which required employees to avoid any conduct inside or outside work which might discredit the employee and/or the Council and its expectation that an employee does whatever is needed to protect his own reputation and standing with the public. He quoted its requirement that employees do nothing away from work which might damage public confidence in the Council or make them unsuitable for the work that they do.

68. Mr Austin said that the Claimant had asserted that he was having a private conversation. He said "However, you attended a public demonstration on a public street and whilst mingling with the opposing demonstration entered into a conversation with another person. You stated during the hearing that you were aware of the presence of a camera". Mr Austin continued, "I do not consider it is for me to pass judgment as to whether Zionism constitutes a protected characteristic or pass comment on your interpretation of historical events other than to say that the evidence you presented relates to events pre-holocaust".

69. Mr Austin said that the fact remained that the Claimant's comments were recorded and circulated widely and the Claimant had been identified as a Council employee. He quoted from the video clip and said, "I think … the average person would interpret your comments as suggesting that Zionists collaborated with the Nazis in the holocaust and is highly likely to cause offence".

70. Mr Austin said that he had checked after the disciplinary hearing and that Mr Grossman's video of the Claimant's conversation was still available and had been viewed over 79,000 times with comments and retweets. He said that the clear majority of the comments had interpreted the Claimant's comments negatively and that the Council had received a written complaint from a local MP. Mr Austin said that the Claimant's statement had been widely circulated and publicised and had been linked to the Claimant's employment with the Council, had caused offense and was insensitive. He said that it amounted to serious misconduct arising from a breach of the Code of Conduct for employees, in that the Claimant had brought the Council and its reputation into disrepute. Mr Austin said that, given the seriousness of the misconduct, he had decided to dismissal the Claimant from his employment with pay in lieu of notice, page 216.

71. Mr Austin gave evidence to the Tribunal. He confirmed that he did not conclude that the Claimant had been guilty of discrimination, or anti-Semitism, in his remarks.

72. Mr Austin said that he had decided to dismiss the Claimant because the Claimant had not made an unreserved apology and that Mr Greenstein's submission, which was submitted and agreed by the Claimant as his appeal document, affected Mr Austin's decision about whether dismissal was the appropriate sanction.

73. Mr Austin told the Tribunal that he accepted that the Claimant was talking about the Havaara Agreement in the video clip and he accepted that the Claimant was an honest witness. Mr Austin agreed that the Claimant had the right to express his views and that there should not be a restriction on this. He said that it would only be appropriate to dismiss an employee who expressed their views outside the workplace where the offence caused was "at quite a high level". He said however, that he accepted that it was inherent in the right to freedom of expression that people have the right to say things which some people might find offensive.

74. Mr Austin said that he did not ask the Claimant whether the Claimant would repeat his comments.

75. Mr Austin was asked about his conclusion that a reasonable person would conclude that the Claimant had said that Zionists had colluded with the Nazis in the holocaust. He was asked whether that was the allegation which had been made against the Claimant at the disciplinary hearing, seeing that Mr Smith had relied on two different comments in recommending that the Claimant go to a disciplinary hearing: that the holocaust was not caused by anti-Semitism; and that Zionists said that Jews were not welcome - and that the evidence on which Mr Smith had relied, including Mr Hands' criticism of the Claimant, related to the Claimant's comments that anti-Semitism did not cause the holocaust and that Zionists collaborated with the Nazis. Mr Smith did not answer that question. He agreed that he had not put to the Claimant Mr Austin's interpretation that the Claimant was saying that Zionists collaborated in the holocaust. Later, in re-examination, he was referred to the article from Labour Party Marxists which said that some people had interpreted the Claimant's comments in that way, that is the Claimant had implied that Zionists had collaborated in the holocaust.

76. Mr Austin confirmed that he had not found that the Claimant was guilty of gross misconduct, but rather that he had found that he was guilty of serious misconduct. He said that he had decided to dismiss in those circumstances because he did not believe that the Claimant would heed a warning. He said that the Claimant was arguing that he had the right to offend. He agreed that he had not specifically asked the Claimant whether he would heed a warning.

77. Mr Austin was asked whether he had enquired of the Claimant whether he would be prepared not to go on social media and not to discuss the matters further. Mr Austin agreed, in evidence, that he had not asked the Claimant that.

78. Mr Austin confirmed that he assumed that the Claimant would not heed a warning without ever putting that to the Claimant. In evidence to the Tribunal, Mr Austin explained that his assumption was based on the Claimant's insistence that the Claimant had a "right to offend".

79. Mr Austin denied that political pressure had influenced his decision.

80. The Claimant appealed against his dismissal on 30 May 2018, page 220. He said that he had worked for the Respondent for 17 years without any disciplinary process ever having been begun against him. He said that he was not employed in a political role and had joined a demonstration outside work hours, with nothing to identify his employer. He said that Mr Austin had not considered a lesser sanction, such as a warning.

81. The Claimant submitted statements from Jewish Labour Party activists and members of Jewish Voice for Labour in support of his appeal, pages 248-249.

82. The Unison London branch confirmed to the Respondent before the appeal hearing that Tony Greenstein was not an accredited Union official in the London region. the Respondent did not permit him to represent the Claimant at the Claimant's appeal hearing, page 254. The Claimant was instead represented by another Unison London representative, Pat Ishmael, page 264.

83. The Claimant's appeal was heard by Mark Grimley, Director of Corporate Services on 10 July 2018. I accepted the Claimant's evidence, once more, that the notes of the appeal meeting were not sent to the Claimant at the time and that he did not have an opportunity to amend them or contest them at the time. Again, it was not in dispute that the notes of the appeal hearing did not constitute a full, or verbatim, record of the meeting.

84. The notes recorded, in note form, "..Should have been given a written warning and waited until contravene before dismissal, please reverse the decision," p266.

85. Mr Grimley told the Tribunal that he did not take into account the political pressure when coming to his decision. He said that he was well aware of the Council's duty independently to investigate and come to its own decision and that he would not even report back to any elected representatives what was the outcome of a disciplinary process. I accepted his evidence in this regard.

86. On 10 July 2018 Mr Grimley wrote to the Claimant, dismissing his appeal, p274. He said that he agreed that serious misconduct was the appropriate conclusion. He wrote, "I note that whilst you continue to debate the historical argument, you have not accepted that the Council's reputation is associated with this episode. You are aware that your views can be polarising, whilst not recognising or apologising for placing the Council in this position." He found that dismissal was a reasonable sanction.

87. Mr Grimley gave evidence to the Tribunal. He agreed in evidence that the Respondent had not made a finding that the Claimant was guilty of anti-Semitic or racist comments. Rather, he said, that what the Claimant had said, in the context and the environment in which it was done, had brought the Council into disrepute. He said, "At no point did we find that he said anything anti-Semitic or that he was a racist".

88. Mr Grimley was asked about this conclusion that the Claimant was guilty of serious misconduct, rather than gross misconduct. Mr Grimley said, "An allegation of racism or anti-Semitism is treated very seriously. It was not appropriate in this case".

89. Mr Grimley told the Tribunal that the Council, in general, gives employees training on social media and on equality and inclusion awareness.

90. In evidence to the Tribunal, the Claimant said that he considered that Mr Greenstein's use of invective, in his document for the disciplinary hearing

responding to Mr Smith's report, was appropriate to show the strength of the Claimant's rejection of the report. He denied that the terms of the document were rude. The Claimant agreed in evidence that he had the opportunity to say anything he wanted to say to the disciplinary and appeal hearing. He said that, if he had been given a warning, he would have been more careful in how he expressed his views in the future. The Claimant said that he is normally good in dealing with people and in showing empathy. He said that he spoke to the Evening Standard after he had been suspended to explain his statements, because the Standard had contacted him and said that they were publishing the next morning.

91. It is clear from the facts that the Respondent did not conclude that the Claimant had made discriminatory, racist, or anti-Semitic statements. The Respondent did not allege that what the Claimant had said amounted to a criminal offence.

92. It was clear from the facts that the Respondent did not allege that the Claimant had himself published or posted the video of his conversation.

93. The Respondent did not suggest that the Claimant's demeanour during the conversation was aggressive, threatening or inappropriate; the Respondent relied on the words that the Claimant used in the video clip. The Respondent did not suggest that the Claimant had personally abused or insulted the person to whom he was talking.

94. The Tribunal was invited to watch the video clip. The transcript was an accurate record of what was said, although it was difficult to hear without the transcript. The Tribunal found that the Claimant's demeanour throughout the video clip was calm, reasonable, non- threatening and conversational.

95. It has not been contended by the Respondent this this case that anti-Zionism is synonymous with anti-Semitism.

Relevant Law

96. By *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer.

97. *S98 Employment Rights Act 1996* provides that it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA*. Conduct is a potentially fair reason for dismissal.

98. Cairns LJ said, in *Abernethy v Mott Hay and Anderson* [1974] ICR 323, [1974] IRLR 213, "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'. These words were approved by the House of Lords in *W Devis & Sons Ltd v Atkins* [1977] AC 931.

99. In *Thomson v Alloa Motor Co Ltd* [1983] IRLR 403 the Scottish EAT described conduct under *s98 ERA* as 'actings (sic) of such a nature whether

done in the course of the employment or outwith it that reflect in some way on the employer–employee relationship'.

100. This definition was applied in *CJD v Royal Bank of Scotland* [2014] IRLR 25 Ct Sess (IH), where the employee was dismissed because of allegations of assault in a purely personal capacity outside work which he vigorously denied and of which he was eventually acquitted. The dismissal was held unfair. Lord Bracadale's Opinion for the Inner House said, “It is difficult to see how the action of an employee, acting in self-defence, pushing another person onto a sofa in a domestic situation could be such as to reflect upon the employer-employee relationship.”

101. However, when establishing 'the reason' for dismissal, there is no legal requirement on the employer to show that the employee's conduct was 'culpable', *J P Morgan Securities plc v Ktorza* UKEAT/0311/16 (11 May 2017, unreported). In that case, the EAT decided that the culpability of the employee's conduct may be relevant in deciding, under *s 98(4) ERA 1996,* whether the decision to dismiss was reasonable in all the circumstances, but not when determining the reason in the first place. See also *Royal Bank of Scotland v Donaghay* UKEATS/0049/10 (11 November 2011, unreported).

102. If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was, in fact, fair under *s98(4) Employment Rights Act 1996*. In doing so, the Employment Tribunal applies a neutral burden of proof.

103. In considering whether a conduct dismissal is fair, the Employment Tribunal is guided by the principles set out in *British Home Stores Ltd v Burchell* [1978] IRLR 379, affirmed by the Court of Appeal in *Post Office v Foley* [2000] ICR 1283.

104. Under *Burchell*, the Employment Tribunal must consider whether or not the employer had an honest belief in the guilt of the employee of misconduct at the time of dismissal. Second, the Employment Tribunal considers whether the employer had, in its mind, reasonable grounds upon which to sustain that belief. Third, the Employment Tribunal considers whether the employer, at the stage at which he formed the belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

105. The Employment Tribunal also considers whether the employer’s decision to dismiss was within a range of reasonable responses to the conduct.

106. In applying each of these tests, the Employment Tribunal allows a broad band of reasonable responses to the employer, *Iceland Frozen Foods v Jones* [1982] IRLR 439.

107. The band of reasonable responses test applies as much to the Respondent's investigation as it does to the decision to dismiss: *Sainsbury's Supermarkets v Hitt* [2003] IRLR 23, LJ Mummery, giving the judgment of the Court, para 30.

108. It is not for the Employment Tribunal to substitute its own view for that of the employer, but to consider the employer's decision and whether the employer acted reasonably, *Morgan v Electrolux Ltd* [1991] IRLR 89, CA, *London Ambulance Service NHS Trust v Small* [2009] IRLR 563, CA.

109. In *Ladbroke Racing Limited v Arnott* [1983] IRLR 154, the Court of Session stated that dismissal for breach of a company rule is not necessarily fair – it still has to be decided whether dismissal was a reasonable response to the particular breach.

110. In *Donachie v Allied Suppliers Limited* EAT 46/80 the EAT held that it was unreasonable to dismiss an employee for failure to comply with a material term of the contract of which he was unaware and of which he could not reasonably have been aware.

111. In *Bishop v Graham Group plc* EAT 800/98 the EAT said, at paragraphs 23-25 of its judgment, " for a single act of misconduct to justify dismissal, it must be serious, wilful, and obvious. ….. The misconduct must be obvious; it must be such that the employee would plainly recognise it as conduct which would merit summary dismissal if discovered by his employers. Such recognition might be either because the employers had expressly made known to their staff that a particular type of misconduct would be treated as a dismissible offence or because the employee, judging the matter for himself according to the ordinarily accepted standard of morality of the time, would recognise dismissal as a predictable consequence of such misconduct".

112. In *Smith v Trafford Housing Trust* [2013] IRLR 86, HC, under the employee's employment contract, the Trust could demote him as a disciplinary sanction for misconduct, which included a breach of company rules or failure to reach the required standards in regard to conduct. It stated that conduct that occurred outside working hours or away from the premises of the Trust might have been considered as a breach of discipline and been subject to disciplinary procedures. The Trust's Code of Conduct provided that, ".. employees are required to act in a non-confrontational, non-judgmental manner with all customers, with their family/friends and colleagues. The trust is a non-political, non-denominational organisation and employees should not attempt to promote their political or religious views ... Customers, their friends and family and colleagues must always be treated with dignity and respect ... Employees should not engage in any activities which may bring the trust into disrepute, either at work or outside work". Its Equal Opportunities Policy provided that, ".. employees have a responsibility to treat their colleagues, tenants, third party suppliers and members of the public with dignity and respect being non judgemental in approach and not engaging in any conduct which may make another person feel uncomfortable, embarrassed or upset".

113. Mr Smith was a practising Christian and occasional lay preacher. He was also a member of the social networking website called “Facebook”. On his Facebook profile page he identified his employer as the Trust. By February 2011, he had 201 Facebook friends, most of them fellow Christians. Forty-five were his fellow employees of the Trust. On a Sunday, he posted on his Facebook wall page a link to a news article on the BBC news website headed “Gay church 'marriages' set to get the go-ahead” together with his comment “an equality too far”. His Facebook friend and colleague, Julia Stavordale, posted on his Facebook wall “does this mean you dont approve?” The next day Mr Smith responded: “no not really, I don't understand why people who have no faith and don't believe in Christ would want to get hitched in church the bible is quite specific that marriage is for men and women if the state wants to offer civil marriage to same sex then that is up to the state; but the state shouldn't impose it's rules on places of faith and conscience.”

114. One of the issues in the case was whether Mr Smith’s postings amounted to a breach of, either the Code of Conduct or of the Equal Opportunities policy, more specifically: whether the postings were activities which might have brought the trust into disrepute.

115. The High Court (Briggs J) held that Mr Smith's Facebook postings on gay marriage had not been contrary to the Trust's Code of Conduct or Equal Opportunities Policy and so had not amounted to misconduct. Briggs J said that a Code or Policy must be interpreted as a whole, and particular forms of behaviour may constitute misconduct even though not precisely specified and prohibited. Nonetheless, Codes and Policies which form 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. If an employee is liable to be demoted and to have his salary substantially reduced as a result of misconduct, he must be entitled to ascertain from the Codes and Policies to which he is subjected what he is and is not permitted to do, and to understand the extent to which those obligations extend beyond the workplace into his personal or social life. An employer may wish constantly to develop and improve its Codes and Policies in the light of experience, but for an employee to be disciplined for misconduct by reason of an alleged failure to comply with Codes and Policies, it must be to an objective interpretation of the Codes and Policies as promulgated and in force at the time of the conduct in question that the employer must have regard.

116. Briggs J also held that the right of individuals to freedom of expression and freedom of belief, taken together, means that they are in general entitled to promote their religious or political beliefs, providing they do so lawfully. Of course, an employer may legitimately restrict or prohibit such activities at work, or in a work-related context, but it would be prima facie surprising to find that an employer had, by the incorporation of a Code of Conduct into the employee's contract, extended that prohibition to his personal or social life. With regard to Codes of Conduct and other Policies, the question of whether and if so how far particular provisions of those documents affect an

employee's personal or social life requires careful consideration of each relevant provision, its purpose and its consequences in terms of the potential for invasion of the employee's human rights of expression and belief. It is therefore first to the language of the provisions relied upon that recourse must be had. But slavish attendance to linguistics may, as so often happens in the construction of documents, be an unreliable guide. The encouragement of diversity in the recruitment of employees inevitably involves employing persons with widely different religious and political beliefs and views, some of which, however moderately expressed, may cause distress among the holders of deeply felt opposite views. The frank but lawful expression of religious or political views may frequently cause a degree of upset, and even offence, to those with deeply held contrary views, even where none is intended by the speaker. This is a necessary price to be paid for freedom of speech.

117. The High Court decided that Mr Smith's postings about gay marriage in church did not bring and could not have brought the Trust into disrepute. No reasonable reader of Mr Smith's Facebook wall page could rationally have concluded that his two postings were made in any relevant sense on the Trust's behalf. First, his brief mention at the top of the page that he was employed as a manager by the Trust could not possibly have led a reasonable reader to think that his wall page consisted of, or even included, statements made on his employer's behalf. A brief mention of the identity of his employer was in no way inconsistent with the general impression to be gained from his Facebook wall, that it was a medium for personal or social, rather than work-related, information and views. Second, viewing the entries on Mr Smith's wall for the period in question as a whole, it was obvious, and would have been obvious even to a casual reader, that he used Facebook for personal and social rather than work-related purposes. The other entries on his wall had no relevance to his work. Nor were his postings about gay marriage in church themselves work related. Although they would have appeared automatically upon the newsfeed pages of his Facebook friends, they would have so appeared divorced from reference to his being a manager at the Trust. Further, his moderate expression of his particular views on his personal Facebook wall at a weekend out of working hours, could not sensibly have led any reasonable reader to think the worst of the Trust for having employed him as a manager.

118. *Smith v Trafford Housing Trust* was cited with approval in *Game Retail Ltd v Laws* UKEAT/0188/14. In that case an employee had been dismissed for having posted several obscene, threatening and offensive tweets on his Twitter account. Several of the employer's stores followed the Claimant on Twitter. At para 46 of its judgment, the EAT said, "We recognise that there is a balance to be drawn between an employer's desire to remove or reduce reputational risk from social media communications by its employees and the employee's right of freedom of expression; see *Smith*. ……. Generally speaking, employees must have the right to express themselves, providing it does not infringe on their employment and/or is outside the work context. That said, we recognise that those questions might themselves depend on the particular employment or work in question."

119. Article 10 European Convention on Human Rights provides,

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."

2. The exercise of these functions, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

120. A failure to follow the *ACAS Code of Practice 1 on Disciplinary and Grievance Procedures* will be taken into account in determining the reasonableness of a dismissal under *s98(4) ERA 1996 – s207 TULCRA 1992.*

121. Paragraphs [19], [20] and [23] of the Code of Practice provide,
"[19] Where misconduct is confirmed .. it is usual to give the employee a written warning. A further act of misconduct .. within a set period would normally result in a final written warning.
[20] If an employee's first misconduct … is sufficiently serious, it may be appropriate to move directly to a final written warning. This might occur where the employee's actions have had, or are liable to have, a serious and harmful impact on the organisation."
[23] Some acts, termed gross misconduct, are so serious in themselves or that they have such serious consequences that they may call for dismissal without notice for a first offence..".

Polkey

122. If the Tribunal determines that the dismissal is unfair, the Tribunal may go on to consider the percentage chance that the employer would have fairly dismissed the employee, *Polkey v AE Dayton Services Limited* [1988] ICR 142.

123. In *Gover v Propertycare Limited* [2006] ICR 1073, the Court of Appeal held that the *Polkey* principle does not only apply to cases where the employer has a valid reason for dismissal but has acted unfairly in its mode of reliance on that reason, so that any fair dismissal would have to be for exactly the same reason. Tribunals should consider making a *Polkey* reduction whenever there is evidence to suggest that the employee might have been fairly dismissed, either when the unfair dismissal actually occurred or at some later date. In making an assessment Tribunals should apply the principles set out in *Software 2000 Limited v Andrews* [2007] ICR 825.

Contributory Fault

124. By *s122(2) ERA*, where the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, the Tribunal shall make such a reduction. By *s123(6) ERA,* where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. *Optikinetics Limited v Whooley* [1999] ICR 984: it is obligatory to reduce the compensatory award where there is a finding of contributory fault. The reduction may be 100% - *W Devis & Sons Limited v Atkins* [1977] ICR 662.

125. In *Nelson v BBC (No 2)* [1980] ICR 110, the Court of Appeal said that three factors must be satisfied if the Tribunal is to find contributory conduct:

a. The relevant action must be culpable and blameworthy;
b. It must actually have caused or contributed to the dismissal;
c. It must be just and equitable to reduce the award by the proportion specified.

Discussion and Decision

"Conduct"

126. I considered, first, whether the Respondent had shown the reason for dismissal and that it was a potentially fair reason. The Respondent relied on conduct as its potentially fair reason for dismissal; in particular, making comments that were inappropriate and likely to be offensive and likely to bring the Respondent into disrepute.

127. I reminded myself that conduct is defined as "actings of such a nature whether done in the course of employment or outwith that reflect in some way on the employer-employee relationship," *Thomson v Alloa Motor Co Ltd* [1983] IRLR 403; *CJD v Royal Bank of Scotland* [2014] IRLR 25 Ct Sess (IH). I reminded myself that conduct did not have to be culpable in order for it to satisfy the definition of conduct, *J P Morgan Securities plc v Ktorza* UKEAT/0311/16.

128. The issue gave me some considerable pause for thought. The undisputed facts of this case were that the alleged inappropriate and offensive comments which were said to be likely to bring the Respondent into disrepute were made outside work and with no relationship to the Claimant's work. They were made in circumstances where there was nothing to identify the Claimant as a Respondent employee and there was no suggestion that the Claimant was speaking on behalf of his employer.

129. The Claimant himself did not seek to publish the comments; they were published without his permission or knowledge and in circumstances in which he did not have control over the publication. The Claimant's comments were

an expression of his views and beliefs. The Claimant, as other employees, had the right to freedom of expression and assembly, which would normally include attending rallies and expressing their views there. The Respondent had not contended that the Claimant's views were discriminatory or anti-Semitic or racist. It has never been suggested that the Claimant committed a criminal offence in saying what he did, or that his actions were otherwise unlawful.

130. I considered, therefore, whether an employee's legitimate exercise of his right to freedom of expression, which was not suggested to be unlawful, away from the workplace and with no link to the workplace at the time, could amount to conduct within the meaning of the definition as set out in the case law: conduct "which reflected in some way on the employer-employee relationship." I considered that this case was similar to the case of *CJD v Royal Bank of Scotland* [2014] IRLR 25 Ct Sess (IH), where the employee was dismissed because of criminal allegations of assault in his personal capacity outside work, which he denied and of which he was acquitted.

131. The Court of Session in that case said that it was difficult to see how the actions of an employee, acting in self-defence pushing another onto a sofa in a domestic situation, could be such as to reflect on the employer-employee relationship. In that case, as in the present case, the employee's actions were lawful, albeit that the employee in that case was subject to criminal charges which were and are, in their nature, public.

132. I considered whether, in the present case, a lawful act done away from the workplace, with no connection to the workplace when it was done, could amount to "conduct", when the conduct in the *CJD v Royal Bank of Scotland* [2014] IRLR 25 Ct Sess (IH) case did not.

133. On the facts of this case, however, the Claimant's actions were publicised and were considered to be offensive by a number of people. They came to be linked to the workplace when the Claimant was identified on social media as an employee of the Council and when a local MP wrote to the Respondent asking that action be taken against the Claimant.

134. I decided, therefore, that they did reflect in some way in the employer-employee relationship. They fell within the definition of conduct.

Reason for Dismissal

135. I found that it was clear, on the facts, that the Respondent did dismiss the Claimant for this conduct. The allegation that he made comments which were considered to be offensive and were inappropriate and likely to bring the Respondent into disrepute was the allegation which was explored throughout the process and during the investigation, the disciplinary and the appeal hearings.

136. While the Claimant contended that the disciplinary and appeal officers were both influenced by the political intervention of the Council leader and the

local MP, I concluded that the reason for dismissal in Mr Austin's mind and in the appeal officer's mind was that the Claimant had made statements which were considered to be offensive and which they considered had brought the Respondent into disrepute. I decided that Mr Austin and M Grimley were not, themselves, part of any concerted effort or campaign to remove the Claimant from employment because of his political views.

Investigation and Evidence: Reasonableness

Video Clip

137. I considered then whether the Respondent had reasonable evidence of the relevant misconduct. I considered whether there was a reasonable investigation from which the reasonable evidence was gained.

138. The Claimant contended that Mr Smith should not have relied on the transcript and/or should have taken into account that it was part of a larger conversation. However, in the investigatory meeting, the Claimant agreed that the transcript and reporting was a reasonable reflection of the 105 seconds in the video clip. The Claimant did not contend then, nor at the Tribunal hearing, that the content of the video clip has been edited to alter what was said during that passage of time.

139. I considered, therefore, that Mr Smith and Mr Austin acted reasonably in relying on the clip and the transcript thereof as an accurate record of what the Claimant said during the period when the footage was taken. I rejected the Claimant's contention that the maker of the film, or Mr Grossman, should have been contacted. In circumstances that the Claimant was not contending that the film was inaccurate, such investigation would have been otiose and irrelevant.

Mr Smith: Evidence Taken into Account

140. The Claimant contended that Mr Smith failed to take into account other evidence and ignored all the evidence which the Claimant had brought to the investigation.

141. However, I concluded, from the notes of the investigatory meeting and the investigation report, that Mr Smith did listen to the Claimant's contentions. His report's conclusions addressed many of the Claimant's contentions and contained matters which he considered to be relevant. There is no requirement that a reasonable investigation specifically addresses all the arguments put to it. In any event, Mr Smith attached the Claimant's evidence, witness statements from supporting witnesses, the Claimant's response to the allegations, the Labour Party Marxist publication and the transcript of the disciplinary hearing to his investigation report, pages 105, 109, 128 and 133. All these, therefore, were put before the disciplinary hearing.

Investigator's Findings

142. The Claimant contended that the investigator should have made findings about whether the Claimant held anti-Semitic views and should have made findings about whether the Claimant's remarks were actually offensive.

143. I concluded that Mr Smith's investigation came within the broad band of reasonable investigations in this regard also. He gathered evidence from Mr Grossman's footage and the responses to it. He gathered Mr Hands' letter to the Council and comments on social media. These constituted evidence that at least some people had found the Claimant's comments to be offensive. Mr Smith commented on that evidence in the conclusions of his report.

144. Mr Austin also specifically addressed the issue in his disciplinary hearing and asked the Claimant questions about it. The Claimant said he could see how his comments could have caused offence, albeit he said that people could be offended if they assumed that the Claimant was talking about the Jews and not about Zionists.

145. I found that it was clear from the evidence, in any event, that the Respondent did not decide that the Claimant had made anti-Semitic or racist or discriminatory remarks. The Respondent did not rely on any such finding in making its decision to dismiss, or in the appeal outcome.

Suspension

146. The Claimant contended that his suspension was in breach of procedure and that it affected the fairness of his dismissal. I decided that the Respondent acted reasonably in allowing Mr Austin to suspend the Claimant, albeit that he was not the correct grade of officer under the Respondent's procedure. Mr Austin simply handed the Claimant the suspension letter, but was not involved in the investigation process thereafter.

147. Mr Smith was entirely responsible for the investigation and investigation report and Mr Austin was independent of it.

148. It was therefore reasonable for him to conduct the disciplinary meeting.

149. I also decided that the fact that Mr Grimley had received Cllr Cowan's email of complaint while on holiday did not render the appeal process unfair. Mr Grimley was not involved at all in the handling of the email, or in the decision to suspend the Claimant. He received the email and nothing more. He was independent of the investigation and the disciplinary hearing and, in that way, he was an independent person to hear the appeal.

150. While the Respondent was clearly put under very considerable pressure by Mr Hands MP and by Cllr Cowan to dismiss the Claimant, I accepted Mr Austin and Mr Grimley's evidence that they had made their decision on their own findings of fact and were not influenced by that political pressure.

"Proper Hearing" – Opportunity to put Claimant's Case

151. However, I did conclude that the Respondent's investigation and disciplinary process was unfair and outside the range of reasonable responses of a reasonable employer in the following regards.

152. Mr Austin decided to dismiss the Claimant on the basis that Mr Austin concluded that the average person would interpret the Claimant's comments as suggesting that Zionists collaborated with the Nazis in the holocaust and that that was highly likely to cause offense.

153. On my findings of fact, the Claimant asked Mr Smith before the investigation hearing to make clear which of his comments were felt to be offensive.

154. In Mr Smith's investigation report, Mr Smith relied on two comments as likely to cause offence. Those were the following; that the Zionist movement collaborated with the Nazis, that the Zionist movement "accepted that Jews are not acceptable here." Mr Smith did not rely, in his report, on the Claimant having said that Zionists collaborated in the holocaust.

155. It was clear these two comments were understood by the Claimant to be the allegedly offensive ones. Professor Machover's statement on behalf of the Claimant specifically addressed those two comments.

156. Mr Austin agreed, in evidence to the Tribunal, that, during the disciplinary hearing, he did not put to the Claimant the allegation that the Claimant had said the Zionists colluded in the holocaust.

157. I concluded that Mr Austin acted unfairly and outside the band of reasonable responses in deciding that the Claimant was guilty of misconduct on a basis which had not been put to the Claimant, either in the investigatory report, or in the disciplinary meeting.

158. It was outside the range of reasonable investigations for an employee not to know, before they are dismissed, the nature of the misconduct alleged against them.

159. I further concluded that Mr Austin did not have reasonable evidence on which to base his conclusion that the average person would interpret the Claimant's comments as suggesting that Zionists collaborated with the Nazis in the holocaust. First, clearly, he did not have the Claimant's comments on the matter. If he had asked the Claimant to comment, the Claimant could have pointed out to Mr Austin that Mr Smith had not interpreted the Claimant's comments in that way, nor had Mr Hands in his Tweet or letter attached to the investigation report, and nor had the other evidence which Mr Smith had relied on from the Mail online or the Evening Standard.

160. The evidence of offence caused, which was attached to Mr Smith's report, was not of offence caused at the Claimant suggesting that Zionists colluded in the holocaust.

161. Mr Austin concluded that a reasonable person would have understood the Claimant to be saying that Zionist collaborated in holocaust, but on the evidence before Mr Austin, none of the national newspaper articles, nor Mr Hands, who had complained to the Council, had interpreted the remarks in that way.

162. The only evidence before Mr Austin, which alluded to the Claimant's remarks being interpreted in that way was a Labour Party Marxist article, which defended and explained the Claimant's comments. Mr Austin did not refer to this in his outcome letter, nor in his evidence, until it was drawn to his attention in examination.

163. Furthermore, I decided that Mr Austin acted unfairly, outside the band of reasonable responses, in failing to give the Claimant an opportunity to comment on whether a warning would be an appropriate outcome and whether the Claimant would heed a warning. Mr Austin confirmed that he assumed that the Claimant would not heed a warning, without ever putting that to the Claimant.

164. In evidence to the Tribunal, Mr Austin explained that his assumption was based on the Claimant's insistence that the Claimant had a "right to offend".

165. However, Mr Austin's evidence on that was contradicted by Mr Austin's own findings in his dismissal letter, where he found that a key point of the Claimant's response was that the Human Rights Act gives a right of freedom of assembly and freedom of expression including a qualified right to offend where expressing beliefs. It is clear from Mr Austin's own findings that the Claimant was not contending that he had the absolute right to offend.

166. Mr Austin acted unfairly in not giving the Claimant an opportunity to put his case regarding a warning. He did not have reasonable evidence for concluding that the Claimant would not have heeded a warning.

Reasonableness of Decision to Dismiss

167. In any event, I have further concluded that Mr Austin and Mr Grimley acted well beyond the range of reasonable responses of a reasonable employer in deciding to dismiss the Claimant in the following undisputed circumstances:

a. That the Claimant made comments outside the workplace in his private capacity with no discernible link to his employment at all;
b. The Claimant did not himself publish the comments;
c. The comments were not found by the Respondent to be discriminatory, anti-Semitic, or racist;

d. The comments were not alleged to be unlawful or criminal or libellous;
e. The comments were not alleged to have been expressed in an abusive threatening, personally insulting, or obscene manner;
f. The Claimant was acknowledged by Mr Austin to have a right to attend demonstrations in his own time and express his own opinions;

even if the Respondent had found that those comments caused offence when they had been circulated and had brought the Council into disrepute.

168. In those undisputed circumstances the degree of culpability of the Claimant was, on any reasonable view, extremely limited, if the Claimant was culpable at all. The degree of culpability of an employee's conduct is relevant in deciding under *s98(4)* whether the decision to dismiss was reasonable in all the circumstances, *J P Morgan Securities plc v Ktorza* UKEAT/0311/16 (11 May 2017, unreported); *Royal Bank of Scotland v Donaghay* UKEATS/0049/10.

169. I have reminded myself that it is not for the Employment Tribunal to substitute its own view for that of an employer but to consider whether the employer's decision was outside the band of reasonable responses. I make clear that the basis of my decision was that the decision to dismiss was indeed well outside the band of reasonable responses in this case. I have taken into account, in considering whether dismissal was outside the band of reasonable responses, the comments of the higher Courts in *Smith v Trafford Housing Trust* [2013] IRLR 86 and *Game Retail Ltd v Laws* UKEAT/0188/14.

170. In this case, the relevant provisions of the employer's Code of Conduct and Policies were striking similar to those in *Smith v Trafford Housing Trust*. The Respondent, in this case, was a local authority and the Claimant's work in its Environmental Health Department concerned housing. The circumstances of his employment were similar to those of Mr Smith in that case. The Claimant was not in a politically restricted post and there were no special restrictions on his employment which would indicate to him, on any reasonable interpretation of the policies, that the Respondent's policies and procedures should be understood in a different way to the way in which they interpreted by Mr Justice Briggs in Smith.

171. I decided that the Respondent acted outside the band of reasonable responses in concluding that the Claimant should be dismissed for bringing the Respondent into disrepute when he expressed his political views in a lawful way, entirely away from the working environment, with no connection to the work at the time, even if those views caused offence to some people. Mr Justice Briggs made clear that the frank but lawful expression of religious or political views may frequently cause a degree of upset, or even offence, to those of deeply held contrary views, even when none is intended by the speaker, but this is necessary price to be paid for freedom of speech.

172. I decided that Mr Justice Briggs' comments applied in this case, even when, through no active participation of the Claimant, his comments were later published abroad.

173. Indeed, the Claimant's actions were in some sense as even less culpable than the actions in *Smith,* in that the Claimant did not himself post or publish the views; his words were not deliberately considered in the way that a person's active publishing of comments on Facebook, on Twitter or other media might be.

174. The Claimant's comments were extracts from an unscripted, spontaneous conversation which were later published by a third party unconnected to the Claimant.

175. I concluded that, if it was within the range of reasonable responses of a reasonable employer to dismiss an employee in circumstances where they have lawfully exercised their rights to freedom of expression and freedom of assembly, unconnected in any way to the workplace, without using language which was personally abusive, insulting or obscene, and when their views and opinions have, without their consent, been published and caused offence to some, or indeed many people, then there is a very great risk of dismissal to any person who expresses their lawful political views outside the workplace. That is particularly so where it seems that, as in this case, Members of Parliament are willing to put pressure on employers to dismiss employees who hold views with which that MP vehemently disagrees.

176. As Mr Justice Briggs indicated, political beliefs and views may well cause distress and offence to others who do not share those views.

177. Furthermore, I have concluded that it was outside the band of reasonable responses to dismiss the Claimant in the circumstances where the Respondent had not made clear to its employees, through it policies or through training or instruction, that expressing lawful political beliefs which could cause offence, outside the workplace, might result in disciplinary sanctions and, particularly, that they could result in dismissal.

178. I concluded that it was further outside the band of reasonable responses for the Respondent to dismiss for a first offence of such misconduct after 17 years of diligent service with an entirely unblemished disciplinary record.

179. The ACAS Code of Conduct advises that normal sanction for a first offence is a warning.

180. The Respondent did not find that the Claimant was guilty of gross misconduct in this case.

181. I took into account the line of caselaw which says that for a single act of misconduct to justify dismissal it must be serious, wilful and obvious *Bishop v Graham Group plc* EAT 800/98.

182. Where, as here, the employer has not drawn to the employee's attention that the exercise of their rights to freedom of expression outside the work place could result in dismissal, even where their comments are not published by the employee, but then become publicly known and associated with the Respondent, I concluded that the employee's conduct could not reasonably be seen as serious, wilful or obvious.

183. I took into account the comments of Briggs J in *Smith v Trafford Housing* that the right of individuals to freedom of expression and freedom of belief, taken together, means that they are in general entitled to promote their religious or political beliefs, providing they do so lawfully. An employer may legitimately restrict or prohibit such activities at work, or in a work-related context, but it would be prima facie surprising to find that an employer had, by the incorporation of a Code of Conduct into the employee's contract, extended that prohibition on expression of religious or political beliefs to the employee's personal or social life. I took into account the statement of the EAT in *Game Retail Ltd v Laws* that, generally speaking, employees must have the right to express themselves.

184. All those matters reinforced my conclusion that it was outside the band of reasonable responses to dismiss for a first offence where the Respondent had not warned the Claimant that such act could be viewed as misconduct and liable to result in dismissal.

185. I therefore found that the dismissal was both procedurally and substantively unfair.

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186. Given that the decision to dismiss was substantively unfair in the way that I have described, I did not find that, if the Respondent had adopted a fair procedure, there was any likelihood that the Respondent could or would have dismissed the Claimant fairly.

Contributory Fault

187. With regard to contributory fault, Mr Austin told me that he took into account, in deciding whether to dismiss, the Claimant's submission to the disciplinary hearing drafted by Mr Greenstein.

188. I have concluded that Mr Greenstein's submission was rude, derogatory and personally insulting. All the points in it could have been made in an equally forcible manner without insulting Mr Smith, who was a fellow employee of the Claimant.

189. I accepted Mr Austin's evidence that that did contribute to his decision to dismiss.

190. I found the Claimant' submission was culpable and blameworthy in that it was unnecessarily rude and insulting to a fellow employee. However, I

considered that that matter was not in any sense the principal reason for dismissal. It was not any part of the allegation which was made against the Claimant and in respect of which it was said he could be dismissed.

191. Therefore, the amount of contributory fault must be a minor one and I assess it at 10%.

192. In considered whether the Claimant's particular use of language in expressing his views at the rally outside Parliament was culpable or blameworthy, for example the use of the word "collaborated", which was suggested by Mr Smith to be unnecessarily offensive.

193. However, I considered that the words were expressed in conversation and not in a considered manner, such as in a written post or publication. The conversation the Claimant had was not a media interview – it was a spontaneous conversation which was stilted and repeatedly interrupted. I did not find that it was culpable or blameworthy of the Claimant to express his opinions in an infelicitous manner in a conversation, even if the conversation was in a public place. I therefore concluded that the Claimant's use of those words did not amount to blameworthy conduct and therefore could not amount to contributory fault. I made no deduction in respect of those.

Witnesses

194. All the witnesses in this case gave their evidence in an equable manner. While I did not ultimately accept the Respondent's arguments, they were made elegantly and persuasively by Mr Cheetham QC on their behalf. I thank the witnesses and Counsel for the pleasant way in which the case was conducted.

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Employment Judge Brown

Dated: 26 June 2019

Judgment and Reasons sent to the parties on:

27 June 2019

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For the Tribunal Office