THE EMPLOYMENT TRIBUNALS

Between:

Claimant: **Mr R Datta**

Respondent: **John Lewis plc**

Hearing at London South on 8 June 2018 before Employment Judge Baron

Appearances

For Claimant: ***Victor Oganbusola***

For Respondent: ***Jesse Crozier***

JUDGMENT AT A PRELIMINARY HEARING

It is the judgment of the Tribunal that the Claimant's complaint to the Tribunal that he had been unfairly dismissed is not well-founded.

REASONS

1 The judgment and the reasons for it were announced at the conclusion of the hearing. These reasons are provided at the request of the Claimant. The facts are straightforward and are set out below.

2 The Claimant was employed by the Respondent from October 2014, working as a Supermarket Assistant in Waitrose at Greenwich. He was summarily dismissed on 9 June 2017. The sole ground of claim before the Tribunal is that the Claimant was unfairly dismissed within Part X of the Employment Rights Act 1996.

3 In his witness statement the Claimant said that sometimes he 'became vocal criticizer of the religious fanatic', and that he made 'sharp criticism of certain fanatic religious conducts and or activities'. The terrorist attack on London Bridge and in Borough Market took place on 3 June 2017. On the following day the Claimant place a post on his Facebook page as follows:

> Ramadan is the best time to rape, torture and kill infidels! Fanatics are following their prophet who showed the way!! Chanting 'It is for Allah' while killing innocent people is just cowardliness'. The Quran is the pathway to production of such bastards.

4 On the following day, 4 June 2017, some members of staff complained to the Department Manager, Mr Gray. Mr Gray then spoke to the Claimant who removed mention of the Respondent which had been on his Facebook entry, and later he removed the post itself.

5 The Respondent has a Social Media Policy. It states as follows:

> Any Partner who identifies themselves as an employee of the John Lewis Partnership, who is known to be a Partner or who is connected, through a social networking site, to other Partners or our suppliers/customers must ensure that all content posted is consistent with this policy., the Acceptable Use policy, and the Internet Security Instructions (ISI).
>
> Partners must not post any information that could be considered to be bullying, harassing, or discriminatory towards any individual or group of individuals. This includes derogatory or offensive comments relating to gender, sexual orientation, race, ethnicity, age, marital status or religious belief.

6 The Respondent also has a disciplinary policy which includes the following as an example of serious misconduct liable to result in summary dismissal:

> Inappropriate behaviour outside of the workplace, including online or via social media, that is capable of causing harm or offence to Partners or customers, or is capable of damaging the Partnership's reputation.

7 Mr Goonewardene interviewed the Claimant on 6 June 2017 and notes of the meeting were made. The Claimant confirmed that he had made the post on his Facebook page.[1] He said that he was an 'online activist and blogger.' Mr Goonewardene concluded that the post was offensive and that it was in breach of the Respondent's policy. On the same day the Claimant was notified that he was required to attend a disciplinary hearing in respect of the following:

> Potential serious misconduct, namely breach of policy on social media causing offence to Partners.

8 The disciplinary hearing was held by Mr Gray on 9 June 2017. Again notes of the meeting were made. The Claimant acknowledged that some of his colleagues could have found the post offensive. He sought to make a distinction between 'good Muslims' and 'bad Muslims' as he put it. Mr Gray decided that the posting by the Claimant constituted serious misconduct, and that summary dismissal was the appropriate sanction.

9 The Claimant appealed, and the appeal was heard by Ms Melanie Ridley, a Manager in the Appeals Office of the Respondent. The appeal was heard on 19 July 2017, and the outcome of the appeal was sent to the Claimant on 2 August 2017. The appeal was not upheld. The outcome letter was detailed and of just over four pages. Helpfully Ms Ridley analysed the two points raised by the Claimant. The first was that Mr Gray had put 'overwhelming pressure' on the Claimant during the disciplinary hearing. The second was that the sanction of dismissal was 'unfair and harsh' and that the Claimant had only ever intended the post to be 'innocent', and he could have 'easily explained' it to anyone who was offended.

10 Having heard the Claimant's appeal Ms Ridley then spoke to Mr Gray. He told her that following the post there had been tension and the Claimant was suspended. Two or three colleagues had reported the post as being ridiculously offensive, and those reporting it were both Muslims and non-Muslims. Ms Ridley was satisfied from speaking to Mr Gray and from the notes of the disciplinary hearing that there had not been undue pressure

[1] I now note that reference is made to 'two messages'. I was only referred to the one above.

placed on the Claimant. She said that from what Mr Gray had told her, and also from what the Claimant had said to her, neither Mr Gray nor she were satisfied that the Claimant would not make similar posts in the future, and she mentioned that the Claimant showed little remorse for his actions.

11 The case for the Claimant was put by Mr Oganbusola on three bases. The first was that there had been a breach of procedure in that the identities of those who complained had not been disclosed. The second was that the decision to dismiss the Claimant was unfair and disproportionate. The post was intended to be innocent, and the Claimant had been shocked by the reaction of his colleagues.

12 The third ground was that the sanction imposed interfered with the Claimant's right to freedom of speech. Mr Oganbusola mad every gerenarl statements about human rights law and the right to freedom of expression in his written submissions. He referred to the 'Danish Cartoon Controversy' and several decisions of the ECHR. I have to say I do not find what he had to say of any assistance. Mr Oganbusola did not elaborate on the point in his supporting oral submissions.

13 Mr Crozier replied for the Respondent. He said that the post was clearly very offensive to all Muslims, and also to others. The Claimant has posted it on Facebook in circumstances where he was also identified as an employee of the Respondent. There had been a clear breach of the Respondent's policy. He submitted that the *Burchell* guidelines applied, and that a fair procedure had been followed. Further, dismissal was within the range of reasonable responses of this employer in the particular circumstances of the case.

14 Mr Crozier also submitted that if there had been any defect in procedure the, applying *Polkey*, there would have been a fair dismissal in any event. I do not propose to consider that point further as it relates to a remedy for the Claimant rather than whether or not the dismissal was fair in the first place.

15 Mr Crozier referred to the point about Convention rights, and the authority of *Turner v. East Midlands Trains Ltd* [2013] IRLR 107 CA [2013] ICR 525. That case involved Article 8, the right to respects for private and family life, whereas Mr Oganbusola here prayed in aid Article 10, relating to freedom of expression. The point relied upon by Mr Crozier is noted in the headnote to the ICR report summarising the judgment of Elias LJ:

> That the safeguards in respect of unfair dismissal afforded by the band of reasonable responses test pursuant to section 98 of the Employment Rights Act 1996 provided a sufficiently robust, flexible and objective analysis of all aspects of the decision to dismiss to ensure compliance with article 8; and that, accordingly, as the claimant had conceded that the procedures adopted by the employer satisfied domestic standards, she could not rely on article 8.

16 To my mind this is a very simple case of dismissal related to the conduct of the Claimant. The fact that that was the reason for the dismissal was never in dispute. The *Burchell* guidelines apply, although of course not as a substitute for the statutory provisions themselves. I remind myself that in considering all these points my role is to determine whether the

Respondent acted within the range of reasonable actions and decisions. It is not for me to make management decisions for the Respondent.

17 The fact of complaints having been made was never in dispute, and in my judgment the fact that the complainants were not identified is neither here nor there. The issue was simply that the Claimant had made a post in the terms in which it was made. It clearly had the potential to be extremely offensive to Muslims by making reference to the Quran and Allah in the context of rape, torture and killing. There was a fair procedure in that the Claimant was interviewed, given proper notice of a disciplinary hearing, and also given the right of appeal. Mr Oganbusola did not suggest that there was any unfairness by the Respondent in those respects.

18 The sole issue to my mind is whether in all the circumstances, including the Article 10 right, dismissal was within the range of reasonable responses of the Respondent in these circumstances. Elias LJ was a judge very experienced in employment law, having been President of the Employment Appeal Tribunal. Although on a slightly different point his views are entitled to great respect and I conclude that the Article 10 right does not add anything in these circumstances. In my judgment dismissal was within the range of reasonable responses, taking into account the words used, the Respondent's clear Social Media Policy and the statement in the disciplinary policy as to serious misconduct. I have also taken into account the point made by Ms Ridley that neither she nor Mr Grey were satisfied that the Claimant would not make a similar post in the future.

19 For those reasons I found that the claim failed.

Employment Judge Baron

Dated 19 June 2019