EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Tracey Webb	**v**	London Underground Limited

Heard at: Bury St Edmunds (CVP) **On:** 22-26 November 2022

Before: Employment Judge R Wood; Ms S Elizabeth; Ms S Blunden

Appearances
For the Claimant: Mr Jones (Counsel)
For the Respondent: Miss Thomas (Counsel)

RESERVED JUDGMENT

1. The Claimant was not the subject of discrimination based on race by the respondent.

2. The claimant was unfairly dismissed by the respondent.

3. The claimant was unlawfully deducted three weeks pay in respect of unpaid holiday entitlement by the respondent.

DECISION

Claims and Issues

1. Page numbering referred to in square brackets in these reasons are to pages in the bundle, unless otherwise stated.

2. This is a claim which involves allegations of direct race discrimination, unfair dismissal, and non-payment of accrued holiday pay. The respondent is, by agreement between the parties, a public body which has responsibility for the underground train system in London. The claimant had worked for a period of 32 years for the respondent, latterly as a train manager. The claimant argues that she was dismissed from her role for reasons related to her being a white woman. The respondent asserts that she was dismissed on the grounds of misconduct, namely the posting of inappropriate, offensive and racist messages onto social media sites. These messages

related to the death of George Floyd, and the situation which evolved in the aftermath of that event. It is submitted by the respondent that the posts breached its policies and guidance in relation to the conduct of employees, particularly in relation to activities on social media. In her claim, Ms Webb states that the posts were factually correct, and were not offensive.

3. The claimant states that she was treated materially differently from other black employees who had been similarly accused of posting inappropriate material on social media. Ms Webb asserts that had she been black, then the respondent would not have taken the view that the posts amounted to misconduct justifying disciplinary proceedings. Furthermore, that she would not have been dismissed if she had not been white.

4. In relation to the claim for unfair dismissal, it is argued that the respondents social media policy and/or the way it was applied in the claimant's case, amounted to an unjustified interference with the claimant's rights under the European Convention on Human Rights ("the Convention") as incorporated into English law by the Human Rights Act 1998, and in particular those rights under Articles 8 and 10 of the Convention, namely the right to a private life and to freedom of expression respectively. It is suggested that there was either no, or insufficient, regard to the claimant's human rights during the disciplinary procedure. The respondent maintains that the interference was justified by reference to the threat posed to it's reputation, and the rights of other employees not to be offended.

5. The claimant also submits that the reason for dismissal was not one prescribed by section 98(2) of the Employment Rights Act 1998, and was not one which was reasonable and fair in the circumstances. Furthermore, that the process engaged by the respondent was, in any event, unfair. For its part, the respondent states that it genuinely dismissed on the grounds of misconduct associated with the alleged misuse of social media, having carried out a reasonable investigation of the allegations. The respondent asserts that the policy it adopted was fair throughout and that the sanction imposed was proportionate and reasonable set against the circumstances of the case.

6. In relation to her claim for accrued but unpaid holiday entitlement, Ms Webb asserts that she went on a trip abroad during her sick leave which was wrongly assigned by the respondent as annual leave. She believes that it should have been treated as holiday leave. The respondent disagrees and did not make a payment in relation to the period.

Procedure, Documents and Evidence Heard

7. The Hearing took place on 22 to 26 November 2022. The claim was heard via a remote CVP hearing in Bury St Edmunds. We first of all heard testimony from the claimant, Ms Webb. From the respondent, we heard evidence from Mr Tom Naughton (Train Operations Manager: dealing with

the investigation), Daniel Howarth (Head of Customer Services Modernisation: dealing with the appeal), Mr Olawole Musa (Area Manager in Camden: dealing with the disciplinary hearings (company disciplinary interview ("CDI")), and Miss K Brades (Depot Manager: also dealing with the CDI). Each of the aforesaid witnesses adopted their witness statements and confirmed that the contents were true. We also had an agreed bundle of documents which comprises 753 pages; and copies of helpful and thorough written submissions from Mr Jones and Miss Thomas.

8. In coming to our decision, the panel had regard to all of the written and oral evidence submitted, even if a particular aspect of it is not mentioned expressly within the decision itself.

Legal Framework

9. The relevant legislation in respect of the allegations of direct discrimination is contained in the Equality Act 2010 ("the Act").

10. Race is a protected characteristics as defined by section 4 of the Act. Sections 39 and 40 prohibit unlawful discrimination against employees in the field of work. Section 39(2) provides that:

> "*An employer (A) must not discriminate against an employee of A's (B) -*
>
> *(a) as to B's terms of employment;*
>
> *(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
>
> *(c) by dismissing B; or (d) by subjecting B to any other detriment.*"

11. Section 136 of the Act provides that:

> "*If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred".*

This provision reverses the burden of proof if there is a prima facie case of direct discrimination.

12. In summary, the Act provides that a person with a protected characteristic is protected at work from prohibited conduct as defined by Chapter 2 of it. In addition to the statutory provisions, Employment Tribunals are obliged to take in to account the provisions of the statutory Code of Practice on the Equality Act 2010 produced by the Commission for Equality and Human Rights.

13. Direct discrimination is defined in section 13(1) of the Act as "*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*". The application of those principles was summarised by the Employment Appeal Tribunal in London Borough of Islington v Ladele (Liberty intervening) EAT/0453/08, which has since been upheld:

    (a) In every case the Employment Tribunal has to determine the reason why the claimant was treated as he was. In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

    (b) If the Employment Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial.

    (c) Direct evidence of discrimination is rare and Employment Tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test. The first stage places a burden on the claimant to establish a prima facie case of discrimination. That requires the claimant to prove facts from which inferences could be drawn that the employer has treated them less favourably on the prohibited ground. If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If they fail to establish that, the Tribunal must find that there is discrimination.

    (d) The explanation for the less favourable treatment does not have to be a reasonable one. In the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation. If the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. The inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, the burden is discharged at the second stage, however unreasonable the treatment.

    (e) It is not necessary in every case for an Employment Tribunal to go through the two-stage process. In some cases it may be appropriate simply to focus on the reason given by the employer ("the reason why") and, if the Tribunal is satisfied that this

discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test.

(f) It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would betreated. The determination of the comparator depends upon the reason for the difference in treatment. The question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as she was. However, as the EAT noted (in *Ladele*) although comparators may be of evidential value in determining the reason why the claimant was treated as he or she was, frequently they cast no useful light on that question at all. In some instances, comparators can be misleading because there will be unlawful discrimination where the prohibited ground contributes to an act or decision even though it is not the sole or principal reason for it. If the Employment Tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then it is unnecessary to determine the characteristics of the statutory comparator.

12. The relevant case law in relation to unfair dismissal is to be found in the Employment Rights Act ("ERA") 1998 at section 98:

"*General*

(1) In determining for the purpose 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-

(a) relates to the capability of qualifications of the employee for performing work of the kind which he was employed to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an

enactment."

Findings

13. Based on the evidence that we heard and read, the Employment Tribunal made the following primary findings of fact relevant to the issues that we had to determine.

14. The claimant's employment with the respondent began in 1989. She had occupied a number of roles and progressed through the company structure over a period of about 32 years. It is common ground that she had served with the respondent for that time without a single blemish on her record. Put another way, the matters that arose in 2020 were the first time there had been any cause to question the claimant's compliance with the respondent's code of conduct or policies. We bore this issue very much in mind when considering all other issues.

15. The claimant was promoted to duty trains manager in August 2003, working out of the Seven Sisters depot in North London. Her statement of main terms and conditions of employment can be found at [94]. In terms of relevant policies and codes of conduct, there was some confusion at the hearing. However, it was eventually agreed that the relevant documents were the 'Guidelines for the use of social media' at [133]. This appears to be a TFL guideline, but its scope is clearly extended to all London Underground Limited staff. There is also a 'Discipline at Work Support Pack' at [70]; and a 'Discipline at Work Procedure' at [111].

16. We find that this depot was situated in a culturally diverse area of London. It was agreed by the claimant that the staff who worked at the depot broadly reflected that diversity. She also agreed that she was responsible for managing up to 250 people, who we find would also have been from various ethnic backgrounds. A train manager is a people manager, dealing with a whole range of issues such as performance management, deployment, attendance, and disciplinary/grievance issues. It is a hugely responsible job which requires a manager to work constructively with team members. In evidence before us, the claimant accepted that the staff she managed needed to have confidence that she would treat them fairly.

17. The context of this case is important. The murder of George Floyd in the USA on 25th May 2020 by a police officer was a global event. It is difficult to imagine that many people can have been left untouched by the events surrounding his death, and it's aftermath. His killing, the result of a police officer placing pressure on his neck for several minutes, was captured on video. To adopt a phrase used in this case in another context, the footage "went viral" around the world. The strength of feeling surrounding these events thrust to prominence the 'Black Lives Matter' movement, which became a vehicle for the highlighting of, and protesting about, historic systemic racism and violence against people of colour. The claimant confirmed at the hearing that she understood that people had been distressed by the incident, and that the community in which she worked was

sensitive to race equality issues.

18. It was against this backdrop that the events which resulted in the dismissal of the claimant played out. On or about 6th-8th June 2020, the claimant placed a number of posts or comments onto her Facebook page. Of course, Facebook is a free social networking website which allows users to create profiles, upload photographs or videos, send messages, or comment on other people's messages to which a person has access. Each member has a number of 'Friends' who in all likelihood will have access to each other's messages and comments. Those outside the circle of an account holder's 'friends' are likely to have much more restricted access, if any access at all.

19. A member has a profile page, which typically includes some personal detail about the person, including their employment. In this case, it is accepted by the claimant that her profile identified her as an employee of the respondent. She had about 200 Facebook friends. A significant proportion of these were other employees of the respondent. It was not suggested that save in this limited sense, that the claimant's Facebook page was anything other than a private account. It was not used for work purposes at all.

20. As stated, on or about 6th-8th June 2020, the claimant added a number of posts/comments to her Facebook account which form the subject of this claim. It is a little difficult to ascertain in what order they were posted by the claimant. We did not think it important to the overall issues in the case.

21. It is agreed that the first to come to the attention of her line manager, Mr Naughton, was one that appears at [143]("A1")(referred to as "Appendix A1" in the Company Disciplinary Interview "CDI" brief later produced by Mr Naughton). We were told that it is a 'meme', in the sense that it is a photograph, with text added to it, which had been widely circulated. The bulk of the post is a photograph of George Floyd, over which is written "*The media and the left made George Floyd into a Martyr. But who was he really?*". There then follows a list of the alleged criminal convictions of George Floyd including armed robbery and drug offences. It is relevant to observe that this photograph and text was not created by the claimant. She had received this herself on her Facebook account from another user, and re-posted it to her 'friends'. However, the claimant added the following to the post: "*Never deserved to be murdered by a police man. But…..: really was not a nice guy*".

22. Mr Naughton was sent this post by a Mr Charles Ayabina (a black trains manager with the respondent) on 8th June 2020. Mr Naughton was told by Mr Ayabina in relation to the post that it was "kicking off" at the Seven Sisters deport and that it had gone "viral", or words this effect. On 9th June 2020, Mr Naughton took advice from a HR partner, Mr Euan Taylor. We find that both Mr Naughton and Mr Taylor both took the view that the post was offensive, inflammatory and racially divisive at the time.

23. We agree with this assessment. The right to freedom of speech must be vehemently protected. People do disagree, even about the most important

issues. It is a defining characteristic of a democratic society that such exchanges of views can take place without fear of repercussion. However, even Article 10 of the ECHR couches the freedom of expression in terms which are far from unrestricted (see below for further discussion). The right must be seen in the context of other peoples' rights and reputations. Comments which are inflammatory and/or offensive risk falling outside the parameters of free speech.

24. In reposting A1, we took the view that the claimant was owning the content of the post, even though she had not created much of it. We were satisfied that this was the view that others would take. In choosing to focus on the criminal history of Mr Floyd, rather than the circumstances of his death, and what it revealed about historic and systemic racism, she was choosing to ignore the important issue in a way which she knew, or ought to have known, would be offensive and provocative to many of her colleagues and friends.

25. Although the claimant repeated on many occasions during the disciplinary process, and in her witness statement to the Tribunal, that her posts contained only what was factually correct, we find she had not verified the information in her posts. In particular, when asked, the claimant stated in relation to A1 that she had not done any research into George Floyd's criminal history. She had simply seen some detail about it on the news. We find that notwithstanding her stated position, the claimant was not significantly concerned as to whether the information on her posts was accurate. Given their potentially inflammatory and offensive nature, we took the view that this displayed a reckless disregard for the effect that this post may have, and for the truth. It was our impression that the claimant seemed to get most of her 'news' from Facebook or other social media outlets.

26. On 9th June 2020, Mr Naughton was approached by another member of staff, Maria McFarlane. She is a black Trains Manager. She was upset about A1, and a chain of comments which had followed on from it. Not all of these comments were available to the Tribunal. However, we did have access to Mrs McFarlane's comment at [144], and the comments from the claimant and Mrs McFarlane which followed. We noted that Mrs McFarlane had attempted to calmly and rationally explain (albeit on Facebook) why the claimant's contribution was misplaced and ill thought out. It was our impression that Mrs McFarlane's efforts fell on deaf ears.

27. Miss McFarlane also showed Mr Naughton the post at [146]("A2"), which is a post concerning the death of Lee Rigby in May 2013. This post was referred to by Mr Naughton as Appendix A2 in his CDI brief. It stated "*On 22 May 2013, no-one rioted in the UK when two black men hacked Lee Rigby to death. Its time to bring back the death penalty. Where were you all then? "All lives matter""*. These comments were superimposed over the top of photographs of Lee Rigby, and his black assailants, one of which was taken in the immediate aftermath, with a knife, and bloodied hands. It is a very sobering image to say the least. We find that this image was reposted by the claimant, and was not created by her. It was posted on 6th June

2020, and so was probably the first in time of the four posts which formed the subject of the alleged breaches of the respondent's policies.

28. This post too we find was offensive and inflammatory. We thought it especially concerning that she chose to use a rather historic incident, of a very different nature, involving as it did an act of terrorism. We accept that as someone with military associations herself, this incident may have been of more general interest than might otherwise have been the case. However, we were still puzzled that she should have opted to refer back to such an old incident at that particular moment. When asked, the claimant told us that the fact that the assailants in Lee Rigby's case were black was incidental to the point she was trying to make. We do not agree. She was clearly inviting the reader to compare the public reaction to a white police officer killing a back man, to two men of colour killing a white man. It was our view that this was provocative in a racial sense, and highly unfortunate, particularly when taken together with A1. We also find that the connection between the BLM movement, 'rioting', and advocating bringing back the death penalty, was intended to be inflammatory.

29. Mr Naughton was also shown a copy of the post at [147]("A3"), which is the post referred to by him as Appendix A3 in his CDI brief. Again, this was a re-posted image from the claimant, showing a photograph of a police officer with a bloodied head. The post above it (again not from the claimant) infers that he had been injured in a BLM protest in London. Below it, the claimant adds a comment as follows: "*Agree…time to hit back hard like in other European countries. Tear gas, bullets and water canons. Would these arise holes behave like this in Russia? Italy? Greece? No they would not.*"

30. Again, we find that this post contained some disturbing ideas. In terms, it was suggesting that those protesting on behalf of BLM should be more robustly policed. This in itself would have been provocative in the circumstances, but advocating the adoption of tactics used in Russia, a totalitarian regime not known for its enlightened views on equality and diversity, was in our view disproportionate and offensive. We were not sure whether "arise" was an accidental or deliberate typographical error. It was clearly intended to be an insult towards those involved in the BLM movement.

31. Mrs McFarlane also brought to Mr Naughton's attention the comments on [148]("A4") between the claimant and Mr Ken Brown. We found this to be a significant set of comments. Mr Brown, who was responding to the earlier posts, tried to counsel the claimant about the lack of wisdom in sharing her comments about this issue, particularly in the way that she had chosen to do so. The claimant responded to him: "*….hear you mate. I know the person I am. Not afraid to call scum scum…n that not due to colour race sex or creed. So wrong he died. But I for one am not sorry his no longer here to hold a gun to another pregnant ladies stomach while robbing her in his own house*". In our judgment, this exemplified the claimant's tendency to injudicious language in what she must have appreciated was a highly febrile environment, especially at the depot. In our view, it was particular

lyunfortunate that she chose to use the word “scum” when apparently having an exchange about matters relating to George Floyd and the BLM moment as a whole.

32. The claimant was asked by Ms Thomas as to her thoughts about the BLM movement and motivation for issuing the posts set out above. She took offence at the comparison she perceived was being made between her mixed race stepson, and George Floyd. As a mother, she was concerned that her step son appeared to be in awe of George Floyd. In short, the claimant objected to the prospect of her stepson seeing George Floyd as a role model. She also said that BLM was not about rioting and looting. She reiterated that there could be no justification for the racist killing of a black man. The claimant also explained that her posts had been intended for her Facebook ‘friends’, and that her Facebook page was closed and private.

33. We accept this evidence, in the sense that it may have, in part at least, represented the conscious thinking of the claimant when she placed the relevant posts on Facebook. However, it was Mr Naughton’s view, amongst other witnesses, that the claimant would have been aware of the high level of sensitivity surrounding the death of George Floyd, and around the BLM movement, amongst the staff working at the Seven Sisters depot. We agree with this conclusion. We also agree that she was likely to have been aware that any one of the posts, or when taken together, would be inflammatory, racially divisive and offensive to many of the staff working at the depot.

34. We find that the posts did have an impact on a significant number of the claimant’s colleagues at work. These included her managerial peers, and also those for whom she had responsibilities as line manager. Although it appeared to have been the claimant’s argument that those who had complained about the posts had done so on a vexatious basis, we did not accept this evidence. For example, Mr Ayabina, had first approached Mr Naughton. The claimant explained during her evidence that she had had a very good working relationship with him. They had travelled to and from work together in the past. The claimant stated in evidence that Mr Ayabina would not have made a vexatious complaint about the posts

35. Mrs McFarlane is a train manager. The claimant agreed that she was a friend of hers, and explained that this was why they were having the debate on Facebook about George Floyd in the first place [144 and 149]. We infer from this testimony that Mrs McFarlane was unlikely to have taken issue with the claimant’s conduct for any reason other than ones which were genuine. We note that at [528], Mrs Mcfarlane wrote to Mr Naughton in the following terms: “*….I personally took offence to the posts that my colleague had put on her page….I was surprised that Tracy had chosen to voice such a controversial opinion on Facebook where a large portion of the people on her friends list are not only people of colour but also members of staff that she directly manages….I find her posts and rhetoric deeply offensive, insensitive, inflammatory and wholly inappropriate.*”.

36. Diane Watson was another who made a complaint. Again, the claimant confirmed that they had been train drivers together, before the claimant became her line manager. She stated they were "very good friends" as well as Facebook 'friends'. It our view, the attempt to explain these complaints away by the claimant as vexatious simply does not stand up to scrutiny.

37. On 9th June 2020, the claimant contacted Mr Naughton. She was on sick leave at the time. She was angry and upset about the feedback she had received about her posts. She felt that some of the comments had been offensive and homophobic. Mr Naughton requested that she take her posts down. However, the claimant initially refused. Later the same day, she changed her mind and removed the posts. Nonetheless, we find that the claimant's initial response to Mr Naughton's eminently sensible suggestion to be instructive as to her frame of mind. We find that the claimant was not inadvertently expressing offensive views about George Floyd and the BLM movement, but was making a deliberately 'stand', appreciating the impact it was having.

38. By 10th June 2020, we find that the posts had been circulated beyond the claimant's Facebook page. We accept Mr Naughton's evidence that the posts were common knowledge at the depot, and were being circulated on various WhatsApp groups. They had also been distributed on Twitter. They had come to the attention of the Commissioner for TfL. On 10th June 2020, Mr Naughton received complaints from other members of the claimant's team: Leona Francis [175]; Enoch Odoi [177]; Preye Oki [178]; and Oluwafemi Adetukasi [195]. All were black employees. Two of these people expressed reservations about working with the claimant again in the future in the light of the views she had expressed on racial issues. Mr Naughton explained in his witness statement that it was unusual for staff to complain about their colleagues in this way. He took them as indicative of a much broader concern about the claimant's conduct. We are satisfied that he was correct in this assessment.

39. As a consequence, on 11th June 2022, Mr Naughton held a fact finding meeting with the claimant. This is a first step in the respondent's disciplinary process. The notes are at [187-191]. No great issue is taken with their accuracy. In relation to A1 and A3, the claimant explained that she could not see how anyone could have been offended by the posts. She accepted that A2 and A4 could have caused offence.

40. Shortly after the hearing, the claimant was suspended from work. Mr Naughton took the view that the posts were racially divisive, and a clear breach of the respondent's social media policy.

41. On 15th June 2020, the claimant informed Mr Naughton that she wished to make a complaint about Miss Sherelle Cadogan concerning comments made of Facebook about her which she viewed as racist and homophobic [157]. I will touch upon Miss Cadogan's posts later. At this stage, it suffices to say that we find these posts to be offensive also, containing as they did

certain racist and homophobic sentiments. The fact that they were a response to the claimant's posts was limited mitigation.

42. Pausing for a moment, we would mention here the petition which appears at [611], which received over 15,000 signatures, complaining about the treatment Miss Cadogan had received from the respondent, and the perceived lack of support she had received, having 'stood up to racism, namely the claimant's posts. There were some inherent flaws in the thinking behind this petition, which we need not dwell upon. However, we mention it because it is evidence of the breadth of feeling that had been engaged within LUL by the issues relating to the claimant's posts.

43. On 19th June 2020, the claimant made a further complaint about another member of staff [482]. The relevant post is at [476], which was a reaction to a chain of comments following the claimant's initial posts. Again, we find that this post had some unpleasant racial overtones which were offensive.

44. By this stage, the claimant's mental health had deteriorated. No doubt this was in part due to the matters addressed above, although we accept that she had experienced previous health problems. We also find that some of the claimant's decision making in terms of when and how to engage on social media during this period was affected to some extent by her health. She was very frank about this in evidence to us, accepting as she did that she was self medicating with alcohol, and was suffering from a dependency. She had also been referred to the Crisis team in mid-June, as a result of fears that she may commit suicide.

45. We find that Mr Naughton was appropriately concerned about the clamant's wellbeing. He was her line manager, as well as the one conducting an investigation. It was our view that there was no fundamental conflict inherent in his two roles at this stage. These health issues were to delay the holding of a further fact finding hearing until 5th November 2020. There is a letter from the claimant's GP at [226] dated 26th June 2020, which sets out a history of depression, anti-depressant medication, and counselling. There was also a history of suicidal ideation [620]. We accepted the medical evidence in its entirely.

46. We accept that Mr Naughton was genuinely concerned about the claimant and did his best to help in the face of considerable pressures. This included taking a number of late night calls from the claimant, when she appeared to be intoxicated.

47. In the meantime, on 26th June 2020, Mr Naughton's attention was drawn to a further post of the claimant [221]. Again, it is a reposting of a message from 'the Hodgetwins', who we were told are a right wing comedy duo in the USA. It is a photograph of an unnamed black gentleman with the caption: "*Elderly white couple murdered by Blackman*" ("A5"). This was referred to in the CDI brief as Appendix A5.

48. It was not clear to us whether the posit was a reference to an actual event. For that matter, neither was anyone else, not even the claimant. The Tribunal took the view that this post was flawed for similar reasons as A2. By focusing on the murder of a white couple by a black man, it is the clear intention of the claimant to be racially divisive. It misses the point of the BLM movement and the death of Mr Floyd, which is about systemic and historic oppression of those of colour. This cannot have been lost on the claimant. In coming to this judgment, we note that A5 was posted 2 weeks after the first fact finding meeting, when she had eventually agreed to remove certain posts, including A2. In our view, this demonstrated a determination to get her point across in the face of the clearest warnings from her employer that it was offensive and inappropriate. Indeed, she had been suspended. The claimant was to say later that she was heavily medicated and/or in drink at the time and did not recall making this post. We did not accept this explanation.

49. I should add that A5 was not specifically included in the charges considered by the respondent. It is clear that it was considered as part of the overall picture. We take the view that it was appropriate to do so, and we adopt the same approach.

50. At [603-603], there was a discussion between the claimant's partner, Linda, and Mr Naughton. It concerned the claimant's plans to go abroad for the purpose of getting married in September 2020. As she was on sick leave, she needed the respondent's permission to travel abroad. Mr Naughton was content to approve the trip, as it was likely to be beneficial to her health (paragraphs 102-107 of his witness statement). This forms the subject of the claim for unpaid holiday to which I will return below.

51. On 5th November 2020, the claimant agreed to participate in a second fact finding hearing. She had been deemed fit to take part by Occupational Health [302], although there was advice that some consideration needed to be given to her focus and logical thinking in the light of the medication she was taking. At the start of the meeting, she confirmed she was fit to answer questions [637]. She stated she had not taken her medication so that she could be as clear as possible. At the hearing, she clarified she had not taken them that day, but that there would still have some effect from her tablets. We accepted this evidence.

52. The claimant was represented for the first time by Mr Morris of the Workers of England Trade Union. It was our view that his participation was viewed with suspicion by those representing the respondent, in part because he was not from one of the usual trade unions that appear for employees of the respondent. By way of example, at the second fact finding meeting, Mr Naughton made the following observation in his witness statement at paragraph 116:

> "*He [Mr Morris] made references to case law and the Human Rights Act, suggesting that TfL's policies could not override those rights. He seemed to be absolutely intent in de-railing the entire process and*

*effectively refused to go ahead without an answer to his questio*n. I ended up having got adjourn the meeting to take legal advice."

53. What concerned us about this was the reference to "derailing the entire process". Surely 'the process' was to facilitate the claimant putting her case, whatever it might have been, and to respond to it accordingly. There is a distinctly begrudging undertone to Mr Naughton's attitude to these matters which was worrying. The human right issues were not unimportant, as he clearly infers. This is reflected in the fact that the panel spent much time considering these arguments at the hearing. Mr Morris' demeanour may well have been robust, but his submissions should have been heard fairly and with an open mind. Our concerns about the attitudes to Mr Morris were to be reaffirmed later (see below).

54. On 5th November 2020, the claimant raised a complaint against Preye Oki, in relation to a post which appears at [461].

55. In passing, we should touch upon a Whataspp message which was sent in error to the claimant by Mr Naughton on 16th November 2002 [322]. It was an unfortunate mistake in the circumstances. However, we took the view that there was nothing inherently inappropriate about it beyond a personal exhaustion in relation to the matter. We are satisfied that it did not reflect any underlying bias against the claimant on the part of Mr Naughton.

56. Mr Naughton made his decision to refer the matter to CDI on 9th December 2020. His decision is set out at [345]. Some criticism was made of this document. It was suggested that it was short on analysis and reasons for the decision [351]. However, without being unduly forensic about it, and when viewing the document as a whole, it was clear why Mr Naughton was making the decision. He took the view, that the claimant had made several offensive and racist posts, for which she had shown little if any contrition or insight. It was his opinion (with which we agree) that this was a clear and obvious breach of the respondent's code of conduct [125] at paragraphs 3.1.1., 3.2.2., and 3.7.7., (to be read in conjunction with the respondent's social media policy [133]) which read as follows:

"*3.1.1 Employees are required to comply with:*

-their employee contract
-all LUL policies, standards and supporting guidelines, working procedures and safety instructions relevant to their job

….

3.2.2 At all rimes employees must:

-treat everyone with whom they come into contact at work with courtesy and respect

-be aware of comply with LUL's policy, standards and procedures on equality and workplace harassment

-Avoid initiating or provoking violent situations or otherwise behave in a manner which is offensive, abusive, intimidating, bullying, malicious, or insulting to fellow employees, customers, and contractors and others with whom they come into contact with in the workplace.

….

3.7.7. Employees must not:

-Do anything whilst on or off duty which could damage LUL's reputation and/or lead to criminal charges."

57. The next step in the process was the company disciplinary interview, which took place on 12th January 2021. The transcript of the meeting is at [366]. Due to Covid-19, it took place remotely. The meeting was chaired by Mr Musa, and co-chaired by Miss Brades, both of whom gave evidence at the hearing. The claimant was represented again by Mr Morris.

58. It was suggested by Mr Musa that in general terms, the claimant was not remorseful about the posts, and argued that she had done nothing wrong. It was suggested that she bordered on arrogance, and lacked appreciation of the impact her actions. This was not significantly challenged in cross-examination. She argued that because she had two mixed race children, and that other members of her family were black, that she could not be racist. We note the claimant's diverse family background. It is certainly a relevant consideration. However, logically, it cannot be a defence to the allegation of racism. In this case, it was more than offset as an issue by the content of the posts and the background to them, which has been set out thoroughly already.

59. It was also submitted on behalf of the claimant that the posts had been put onto her private Facebook page. Accordingly, it was outside of the remit of the respondents' policies which applied only to work related situations. We return to this issue below. However, we did not accept this argument. We note that the policy itself has a warning which was applicable here. At paragraph 4 it states that a private post can still impact on employment because they can easily enter the public domain, even if this was not the intention of the person posting the message. Further, it specifies that insulting posts can constitute gross misconduct, as can comments which could cause reputational damage to the respondent.

60. The claimant also relied in this context on a letter from the Free Speech Union [362] which set out her arguments relating to the importance of free speech. The disciplinary panel found the charges proved. They felt that in the light of the nature of the posts, and the lack of remorse or insight, that

summary dismissal was the only appropriate sanction, especially given her role as a manager. The CDI outcome is set out at [409].

61. The decision was handed down to the claimant on 15th February 2021, again on a remote basis. Mr Musa described this as a "very nasty experience". He describes in his witness statement at paragraph 78 feeling "*personally threatened and personally fearful…..It was not so much what was said, as the mannerism, body language and tone of what was being said by Tracy and particularly her representative, that came across as strongly menacing, threatening and intimidating."*. Mr Musa made a note of the hearing at [514]. Given this was a remote hearing, we were at a loss to understand why the alleged conduct was said to have had the impact that was alleged on Mr Musa. Miss Brades does not mention it at all in her witness statement.

62. The claimant appealed this decision. The hearing was held on 16th March 2021, and was chaired by Mr Howarth, who gave evidence before us. The transcript of the hearing is at [418]. She continued to argue that she should have the right to put up the said posts onto her private and closed Facebook account. It was Mr Howarth's view that she was "entirely unrepentant". Indeed, he made the point repeatedly, that if she had taken a different view, and had shown some insight, then the "*outcome would have been very different*".

63. During the course of cross-examination, Mr Jones asked Mr Howarth whether he had invited the claimant to apologise for her conduct. He agreed that he had, but that she refused. We find that Mr Howarth's question was inappropriate. There might have been ways to have raised the question of reflection. However, the way in which Mr Howarth chose to do it did, in our view, revealed that he had pre-determined the issue. It certainly must have given that impression to the claimant. Further, we find that the way the question is set out in the transcript, did not reflect how the question was actually put.

64. When asked about his approach to the hearing, Mr Howarth confirmed that it was by way of a review. However, he went on to say that the only evidence he had read were the four relevant posts. Notwithstanding the size of the CDI brief forwarded by Mr Naughton, and the other documents submitted by the claimant for the proposes of the CDI, Mr Howarth professed to having read none of the material. He also went on to state that although he understood what mitigating features were in principle, that he had felt that there were no such features in this case, notwithstanding her long and unblemished career with LUL, and her mental health problems (for example).

65. As for Mr Morris, who again appeared on behalf of the claimant, Mr Howarth made the following observations (paragraph 9 of his witness statement): "*I am afraid that I felt her trade union representative was unhelpful. Together, they came to the appeal with a confrontational and antagonistic approach, standing firmly on her right to free speech. I think if she had been*

represented by one of our usual trade union representatives, she would have been counselled to calm down and present a more measured and conciliatory tone. I felt that their position had become entrenched".

66. We found this to be a worrying attitude. As already stated, it is not for the chair of such a panel to decide whether an argument should be made or not. The obligation is to hear the submissions with an open mind. We were at a loss to understand why the claimant needed to be "conciliatory in tone". Mr Howarth's remarks about the claimant had a rather condescending flavour. We also thought that the comparison to other representatives, from "**our usual trade unions**" had a suspicion of animosity based on Mr Morris' professional background. In our judgment, it risks creating completely the wrong perception in the mind of a person who has already been dismissed, and who simply wants a fair and open minded appeal.

67. At paragraph 11 of his witness statement, Mr Howarth suggests that Mr Morris repeatedly argued for "unfettered" freedom of speech. However, if Mr Howarth would have read the detailed letter from Free Speech Union at [362](which was available to him), he would have found a thoroughly reasoned application of the principles. Instead he referred to Mr Morris as having taken a "*rigid purist line in terms of free speech*" (paragraph 17).

68. Mr Howarth was asked a number of questions in cross-examination. I am afraid that we found him to be inflexible and lacking some of the core skills required of someone chairing this type of hearing.

69. The appeal was dismissed. The decision appears at [425]. The decision is brief, and lacking detailed analysis, which is perhaps a reflection of the breadth of the reading that Mr Howarth had done.

The Comparators
Ms Sherelle Cadogan

70. Ms Cadogan was an instructor operator based at the Morden Depot. She posted a message which appears at [157-159], and about which the claimant made complaint on 18th June 2020 [211]. This was a response to some of the posts/comments of the claimant. It is, in our judgment, homophobic, offensive, and racist.

71. Formal disciplinary action was taken against Ms Cadogan. It was a response to a complaint by the claimant. The CDI brief appears at [439-443]. The investigation was conducted by Trains Manager Edwin Lyashere. Initially the decision was taken to deal with it at a local level. However, upon review with HR and the legal department, he changed his decision and concluded that the alleged misconduct might constitute gross misconduct and should be referred to CDI. Ms Cadogan showed remorse at fact finding, as well as insight into the effect of the post. It was also felt that she had been provoked by the claimant. At CDI, the post was found to be homophobic, racist and offensive. She was issued with summary dismissal

suspended for 12 months [444]. Upon appeal, this was reduced to a written warning for 12 months [460].

Mandy Phoenix Kaur Sahota

72. Ms Sahota's posts appear at [154-156], and more particularly at [476](the "slave owners" post). The latter was a clear reference to the earlier posts by the claimant and her assertion that she had mixed race children. It is clearly an offensive and inflammatory post when viewed in context. When this matter was first dealt with by Ann Costigan in May 2020, it was not apparent that the post of [476] was part of the complaint by the claimant. We accept that this was why no action was taken, it being viewed as a disagreement between two members of staff [218]. In November, the claimant makes a further complaint which is more clearly about the post on [476]: see [634]. It is not clear to what extent this new complaint was considered by the respondent. No further action was taken against Ms Sahota. Having heard from the witnesses on this issue, we accept that this was an oversight. The matter appears to have been lost in the complexity of the issues at large at the time.

Preye Oki

73. Ms Oki was a train operator at Seven Sisters. She re-posted the "slave owners" post at [461]. It was the subject of a grievance from the claimant in November 2020 [464]. It was dealt with at a local level for disciplinary purposes by Charles Ayabina. She readily agreed to remove the post when asked to do so. She denied it was in response to the claimant's posts. We do not agree with this observation. It was dealt with by "suitable informal management advice".

Laifa Linora Tobago Gyal

74. Ms Gyal is a trains manager. The claimant raised issues with a number of her posts. They are at [494] (toppling statues) and [492-493]. We take the view that there is little of concern in so far as [492] and [494]. The other is more troubling, using as it does the "N…" word. However, it is clearly a critique of the original use of the word by the said author. The post is in a wholly different context to those used by the claimant in this case. The matter was referred to Mo Mayet, another trains manager. Ms Gyal volunteered the posts to Mr Mayet. She was recorded as being very apologetic and obviously concerned about the impact of the posts. She was dealt with informally.

Reasons and Decision

75. Towards the end of the hearing, the parties were asked to agree a list of issues which adequately incorporated any ECHR issues. The following was agreed:

*"**1. Unfair dismissal***
1.1 What was the reason (or, if more than one, the principal reason) for the Claimant's dismissal? The Respondent asserts that the Claimant was dismissed for a reason related to her conduct (s.98(2)(b) ERA), specifically for making inflammatory, offensive, insulting and racist social media posts contrary to the Respondents' Code of Conduct and social media policy.
1.2 Did dismissing the Claimant for this reason involve an unjustified interference in her Convention rights (under Articles 8 and 10)? (The parties will make submissions as to the stage at which this should be considered.)
1.2.1 Did the Facebook posts fall within the ambit of Article 8 (right to private life and correspondence) and Article 10 (freedom of expression)?
1.2.2 If so, was restriction of those rights justified on any of the grounds set out in Article 8(2) or Article 10(2) respectively?
1.2.3 Was the restriction prescribed by law (including common law)?
1.2.4 Was it necessary in a democratic society? In considering this the tribunal will consider whether the measure concerned was appropriate to the legitimate aim to which it was said to relate, and whether the extent of the interference which it brought to the exercise of the right was no more than proportionate to the importance of the particular aim it sought to serve.
1.3 If the Tribunal is satisfied that the Claimant was dismissed for a reason relating to her conduct:
1.3.1 Did the Respondent's managers believe the Claimant to be guilty of gross misconduct?
1.3.2 Did the Respondents' managers have in mind reasonable grounds upon which to sustain that belief?
1.3.3 At the stage at which that belief was formed on those grounds, had the Respondents' managers carried out as much investigation into the matter as was reasonable in the circumstances?
1.4 Did the Respondents in the circumstances (including its size and administrative resources) act reasonably or unreasonably in treating said conduct as a sufficient reason for dismissing the Claimant, to be determined in accordance with equity and the substantial merits of the case.
1.5 In the particular circumstances of this case, did the decision to dismiss fall within the band of reasonable responses which a reasonable employer might have adopted?

2. Race Discrimination:
2.1 The Claimant identifies as White.
2.2 Did the Respondents engage in less favourable treatment of the Claimant by doing the following:
2.2.1 treating the Claimant's social media posts as a disciplinary issue; and
2.2.2 in dismissing the Claimant?

2.3 If so, in doing so did the Respondents treat the Claimant less favourably, in circumstances with no material difference, than the Respondents treated or would treat others. The Claimant relies on the following as comparators:
2.3.1 Mandy Sahota,
2.3.2 Preye Oki
2.3.3 Laifa Linora Tobago Gyal
2.3.4 Sherelle Cagogan
2.3.4 A hypothetical black employee.
2.4 Was the Claimant subjected to that less favourable treatment because of her race?
2.5 In determining this claim, it is for the Claimant to prove facts from which, in the absence of an adequate explanation, the tribual could conclude that the Respondent has committed an act of discrimination. If so, it is for the Respondent to prove that race was not a ground for the treatment in question.

3. Holiday Pay / Unlawful Deduction from Wages
Are any amounts owed to the Claimant by the Respondents? The Claimant alleges she was forced to take three weeks holiday whilst being suspended and covered by a sick note."

Discrimination

76. At the request of the parties, we began our considerations by looking at the race discrimination allegations. The parties agreed that this was not impacted by the issue surrounding the Convention, and the right to freedom of speech.

77. In relation to the list of issues, we added Miss Cadogan to the list of comparators. We took the view that it had been erroneously omitted by the parties

78. Applying the guidance set out in the case of *Ladele* above, we adopted the following approach. Firstly, we do not apply the two stage test in *Igen.* In our view, this is an unusual case. Instead, we have adopted what is often referred to as the "reason why" test. We have chosen to focus on the reason given by the respondent, namely whether its actions were on the grounds of misconduct. If we are satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test.

79. Secondly, we do not rely on actual comparators in this case. We do not find them helpful. In short, we have been asked to draw comparisons between the way the claimant was treated in the context of disciplinary issues, and the way other members of staff were treated who were not white. In our

view, this is a flawed approach in this case. It is impossible to say that any the comparators was materially in the same circumstances as the claimant.

80. It is trite to make the point that each set of disciplinary proceedings turns on it own facts. There may be a myriad number of differing facets, some obvious, some more nuanced, which might contribute towards a particular outcome. We were asked to assess the circumstances of Mandy Sahota, Preye Oki, Laifa Linora Tobago Gyal, and Sherelle Cadogan. We have been privy to some of the surrounding circumstances of these disciplinary matters, as set out above. However, we were conscious that we had far less information than for the claimant. For some of the comparators, we had more detail than for others.

81. By way of example, Miss Sohata and Miss Oki were all more junior employees than the claimant. The allegations for all four related to single posts, of a differing nature to those forming the subject of the allegations against the claimant. None of them had objected to removing the posts. Further, most (if not all) had shown a degree of contrition as to the impact of their actions. This is not to say that they did not have aggravating features to them. Some were dealt with in a way which was surprising. However, in summary it is difficult see any of them as equivalently serious cases to that of the claimant.

82. Moreover, the disciplinary decisions in the comparator cases were not made by any of those decision makers in the claimant's case. There is a natural variation of decision making within a large organisation. This is, in part, the result of different people being able to arrive at different conclusions, albeit on the same facts. We are no strangers to this principle in the Tribunal Service. In our judgment, this factor made it doubly challenging to use the circumstances of any of the comparators to shed any light on whether there was discrimination in the claimant's case. We can see that all were actioned (eventually), but dealt with in a variety of ways under the respondent's policies.This is as far as it goes.

83. However, we make it clear that in adopting this approach, we did not rule out discrimination. We simply did not feel that the comparators put forward were very enlightening. We focussed in the broadest sense, on whether there was evidence that a non-white member of staff, otherwise in the same circumstances as the claimant, would have been treated less favourably.

84. One looks then for other, more reliable, evidence of the respondent's motivation for first applying its disciplinary procedures, and then to dismiss. We agree with Miss Thomas that the overarching feature of this case is that the respondent was placed in a most unusual and urgent situation, not of its own making, but by the combination of the aftermath of the George Floyd incident, and the social media posts issued by the claimant. Having made the finding that we have concerning the posts namely that individually, and when taken together, they were offensive, inflammatory, and racially divisive, then the respondent was obliged to act.

85. The reactions to the posts throughout was consistent, and in keeping with those of the Tribunal. Mr Naughton, Mr Musa, Miss Brades, and Mr Howarth all expressed the same views about the posts. They appeared to do so independently, and we make that finding. We have found insufficient evidence that these reactions were anything other than genuine, or that they were the result, either wholly, or in part, of a racial motivation. We note that Mr Naughton and Miss Brades are white, as are the Tribunal members. It does not appear to have impacted on the views they held as to the content of the social media posts.

86. Furthermore, it is clear from the reactions to the posts amongst the claimant's fellow staff, that the respondent was required to act. There were several complaints received by Mr Naughton. We find that it was the nature of these complaints together with his own view about the posts, which led Mr Naughton to engage the investigation process, and to then refer the matter to a company disciplinary interview, he having found that there was a case to answer on the question of gross misconduct.

87. It is our view of Mr Naughton that he was an honest and thoughtful witness. It is not necessarily a criticism of him that we find that he became out of his depth as this matter escalated. Both in his witness statement, and in his testimony before us, he expressed a growing bewilderment as to the complexity and seriousness of the issues, which he found challenging to manage. This explains the rather unfortunate WhatsApp message which he mistakenly sent to the claimant. He was also having to cope with a number of matters in his personal life which were added stressors. Notwithstanding, he dealt with the claimant in a kind and tolerant manner. Put simply, we did not sense any untoward motivation for his actions or decision making. It was our impression that he sympathised with the claimant in respect of her mental health issues. He was prepared to delay the second fact finding meeting for a number of months to accommodate this, as well as taking several difficult phone calls from her late at night. We reject the suggestion of discrimination contributing to the initiation of disciplinary proceedings.

88. We then turned to consider the allegation that discrimination was the cause of the claimant's dismissal. It is right to say that none of the comparators were dismissed, but for the reasons stated, this does not help us. The respondent's polices were clear that use of social media, even involving otherwise private accounts, can give rise to issues of gross misconduct, where the posts are offensive, or where there might be damage to the respondent's reputation. The claimant was also warned in the same policies that social media posts which are made privately, can become more widely distributed, and find themselves in the public domain. In making it clear such matters can constitute gross misconduct, the claimant was put on notice that such matters would be viewed seriously, and may be considered grounds for dismissal. There is therefore no inconsistency in the approach of the respondent to these issues. We appreciated that the claimant was arguing that these policies were inconsistent with her Convention rights, but that is separate issue which we consider below.

89. In our judgment, the sanction was proportionate, having regard to the nature of the breaches, and the claimant's reaction to disciplinary process. We accepted the evidence given concurrently by all of the witnesses on behalf of the respondent, that a dominant feature of their decision making had been the claimant's complete lack of insight or contrition. The claimant was notably more reflective at the hearing before us. However, we accept that she adopted a different stance during the disciplinary process. There is no doubt that her argument was robustly put by Mr Morris, namely that the posts were justified by her article 10 right to free speech. As will be apparent below, this Tribunal defends a person's right to put their case robustly, and to have it heard in an open minded fashion.

90. However, in the context of this case, such an approach is not without potential consequences. In effect, it closes the door to any mitigation in terms of remorse, or perceived understanding as to the impact of one's behaviour on others. This was inevitably a significant feature of this case. Her posts had caused a furore, both within the organisation, and beyond. She was a white manager with responsibility for a large team of ethnically diverse staff. Some had complained about her behaviour. There was no apology from her about her conduct. The respondent was correct to draw the conclusion that in the absence of a suitable demonstration of remorse or insight, that there was a likelihood of repetition in the future. This was clearly unacceptable, and a serious aggravating feature of the claimant's case in terms of sanction.

91. As Mr Howarth put it on several occasions, if the claimant had shown remorse, then matters might have been different. We were not sure we accept this sentiment in its entirety. However, we do accept that without remorse, the respondent was spared any serious consideration of alternative sanctions. In our view, dismissal was not only the likely outcome, but it was inevitable. In which case, we find that it was the circumstances of the alleged breaches i.e. the misconduct, which resulted in the claimant's dismissal, and not discrimination on the grounds of race. We therefore dismiss this aspect of the claim.

92. We were concerned that none of the managers seemed to have had access to a company equality policy, or the provisions of the statutory Code of Practice on the Equality Act 2010 produced by the Commission for Equality and Human Rights. None seemed to have had a recent or substantial training on race equality issues. However, for the reasons set out above, we find that this insufficient evidence of race discrimination.

Unfair Dismissal

93. We then addressed the claim of unfair dismissal. For all of the reasons set out above, we were satisfied that the principal reason for the dismissal was misconduct, and specifically the making of inflammatory, offensive, racially divisive social media posts contrary to the respondent's code of conduct and specific social media policy. The fundamental facts were not in dispute. As stated above, the need for the respondent to act in the light of the posts was

pressing and obvious. We are satisfied, having heard the witnesses for the respondent, that the reason for dismissal was misconduct.

94. We were then properly asked to consider whether the dismissal of the claimant involved an unjustified interference with her rights under the European Convention on Human Rights ("the Convention"). In particular, we were asked to consider her rights under article 8 (right to private life) and/or article 10 (right to freedom of speech). For ease of reference, the relevant articles are set out:

> "*ARTICLE 8*
> *RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE*
>
> 1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> 2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*
>
> *ARTICLE 10*
> *FREEDOM OF EXPRESSION*
>
> 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 freedoms, 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."*

95. The parties agreed that the respondent is a public body, and also that article 10 was engaged in this case. The respondent disputes that article 8 rights apply to the circumstances, and rely upon the case of *Crisp v Apple Retail Ltd ET Case No.1500258/11.* This is a first instance case, and is therefore not binding on us. In that case the Tribunal concluded that the employee did not have a reasonable expectation of privacy in relation to Facebook posts. Although he had his settings restricted so that his posts could be seen only by his 'Friends', he was aware posts could be circulated beyond that narrow circle of people. The case has similarities with this one. The employer had been provided with the comments by a third party outside of the employee's group of Facebook 'friends'. There appears to be no other authority on this point.

96. The question here is whether it was reasonable for the employer to rely upon the content of the posts for disciplinary purposes, having regard to the claimant's right to private life. We agree with the approach in *Crisp*. We accept this was a private Facebook page with restricted access. However, the respondent's social media policy explicitly warns (if one were needed) that private posts were subject to the risk of circulation into the public domain. Further, that there was a risk of disciplinary action if such posts were inconsistent with it's social media policy.

97. Indeed, all of the relevant posts were re-posted by the claimant. She was in the habit of circulating posts she had received from third parties. She took no steps to ensure that her 'Friends' did not do the same. She also posted comments on other people's accounts who were outside of her Facebook 'friends'. It was our judgment that the claimant was not only unconcerned by the possibility of her posts being broadcast beyond her circle of 'friends', it was likely that she would have expected, and welcomed, it. She was willingly involving herself in the broadest possible public debate about the relevance of the George Floyd incident and the BLM movement. It was certainly not a limited discussion in any sense. As such, we disagree the relevant posts, in context, were not similar at all to sending a postcard to friends, as was argued by Mr Jones. In the circumstances, she could have had no reasonable expectation that the posts were merely part of her private life as defined. We therefore find that article 8 was not engaged in this case.

98. As for article 10 of the Convention, we agree that it was engaged here. As stated above, the tribunal places great value on the right to freedom of speech and was cautious about making any finding which might be perceived as infringing such a right. As a public body, the respondent was bound to respect that right. There is no doubt that in disciplining the claimant in these circumstances, and then dismissing her, that the respondent was restricting that freedom. There was no dispute about this.

99. We then needed to consider whether the restriction was justified on any of the grounds set out in article 10(2). The two potential grounds are the protection of reputation of the respondent, and protection of the rights of other employees e.g. not to be offended or upset by the claimant's posts. We find that both are applicable grounds in this case. In arriving at this

judgment, we have regard to the cases of *Hill v Governing Body of Great They Primary School UKEAT/0237/12/SM*; *Smith v Trafford Trust [2012] etc 3221 (Ch)*; and *Core Issues Trust v Transport for London [2013] EWHC 651 (Admin)*. There was clear evidence here that other members of staff were, as a matter of fact, deeply offended, and that they found the posts racially divisive and inflammatory. We also find that there was a genuine and sufficient reputational issue for the respondent here. It is a public body with a high profile in London. It operates in a community which is ethnically diverse, and it's staff reflect this fact. The debate into which the claimant became embroiled was subject to the highest possible scrutiny, both internally and in the public arena. The respondent was under an obligation to act. To have remained dormant on the issue would have resulted in acute damage to its reputation amongst staff and the community at large. How it dealt with the claimant was under similar scrutiny.

100. *Was the restriction prescribed by law (including common law)?* In our view it was. The respondent's relevant codes and policies had been incorporated into the claimant's terms and conditions of employment. They were clearly set out and accessible by the claimant at all times. The code of conduct at paragraph 3.2.2 sets down standards of behaviour towards fellow employees and customers. At para 3.7.7 employees are prohibited from doing anything whilst on or off duty which could damage the respondent's reputation [341]. The respondent's bullying and harassment procedure [104] expressly identifies that harassment and bullying may be committed via social media. The respondent's social media guidelines provide that a comment made in a private capacity can impact on the formal employment relationship [133]. Discrimination and Harassment in the workplace is also prescribed by the Equality Act. Furthermore, the claimant contract of employment included a mutual implied term of trust and confidence.

101. *Was the restriction necessary in a democratic society?* In considering this the tribunal was required to consider whether the measure concerned was appropriate to the legitimate aim to which it was said to relate, and whether the extent of the interference which it brought to the exercise of the right was no more than proportionate to the importance of the particular aim it sought to serve.

102. The first thing to say, applying the approach in *Core Issues Trust*, is that we placed little weight on the decision of the respondent in this regard. As we will mention below, we took the view that there was considerable impatience shown by the respondent's representatives towards the claimant and Mr Morris when they tried to raise this point. it was difficult to know to what extent it had regard to the article 10 point.

103. Proportionality involves two concepts in our view. First whether the means employed are proportionate to the legitimate aim pursued. Second, whether a fair balance has been struck between the interests of the community and the protection of the individual's rights. In assessing these issues, we found the guidance in *Smith v Trafford Housing* to be of assistance, involving as it

did, a Facebook posts about gay church marriages. It is not an Employment Tribunal case, but we are satisfied that the principles are applicable here.

104. In our judgment, the restriction on employees from using social media to posts messages which were '*offensive, abusive, intimidating, bullying, malicious, or insulting to fellow employees, customers, and contractors and others with whom they come into contact with in the workplace'* is necessary in order to meet the legitimate aims identified under article 10(2). We take the same view about the requirement under the social media policy to refrain from doing "*anything whilst on or off duty which could damage LUL's reputation…".*

105. Matters posted on social media are capable off being circulated in the broadest sense, as was the case here. Offensive material is likely to be subject to a great deal of scrutiny. We accept that the claimant posted on private account, but as we have already explained, this provides only a limited defence in this case. She identified herself as a member of staff on her Facebook site. It was not a work related facebook account, but by reason of the claimant's employment, and the fact that many of her Facebook 'friends' were other members of staff, it was very apparent that the posts were not only associated with the claimant, but also with the respondent, by association. Otherwise, why was there an attempt to bring them to the attention of the TfL commissioner, the Mayor of London, and Sky News.

106. The claimant must have been aware of the pervasive nature of social media. The respondent had warned her about it within it's policies. Those who wish to express views which are offensive must be free to do so. However, it was our judgment that to do so on a social media platform, before many other members of the respondent's staff, in the circumstances of this case, was not proportionate. There are other ways to have the debate with your close private circle of friends.

107. This view was supported by the predictable response to the claimant's posts. We find that there were not only offensive, but racially divisive, and inflammatory in a racial context. It is no surprise to us that many regarded them as inherently racist, although we stop short of making a finding about that. We agree that some of the posts were clearly inciting police oppression of BLM 'protests'. We found this to be a surprising stance for a claimant who placed so much reliance on the right to freedom of speech.

108. Taking the posts as whole, and quoting Ms Justice Lang in *Core Issue Trust,* they were not a reasoned, informed contribution to debate. They were liable to cause racial division and unrest, which we regarded as intentional. In general terms, it contributed in an unhelpful way to the febrile atmosphere which developed in the wake of the George Floyd murder. This was all particular unfortunate, given the claimant's position as a manager of an ethnically mixed team. It may not have been the initial intention of the claimant to have her employer involved in her debate, but the evidence was clear, that in the public arena, her views were being associated with the

respondent, in a way which was wholly unacceptable to it. Accordingly, we find that the restrictions to the claimant's right to freedom of speech, in the form of the disciplinary proceedings issued under the respondent's codes of conduct and policies, was justified and proportionate. It was possible for the claimant to work out from the policies, if she chose to do so, what she was permitted and not permitted to do. In particular, we find that it was possible to understand the extent to which the obligations under the policies extended beyond the physical work place.

109. *The next issue for us to decide was whether the Respondent's managers believe the Claimant to be guilty of gross misconduct*? *Did the Respondents' managers have in mind reasonable grounds upon which to sustain that belief?* We are satisfied that they did genuinely believe that misconduct had taken place, and that they had reasonable grounds for doing so.

110. We found the witnesses to be credible on this point. There is no dispute that the alleged acts took place. It was simply a question of the managers assessing the nature of the posts, and their wider impact. The decisions, made at investigation stage and CDI stage contained cogent analysis of the facts and reasons for the decision when looked at as a whole. The rationale of the decisions was clear. The witnesses found the posts to be offensive, inflammatory, and racially divisive. For all of the reasons set out in some detail above, this was an assessment with which we agree. We therefore accept that this was the genuine basis for the action taken by the respondent in respect of the claimant.

111. *At the stage at which that belief was formed on those grounds, had the Respondents' managers carried out as much investigation into the matter as was reasonable in the circumstances? Had they carried out a fair procedure?* In fact, in large part, we find that the investigation was thorough and fair. It is difficult to say that any investigation is without flaw. However, we were impressed by Mr Naughton's diligence. He collated an impressive amount of material for the purposes of his CDI brief. We take Ms Thomas' point that in truth, there was no a need for a high degree of investigation, given that the posts spoke for themselves to some extent, and it was agreed that they had been posted by the claimant. That being said, Mr Naughton was required to handle a number of complaints and counter-complaints over many months, which complicated matters. In all save for one matter, we were satisfied that there had been a reasonable investigation of these allegations.

112. We accept that in broad terms, both Mr Musa and Ms Brades understood their roles. Under cross examination, they did not always express themselves very well. There is a danger of being too forensic about this sort of testimony. We find that they did both understand that they could find that there was no misconduct here, had it been the case. Of course, for the reasons already discussed, this was a rather academic consideration.

113. We agree that Mr Naughton may have interviewed those who had made complaints about the claimant in a formal sense, at an earlier stage in the

investigation, rather than leaving it until after the second fact finding interview. Of course, he had already engaged with them in taking their complaints in the first place. The outstanding issue related to allegations that the complaints were vexatious. It is interesting to note that, in relation to some of the complainants at least, there is no longer the suggestion that the complaints were malicious. We are satisfied that this did not render the overall investigation unfair.

114. Neither do we agree that there is much merit in Mr Jones' suggestion that too much weight was placed by Mr Naughton on the claimant's demeanour at second fact finding stage. Mr Naughton was more than aware of the mental health background. In other regards, he had displayed patience and empathy towards the claimant. We have no reason to believe he placed disproportionate and unfair weight on this issue when referring to CDI, which as we have said was justified on the evidence.

115. We have one concern about the overall process. In this context, we must ask whether the Respondent in the circumstances (including its size and administrative resources) acted reasonably or unreasonably in treating the said conduct as a sufficient reason for dismissing the Claimant. It must be determined in accordance with equity and the substantial merits of the case.

116. As set out in some detail, we had concerns about the approach towards Mr Morris (the claimant's representative). The ability to have a fair hearing before a panel keeping an open mind throughout, is a fundamental tenet of an adequate investigation and fairness.

117. It is clear that, in turn, Mr Naughton (see paragraphs 52-53 above), Mr Musa (paragraph 61 above), and Mr Howarth (paragraphs 65-67 above) all adopted an unfavourable impression of Mr Morris. It was sometimes difficult to understand why they had come to the view they had. In Mr Musa's case, we were left with only the vaguest sense as to why Mr Morris might have earned such criticism. In Mr Naughton's and Mr Howarth's case, it was apparent that there was a certain level of antagonism created by Mr Morris' determination to argue his client's right to free speech as a justification for her posts. Although we have sided against Mr Morris on this point, it was an argument which had some merit.

118. There was, in our view, a reluctance on the part of the respondent to engage with this point during the hearings. This was unfortunate, given it was the claimant's primary submission. In our judgment, it was the result of a lack of understanding of the arguments being raised, and not any underlying prejudice against the claimant herself, based on race or any other protected characteristic. We had some sympathy for the managers who had to deal with a relatively esoteric legal point, especially in the context of workplace disciplinary hearings.

119. Unfortunately, the managers received limited assistance when dealing with the article 10 point. What happened was that the various managers contacted the legal department. So far as we can ascertain, they were each

told to get on with the hearings and apply the policies, with little if any further advice. Of course, the respondent has chosen not to adduce the legal advice provided. There is certainly nothing in writing within the bundle. This did not help the claimant or Mr Morris who were arguing that the policies were unlawful by reason of article 10 of the Convention. It would have been helpful for the respondent to have expanded on it's position, by citing the particular justification in article 10(2) upon which it relied, and/or by explaining why it took the view (as it doubtless did) that its policies properly incorporated article 10 principles.

120. In our view, Mr Morris was not "antagonistic", "confrontational"; nor did he attempt to "derail" the proceedings. Mr Morris was obliged to represent his client to the best of his ability. It seems clear that he did this in a more robust manner than was usually expected from the respondent's recognised Trade Union representatives. Nonetheless, the Respondent's representatives ought to have engaged with the points Mr Morris was making, giving them due weight and set out their reasons for disagreement in their findings. This was not done sufficiently in our view.

121. This prevailing attitude towards Mr Morris can be seen throughout much of the process. In addition, we find that it is part of a more fundamental problem with the appeal hearing which was chaired by Mr Howarth, who we find was ill equipped to conduct this type of hearing. He had rigid ideas about the merits of the case, and how he should prepare for and conduct the appeal, which were in our view erroneous. He admitted with candour that he had not read any of the material generated by the investigation save for the four main posts. More worryingly, when put to him, he could not see how that might be an obstacle to reviewing the decision to dismiss.

122. Neither did he accept that there were any mitigating features in the case. For instance, he had did not consider her length of service, or good character, as mitigation features, and stated that he had not taken them into account when reviewing the decision.

123. During the appeal hearing, he had invited the claimant to apologise for her conduct. We take the view that this reflected what was already apparent to us, that Mr Howarth had predetermined the appeal, and that it was his opinion that it was a box ticking exercise. He repeated, time after time, in response to all questions, that had the claimant shown remorse, then matters would have been different. This may well be true. However, it was not the only issue in the case for him to determine.

124. Accordingly, we find that the procedure, and therefore the dismissal was, by reason of the flaws identified, unfair. In coming to this conclusion, we have regard to the size and administrative resources. It is clearly a very large organisation, with access to in-house human resources and legal advice.

125. We then went on to consider whether, notwithstanding our finding of unfair dismissal, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted? It was our

view, that having regard to the nature of the posts, and the overall context in which they were made by the claimant, that the decision to dismiss fell within a band of reasonable decisions. Firstly, we bear in mind the fact that the social media messages were offensive, inflammatory and racially divisive. Secondly, that the claimant showed little, if any, insight or remorse during the disciplinary procedure. Thirdly, that she was a manager in a culturally diverse workplace, with line management responsibilities for an ethnically mixed team.

126. There clearly were some mitigating features here. The claimant had an unblemished record over about 32 years for the respondent, much of which was in a management role. She had a number of character references which spoke highly of her [228-242]. She also had a history of mental health problems, which we feel did contribute to some of her unfortunate decision making in this matter. However, even having regard to these important factors, it was our view that in the absence of contrition or understanding as to the impact of her conduct, that the claimant's dismissal was inevitable. Even after concerns were brought to her attention early in June 2020, the claimant continued to use social media in a similar manner, thereby increasing the perceived risk of repetition in the future. No reasonable employer could have countenanced such a situation.

127. As we have already stated, the comparators provide very limited assistance, for the reasons set out in some detail above. They do not provide sufficient support for the proposition that the sanction in this case was excessive. The other cases are too dissimilar for helpful comparison.

128. We were not asked to make a decision as to remedy, contributory fault or 'Polkey' deductions. These will be dealt with at the remedy hearing, if necessary, which has been listed for 24 February 2023, in respect of which further directions will follow.

129. In summary, the claim of unfair dismissal is allowed. The claim of discrimination is dismissed.

Unpaid Holiday Entitlement

130. We allow this claim. In short it is clear that there was a misunderstanding on the part of the respondent as to what the claimant as attempting to do in the lead up to her holiday. She was off sick at the time. She was aware that as someone on sick leave, she would need the permission of the respondent to leave the country. It would need to be justified. This was clearly the purpose of the medical evidence presented to the respondent at the time. We accept that the reference in the medical notes at [661] properly reflects the claimant's intention in this regard, as does the letter her GP at [300], i.e to go abroad whilst on sick leave.

131. Mr Naughton misunderstood this intention. We accept this was a genuine error. An employer cannot unilaterally determine that a member of staff take annual leave. It is understandable in the light of the all of the other issues

Mr Naughton was fielding in relation to the claimant. But we are satisfied that it was his mistake. The nature of the leave was wrongly recorded. Given the claimant was on full pay at the time, it was not in her interests to use up annual leave, unless the initial request to go abroad whilst on sick leave was rejected.

132. We therefore allow for claim for three weeks of annual leave entitlement. We have not received submissions as to the sum due under this head. We will hear submission at the remedy hearing, if necessary.

Richard Wood

Employment Judge R Wood

Date: 12 December 2022

Sent to the parties on: 25 January 2023

L TAYLOR-HIBBERD

For the Tribunal Office