Case No: EA-2019-000733-DA (previously UKEAT/0333/19/DA)
EA-2020-000129-DA (previously UKEAT/0134/20/DA)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26 October 2021

Before :

HER HONOUR JUDGE KATHERINE TUCKER
MR C EDWARDS
MR D G SMITH

- -

Between :

LONDON BOROUGH OF HAMMERSMITH AND FULHAM	**Appellant**
- and -	
MR S E KEABLE	**Respondent**

- -
- -

Mr S Cheetham QC (instructed by London Borough Hammersmith and Fulham) for the **Appellant**
Mr D Renton (instructed by R&A Solicitors) for the **Respondent**

Hearing date: 12 January 2021

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

UNFAIR DISMISSAL

The EAT dismissed an appeal against a Tribunal's decision that the Claimant had been unfairly dismissed.

The Claimant was dismissed for serious misconduct arising out of comments he made in a conversation with another individual when they each attended different rallies outside Parliament. During the disciplinary process within the Council it was accepted that the conversation was about events around the time of the Haavara Agreement of 1933 prior to WWII. The words spoken included reference to anti-Semitism, Nazis and the Hollocaust.

The conversation was filmed and then made public through the media and social media. Others posted and retweeted the video clip and expressed their own views about it. This took place without the Claimant's knowledge or consent. The video clip of the conversation came to the attention of an MP who tweeted about the comments and identified the Claimant as a member of the Labour Party and a Momentum organiser. Through those tweets one of the Respondent's Councillors identified the Claimant as a Council employee and invited the Respondent to take action. Following disciplinary proceedings, the Claimant was dismissed. The Judge hearing the claim determined that the dismissal was both procedurally and substantively unfair. She made an order for reinstatement.

The Judge was entitled to conclude that the dismissal was unfair. She concluded that there were relevant and significant errors in the procedure adopted by the Council employer, including the fact that the Claimant was not informed of the specific allegation which led to his dismissal and the fact

that the possibility of a lesser sanction, a warning, was not discussed with him. In reaching her conclusions the Judge did not substitute her own views for that of the employer. Whilst the Judge should have raised a relevant authority with the parties, on the facts of this case, that did not vitiate the decision, **Stanley Cole Stanley Cole (Wainfleet) Ltd v. Sheridan** applied. As to remedy, on the evidence before her, the Judge was entitled to conclude that reinstatement was practicable and to make the order she did.

Both appeals were dismissed.

HER HONOUR JUDGE KATHERINE TUCKER:

1. This appeal arises out of the decisions of Employment Judge Brown sitting in the Employment Tribunal at London Central in respect of a claim of unfair dismissal made by Mr Keable (the Respondent employee to this appeal).

2. In this Judgment we refer to the Appellant local authority as the Council and Mr Keable as the Claimant, as they were before the Tribunal. The Employment Judge sat alone without members. We refer to the Judge as 'the Judge' or 'the Tribunal' interchangeably.

3. There are two appeals before the Employment Appeal Tribunal. The first, EAT/0333/19/DA, is in respect of a Judgment and Reasons sent to the parties on 26 June 2019 by which the Judge found that the Claimant was unfairly dismissed. The second appeal, EAT/0134/20/DA, arises out of the subsequent decision of same Judge in respect of remedy. The Judge made an Order for reinstatement.

The facts

4. We have taken the facts from the decision of the Tribunal.

5. The Claimant worked for the Council as a Public Protection and Safety Officer within the Council's Environmental Health Department. He worked full-time. There was agreement that he was good at his job and that, before the matters leading up to his dismissal occurred, he had a clean disciplinary record. He began working for the Respondent Council on 19 March 2001. At the date of the decision to dismiss him, therefore, he had worked for the Council for some 17 years.

6. The Council's Code of Conduct for its employees set out standards of behaviour expected from all of the Council's employees. The Claimant was expected to abide by the terms of that Code of Conduct. Within it, there were provisions regarding politically restricted posts. The Claimant's role was <u>not</u> a politically restricted post. However, the Code of Conduct provided that:

> "the effect of including a local authority employee on the list of politically restricted posts is to prevent that individual from having any active political role either in or outside the workplace … The effects of these restrictions is to limit the holders of politically restricted posts to bare membership of political parties with no active participation within the party permitted."

7. It was agreed by both parties that as the Claimant was not the holder of a politically restricted post, he was free to be politically active, to attend political meetings and demonstrations, to discuss political views there and to state his opinions.

8. The Claimant is politically active and he accepts that is so. The Council described him as a 'political activist'. In his written evidence before the Tribunal the Claimant explained that in his spare time he has participated in campaigns for social justice, including supporting Palestinian rights, and that his parents had supported Jewish refugees from Nazism. During the course of the investigatory process, which took place before the disciplinary proceedings which ultimately led to the Claimant's

dismissal, the Claimant described himself as "anti-Zionist". He stated that that was/is a political position which he adopted. The Claimant stated, both in documents prepared during the course of this litigation, and during the course of the relevant disciplinary proceedings that his former wife and his daughter are Jewish. The Claimant's former wife provided an email statement during the course of the Council's investigation. In that email she set out her belief that the Claimant is not an anti-Semite. She also stated that, in her view, it is not anti-Semitic to be opposed to Zionism, as many Jews are, or, to criticise the government of Israel.

9. On 26 March 2018, two rallies took place outside Parliament. Both are described by the Claimant as being organised by Jewish groups. The Claimant attended the rally organised by Jewish Voice for Labour. The other rally was organised by "Enough is Enough". The Claimant's attendance at the rally took place out of work hours, and during the Claimant's own time and he attended in his personal capacity. He was not wearing any clothing which would identify him as an employee of the Council. Nor did he say anything to link him to the Council or to his employment.

10. During the rally, the Claimant spoke to an individual attending the rally organised by Enough is Enough. That conversation, between two individuals, was filmed, at least in part. It was not filmed by the Claimant, nor was it filmed with his consent. During the disciplinary proceedings the Claimant observed that he had been aware of a camera at some point.

11. During the conversation, the following exchange took place:-

> "**Claimant:** You have totally missed the interpretation.
>
> **Man**: But you say …
>
> **Claimant**: He has got a lifelong history of antiracism.
>
> **Man**: But you say, you say it is unreasonable to extrapolate the fact that you commented in that way on that mural and the fact that that mural reflects kind of traits which have existed for hundreds of years that really resulted in the anti-Semitism that resulted in the Holocaust … there is a connection between.
>
> **Claimant**: I don't think that is what caused the Holocaust, no.
>
> **Man**: You don't think it was anti-Semitism which caused the Holocaust.
>
> **Claimant**: Well obviously the Nazis used anti-Semitism.
>
> **Man**: No it was anti-Semitism that caused the Holocaust. Are you really, are you suggesting that it was not anti-Semitism?
>
> **Claimant**: No, no I am not saying that. I am saying that the Nazis were anti-Semitic. The problem I have got is that the Zionist movement at that time collaborated with them.
>
> **Unseen person**: That's a lie. (Laughing) that's a lie.
>
> **Claimant**: Well, you laugh, you laugh…

> **Unseen person**: No man. You're an idiot.
>
> **Claimant**: Look, the policy of Germany at that time was to have a Germany that was unified.
>
> **Unseen woman**: Don't give him the time of day!
>
> **Claimant**: no but the - no but the …
>
> (Inaudible-various voices)
>
> **Claimant**: Oh stop trying so hard! You are trying to stop the discussion. You are trying to stop the discussion.
>
> **Unseen man**: (inaudible)
>
> **Claimant**: the Zionist movement from the beginning was saying that they accepted that Jews are not acceptable here. He is answering someone else. I'm giving a… I'm giving a… I'm I'm"
>
> [End of recording]

12. The Claimant did not give permission for his part in that conversation to be filmed or recorded.

13. The Tribunal viewed the clip as part of the hearing. It recorded that the Claimant's demeanour throughout the video clip was *"calm, reasonable, non-threatening and conversational."*

14. Part of the footage which had been filmed was later posted on the Twitter account of David Grossman, a BBC Newsnight journalist. A caption was added to it which stated, "Anti-Semitism Didn't Cause the Holocaust and Zionists Collaborated with the Nazis." Mr Grossman did not make any reference to the Council or the Claimant's employment by the Council. Nor did any of those who subsequently commented upon it. However, the post attracted comments including those recorded in paragraph 32 of the Tribunal's liability Reasons:

> "**Dave Miller:** "I don't believe I have just heard what that man said: that the "Zionists" conspired with the Nazis to send 6 million of their own people to their deaths. Are these the twisted perverted people who aspire to govern this country? If they are, God help the Jews.
> **#LabourAgainsttheWitchhunt (LAW):** Um he didn't say that #fakenews
> **Jewish Voice:** he said that the Nazis used anti-Semitism and that Zionists collaborated with them both are demonstrable lies.
> **Metal_Resistance:** How is it a lie that the Nazis used anti-Semitism?
> **Lucas Claerhout:** maybe its Ken Livingston in disguise..."

15. Mr Greg Hands, MP for Hammersmith, shared David Grossman's Twitter post on his own Twitter feed. He stated that,

> *"Many report that this is Stan Keeble, the local momentum organiser in Hammersmith & Fulham. If so, will (the Labour MP for Hammersmith and Fulham) and (the Labour leader of London Borough of Hammersmith and Fulham) investigate and urge action?"*

This appears to have been the first time any link was made between the conversation/ posts and the Claimant and the Council.

16. On 27th of March, Mr Hands posted a further Tweet as follows:

> *"not a peep out of anyone in (Hammersmith and Fulham Labour Party) about the anti-Semitism crisis or from (the Hammersmith and Fulham Labour MP) for council leader - despite their reportedly leading activists telling Newsnight here that, "Zionists" plotted with Hitler & the Holocaust wasn't anti-Semitic".*

17. The video came to the attention of Councillor Steven Cowan, the Labour leader of the Council.

18. On 27 March 2018 Councillor Cowan sent an email to senior Council officials including Mark Grimley, the Council's Director of Corporate Services. The title to the email was "LBFH employee Stan Keeble making anti-Semitic comments." In the body of the email Councillor Cowan stated as follows:

> *"I'll let Mr Keeble's words speak for themselves. I believe he has brought the good name of LBFH into disrepute and committed gross misconduct. Please have this looked at immediately and act accordingly and with expediency... Please advise me at your earliest opportunity what action you have taken."*

19. On the same day the Claimant was suspended and a decision was taken to investigate Councillor Cowan's allegations. The suspension letter provided to the Claimant informed him that his suspension related to:

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

The letter recorded that an investigator would be appointed and that the allegations might change during the course of the investigation. The Claimant was informed that, if the allegations were substantiated at a formal disciplinary hearing, they may be viewed as gross misconduct and result in his dismissal from the Council.

20. Before the Tribunal the Council witnesses, whilst explaining a valid reason for the Claimant's suspension (related to the media attention and the desire to "take the heat out of the situation"), acknowledged that there were flaws in the procedure adopted. In particular, it was accepted by the Council that the Claimant was suspended without a Trade Union representative being present and before he had had an opportunity to state his case and that the actual suspension had been carried out by the wrong level of employee, in breach of the Council's own policy.

21. An investigation then took place, undertaken by Mr Smith, Head of Policy and Strategy. His conclusion was that the matter should proceed to a disciplinary hearing. He modified the first allegation to be investigated and added that the Claimant's comments could potentially be in breach of the Equality Act 2010. During the course of Mr Smith's investigation the Claimant asked to be told precisely which comments were relevant to the allegations against him, explaining that that would help him prepare for the investigatory meeting. He clearly stated that nothing he said in conversation had been intended to offend and that the conversation had simply been an exchange of political opinions, within a private conversation, carried out willingly between two people. He also explained that the clip was a short one (of some one hundred and five seconds) but which was part of a longer conversation. He explained that he had complained to the BBC about the video clip being tweeted on social media without his permission. During the investigatory procedure, as set out above, the Claimant's ex-wife provided a statement supporting him and setting out her views that she was confident that the Claimant was not anti-Semitic, and further that to be opposed to Zionism was not anti-Semitic.

22. As noted above, the outcome of the investigation into the allegations was that the disciplinary hearing should take place. Following the investigatory procedure, the Claimant was informed that the specific allegations he faced were: –

(1) That, in attending a counter demonstration outside the houses of Parliament on 26 March 2018, [the Claimant] knowingly increased the possibility of being challenged about his views and subsequently proceeded to express views that were in breach of the Council's Equality Diversity and Inclusion policy and the Council's Code of Conduct (working with integrity and working with the media.)
(2) That [the Claimant] made inappropriate comments which have been subsequently circulated on social media which are deemed to be insensitive and likely to be offensive and potentially in breach of the Equality Act 2010 and/or the Council's Equality Diversity and Inclusion Policy.
(3) That these comments contravene standards of behaviour required of all staff as set out in the terms and conditions of employment, in particular, that all staff must avoid any contact inside or outside of work that may discredit the Council.
(4) That these comments have brought the Council into disrepute and that they contravene the Council's Code of Conduct for employees.

23. In his investigatory report, Mr Smith stated that the reaction on social media to the Claimant's comments suggested that they were "deemed to be insensitive and offensive to some people". He stated that *"if Zionism constitutes a belief under the terms of the Equality Act then the statements made by the Claimant that the Zionist movement collaborated with the Nazis and that it accepted that "Jews are not acceptable here" might be deemed to have breached the Equality Act"* and, *"do not promote inclusion nor treat everyone with dignity and respect and … have breached the Council's Equality, Diversity and inclusion policy."*

24. In evidence before the Tribunal, Mr Smith stated that the two comments which he considered to have been offensive were first, that Zionists colluded with the Nazis and secondly that Zionists agreed that Jews are "not welcome here". He stated that the use of the word 'colluded' was offensive.

25. Mr Smith also concluded that in attending the demonstration at Westminster and, in making the comments which were subsequently reported on social media, the Claimant had failed to avoid any conduct outside work which might discredit him with the Council; had thereby breached the Council's Code of Conduct, and the requirement not to bring the Council's name into disrepute through the press or media. Mr Smith accepted that the Claimant may not have considered that he was being interviewed but noted that the discussion took place in public, during a busy demonstration and was filmed on a camera phone and posted on social media which led to the Claimant being identified as an officer of the Council and the subsequent commentary through social media.

26. The Claimant was called to a disciplinary hearing, chaired by Mr Austin, Director of the Council's Residents Service. The Claimant was informed that the hearing would consider the allegations set out at the end of Mr Smith's investigatory report.

27. The Claimant submitted a response which had been prepared by the Claimant's trade union representative, Mr Greenstein. The response criticised the investigatory report, including a description of it as *"indigestible gobbled gook … pitiful verbiage … spurious nonsense*", and also asserted the Claimant's right to freedom of thought and religion, free speech and right to peaceful assembly as set out in Articles 9, 10 and 11 ECHR. The Claimant also submitted a report from an Emeritus Professor who set out that the factual statements that the Zionist movement collaborated with the Nazis, from the beginning, as that movement was saying that 'Jews were not acceptable here" were factually correct and were facts known to serious researchers of the history of Zionism. The Professor set out a brief history of the Havaara Agreement and the opinions of the Jewish community in Britain at the time of the Balfour Agreement in support of his assertions. The Claimant also submitted a statement from Mike Cushman, chairperson of an organisation called Free Speech on Israel.

28. The Tribunal recorded the following facts regarding the disciplinary hearing:

> "62. During the hearing, the Claimant said that he was not in a politically restricted post and that going to a demonstration should be acceptable for him. He repeated that he was an anti-Zionist. He said he was trying to explain the Zionist movement and its history to the person in the video clip. Mr Austin asked, "But do you understand how it could have been misinterpreted?" The Claimant replied, "I can see how it caused offence," … He said "They were quick 'off the cuff' remarks … people could be offended if they assumed I was talking about Jews and not Zionists.
>
> 63. The notes of the hearing recorded that, at the end of the hearing, Mr Greenstein said that the Human Rights Act stated that a person has a right to express his views in any way he wishes."

29. Mr Austin dismissed the Claimant by a letter dated 21 May 2018. The Tribunal's decision contained the following passages regarding the reason for the dismissal as set out in that letter:

> "65. He recorded the Claimant's submissions at the disciplinary hearing as including, "That the Human Rights Act gives the right to freedom of assembly and freedom of expression including a qualified right to offend when expressing your beliefs.
>
> 66. He said that the Claimant had contended that the Claimant's assertion that the Zionist movement collaborated with the Nazis is well founded in history. Mr Austin said that he found that when public authorities carry out their functions they are governed by the Equality Act and the Council had a commitment to social inclusion. He acknowledged that the Claimant was not in a politically restricted post and had a right to attend a demonstration in his own time and express his own opinions."

The Tribunal recorded that Mr Austin referred to the Council's Code of Conduct and the provisions which required employees to avoid conduct either inside or outside of work which might discredit the Council and the obligation to abstain from actions which might damage public confidence in the Council. The reasons continued:

> "68. Mr Austin said that the Claimant had asserted that he was having a private conversation. He said "However, you attended a public demonstration on a public street and whilst mingling with the opposing demonstration entered into a conversation with another person. You stated during the hearing that you were aware of the presence of a camera". Mr Austin continued, "I do not consider it is for me to pass judgement as to whether Zionism constitutes a protected characteristic or pass comment on your interpretation of historical events other than to say that the evidence you presented relates to events pre-Holocaust."
>
> 69. Mr Austin said that the fact remains that the claimant's comments were recorded and circulated widely and the claimant had been identified as a Council employee. He quoted from the video clip and said, "I think … The average person would interpret your comments as suggesting that Zionists collaborated with the Nazis in the Holocaust and is highly likely to cause offence". (Emphasis added.)
>
> 70. Mr Austin said that he had checked after the disciplinary hearing and that Mr Grossman's video of the Claimant's conversation was still available and had been viewed 79,000 times with comments and retweets. He said that the clear majority of the comments had interpreted the Claimant's comments negatively and that the Council had received a written complaint from a local MP. Mr Austin said that the Claimant's statement had been widely circulated and publicised and had been linked to the Claimant's employment with the Council, had caused offence and was insensitive. He said that it amounted to serious misconduct arising from a breach of the Code of Conduct for employees and, that the Claimant had brought the Council and its reputation into disrepute. Mr Austin said that, given the seriousness of the misconduct, he had decided to dismiss the Claimant from his employment with pay in lieu of notice."

30. The Tribunal recorded that in oral evidence, Mr Austin had stated that he had decided to dismiss the Claimant because he had not made an unreserved apology and, further, that he felt that the submission made by the Claimant's union representative (which had been submitted and agreed by the Claimant) had affected his view about whether dismissal was the appropriate sanction.

31. Mr Austin did not conclude that the Claimant had been guilty of discrimination or of anti-Semitism because of the remarks. Further, he did not conclude that he had been guilty of gross misconduct, rather that he had been guilty of serious misconduct. He accepted that the Claimant had been speaking about the Havaara Agreement in the video clip and that the Claimant had been an honest witness in the proceedings. He also accepted that the Claimant had a right to express his own views; that it was inherent in the right of freedom of expression that people have a right to say things which others may find offensive; and, that it would only be appropriate to dismiss an employee who expressed their views outside the workplace, "where the offence caused was "at quite a high order.". Finally, Mr Austin agreed that he had not asked the Claimant about his own interpretation of the clip, namely that *"a reasonable person would conclude that the Claimant had said that Zionists had colluded [or collaborated] with the Holocaust".*

32. The Claimant was not asked by Mr Austin whether he would repeat his comments. Nor did Mr Austin enquire whether the Claimant would be prepared not to go on social media and not to discuss the matters further. The Tribunal stated that Mr Austin assumed that the Claimant would not heed a warning based upon the Claimant's insistence that he had, "a right to offend".

33. The Claimant appealed against his dismissal, emphasising his length of service and previously unblemished disciplinary record. He also contended that Mr Austin had not considered a lesser sanction, such as a warning. The appeal was held by Mr Mark Grimley, Director of Corporate Services. Mr Grimley dismissed the appeal. He gave evidence, accepted by the Tribunal, that he did not take into account political pressure when reaching his decision and did not report back to elected representatives. Mr Grimley considered that the Claimant's comments brought the Council into disrepute and that he was guilty of serious misconduct.

The Tribunal's conclusion on liability

34. The Council asserted that the reason for the Claimant's dismissal was 'conduct' [para.126.]. The Tribunal accepted that the Respondent had established that the reason for the Claimant's dismissal was 'conduct', ("acting of such a nature whether done in the course of employment or out with that reflect in some way on the employer-employee relationship," **Thomson v Alloa Motor Co Ltd** [1983] IRLR 403; **CJD v Royal Bank of Scotland** [2014] IRLR 25 Ct Sess). However, the Judge recorded that that issue had not been entirely straightforward and why that was: on the facts of this case, the comments which were said to have been likely to bring the Council into disrepute:

> "were made in circumstances where there was nothing to identify the Claimant as a [Council] employee and there was no suggestion that the Claimant was speaking on behalf of his employer."

Further, the Claimant, "did not seek to publish the comments; they were published without his permission or knowledge and in circumstances in which he did not have control over the publication" and, were an exercise of his own beliefs.

On balance, however, the Judge concluded that,

> "the Claimant's actions were publicised and were considered to be offensive by a number of people. They came to be linked to the workplace when the Claimant was identified on social media as an employee of the Council and when a local MP wrote to the [Council] asking that action be taken against the Claimant… I decided, therefore, that they did reflect in some way in the employer-employee relationship."

35. The Judge found that the operative reason on the relevant decision maker's mind for the dismissal was that,

> "the Claimant had made statements which were considered to be offensive and which they considered had brought the Respondent into disrepute."

The Judge did not find that those decision makers were part of any concerted effort or campaign to remove the Claimant from his employment because of his political views.

36. The Judge concluded that both the investigating officer, Mr Smith, and the dismissing officer, Mr Austin, had acted reasonably in relying upon the video clip. Further, the Judge rejected the Claimant's contention that the filmmaker, Mr Grossman should have been contacted. The Judge also rejected a contention that the investigating officer had not taken proper account of evidence provided by the Claimant, concluding that the investigation **"came within the broad band of reasonable investigations"** (paragraph 142).

37. However, the Tribunal found that the dismissal of the Claimant was unfair for reasons it set out under two headings: "Proper Hearing – Opportunity to put Claimant's Case" and, "Reasonableness of Decision to Dismiss". Broadly, those headings set out first, grounds on which the Judge concluded that the dismissal was procedurally unfair and secondly, the basis on which she concluded that the dismissal was substantively unfair.

38. Under the first heading, the Judge found that the investigation and disciplinary process was unfair and outside the range of reasonable responses of a reasonable employer because, the precise basis for the dismissal was different to that which the Claimant had been informed he would be required to meet during the investigatory and disciplinary process. The Judge referred to the fact that the Claimant had specifically asked the investigating officer, Mr Smith, which of his comments were felt to be offensive. Mr Smith considered that the two comments likely to cause offence were that "the Zionist movement collaborated with the Nazis"; the second was that "the Zionist movement

"accepted that Jews are not acceptable here." He did not refer to the Claimant having said that Zionists collaborated in the Holocaust. During the disciplinary process the Claimant submitted evidence regarding the two comments Mr Smith identified.

39. As recorded above, Mr Austin dismissed the Claimant because he concluded that, *" the average person would interpret the Claimant's comments as suggesting that Zionists collaborated with the Nazis in the holocaust".* He did not 'put' that interpretation to him, nor raise it with him.

40. The Judge concluded that,

> "157. … Mr Austin acted unfairly and outside the band of reasonable responses in deciding that the Claimant was guilty of misconduct on a basis which had not been put to the Claimant, either in the investigatory report, or in the disciplinary meeting.
>
> 158. It was outside the range of reasonable investigations for an employee not to know, before they are dismissed, the nature of the misconduct alleged against them.
>
> 159. I further concluded that Mr Austin did not have reasonable evidence on which to base his conclusion that the average person would interpret the Claimant's comments as suggesting that Zionists collaborated with the Nazis in the Holocaust. First, clearly he did not have the Claimant's comments on the matter. If he had asked the Claimant to comment, the Claimant could have pointed out to Mr Austin that Mr Smith had not interpreted the Claimant's comments in that way, nor had Mr Hands in his Tweet or letter attached to the investigation report, and nor had the other evidence which Mr Smith had relied on from the Mail online or the Evening Standard."

41. Further, the Judge concluded that Mr Austin acted unfairly and outside the band of reasonable responses,

> "163. … in failing to give the Claimant an opportunity to comment on whether a warning would be an appropriate outcome and whether the Claimant would heed a warning. Mr Austin confirmed that he assumed that the Claimant would not heed a warning, without ever putting that to the Claimant … based on the Claimant's insistence that [he] had a "right to offend".
>
> 165. However, Mr Austin's evidence on that was contradicted by Mr Austin's own findings in his dismissal letter, where he found that a key point of the Claimant's response was that the Human Rights Act gives a right of freedom of assembly and freedom of expression including a qualified right to offend when expressing beliefs. It is clear from Mr Austin's own findings that the Claimant was not contending that he had an absolute right to offend."

42. Under the heading "Reasonableness of Decision to Dismiss" the Judge stated as follows:

> "167. In any event, I have further concluded that Mr Austin and Mr Grimley acted well beyond

the range of reasonable responses of a reasonable employer in deciding to dismiss the Claimant in the following undisputed circumstances:

a. That the Claimant made comments outside the workplace in his private capacity with no discernible link to his employment at all;
b. The Claimant did not himself publish the comments;
c. The comments were not found by the Respondent to be discriminatory, anti-Semitic, or racist;
d. The comments were not alleged to be unlawful or criminal or libellous;
e. The comments were not alleged to have been expressed in an abusive threatening, personally insulting, or obscene manner;
f. The Claimant was acknowledged by Mr Austin to have a right to attend demonstrations in his own time and express his own opinions;

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

43. The Judge concluded that in the circumstances of the case the degree of culpability of the Claimant was, "on any reasonable view, extremely limited. Having set out the importance of not substituting the Tribunal's view for that of the employer, the Judge stated that her conclusion that in this case, the decision was "indeed well outside the band of reasonable responses."

44. The Judge then referred to the decision **Smith v Trafford Housing Trust** [2013] IRLR 86, and one other authority, **Game Retail Ltd v Laws** UKEAT/0188/14.

45. In respect of the decision in **Smith** the Judge stated as follows:

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

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

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

> 173. Indeed, the Claimant's actions were in some sense even less culpable than the actions in Smith, in that the Claimant did not himself post or publish the views; his words were not deliberately considered in the way that a person's active publishing of comments on Facebook, on Twitter or other media might be.
>
> 174. The Claimant's comments were extracts from an unscripted, spontaneous conversation which were later published by a third party unconnected to the Claimant.
>
> 175. I concluded that, if it was within the range of reasonable responses of a reasonable employer to dismiss an employee in circumstances where they have lawfully exercised their rights to freedom of expression and freedom of assembly, unconnected in any way to the workplace, without using language which was personally abusive, insulting or obscene, and when their views and opinions have, without their consent, been published and caused offence to some, or indeed many people, then there is a very great risk of dismissal to any person who expresses their lawful political views outside the workplace. This is particularly so where it seems that, as in this case, Members of Parliament are willing to put pressure on employers to dismiss employees who hold views with which that MP vehemently disagrees.
>
> 176. As Mr Justice Briggs indicated, political beliefs and views may well cause distress and offence to others who do not share those views.
>
> …
> 183. I took into account the comments of Briggs J in *Smith v Trafford Housing* that the right of individuals to freedom of expression and freedom of belief, taken together, means that they are in general entitled to promote their religious or political beliefs, providing they do so lawfully. An employer may legitimately restrict or prohibit such activities at work, or in a work-related context, but it would be prima facie surprising to find that an employer had, by the incorporation of a Code of Conduct into the employee's contract, extended that prohibition on expression of religious or political beliefs to the employee's personal or social life. I took into account the statement of the EAT in *Game Retail Ltd v Laws* that, generally speaking, employees must have the right to express themselves.
>
> 184. All those matters reinforced my conclusion that it was outside the band of reasonable responses to dismiss for a first offence where the Respondent had not warned the Claimant that such an act could be viewed as misconduct and liable to result in dismissal.
>
> 185. I therefore found that the dismissal was both procedurally and substantively unfair."

46. The reference in paragraph 184 of the Reasons to the lack of warning and first offence refers back to the Judge's more detailed explanation of her findings regarding those matters in paragraph 177-182 of the Reasons.

47. Given the conclusions reached, the Judge did not consider that there was any likelihood that the Respondent could or would have dismissed the Claimant fairly given her conclusions and stated that it would not be appropriate to make a ***Polkey*** reduction. However, the Judge concluded that the

submission drafted by Mr Greenstein on behalf of the Claimant at the disciplinary hearing was *"rude, derogatory and personally insulting"* and that the points within it could *"have been made in an equally forcible manner without insulting Mr Smith, who was a fellow employee of the Claimant".* The Judge accepted that the submission and the manner in which it had been made had contributed to Mr Smith's decision to dismiss the Claimant and that that submission was *"culpable and blameworthy"* which led to a *'minor'* deduction for contributory fault of 10%. The Judge concluded that the Claimant's use of language and expression of his views at the rally was not blameworthy and could not amount to contributory fault.

48. A separate hearing took place for the purposes of determining the appropriate remedy. The Judge made an order for reinstatement. In reaching the conclusion that that was the appropriate remedy the Judge noted that the evidence presented in the hearing(s) was that the Claimant was good at his job, and had had a clean disciplinary record. Further, when giving evidence the Claimant had accepted that the right to freedom of expression was not unqualified, and that he had *"made appropriate concessions and said that he would be careful about how he would express his views, mindful that comments on sensitive subjects may cause offense to those with opposing views."* Further, the Claimant gave evidence that he remained on friendly terms with all his former work colleagues and that none of his former colleagues had raised any complaint about him. Some gave evidence on his behalf. The Claimant's evidence was unchallenged by the Respondent, and was accepted by the Judge.

49. Whilst the Respondent contended that some of the Claimant's actions since he had been dismissed, and post the liability judgment *"had not helped"* the Respondent's witness (Mr Hooper) did not go so far as to assert that the Council had lost trust and confidence in the Claimant. Mr Hooper stated that,

> "… no objections had been raised by elected members, or managers to the Claimant being reinstated. Further, he said that he had no reason to disbelieve the Claimant when the Claimant said he was not hostile towards anyone in the Council's management structure."

50. The Judge was satisfied on the evidence presented at the remedy hearing that the Claimant's job still existed and remained vacant.

51. The Judge concluded that reinstatement was practicable in all these circumstances, making a finding of fact that, despite some difficulties which had arisen as a result of the Claimant's conduct, *"it was plain that the Respondent had not lost trust and confidence in the Claimant"* [para 57].

The Appeal

52. Four grounds of appeal were advanced; two relating to the liability decision, and two to the remedy decision. No party contended that the Tribunal had mis-stated the relevant legal principles. Rather, it was contended that having set those principles out correctly, the Tribunal had failed to follow its own self-directions in respect of those legal principles and had erred in drawing the decision in **Smith** to the parties' attention.

The Appeal, submissions and the law

Liability decision

Ground 1

53. The first ground of appeal was that, in concluding that the Council's investigation and disciplinary process were unfair and outside the range of reasonable responses, the Tribunal misdirected itself by reference to its own findings of fact as to what fell within *"the range of reasonable responses".* It was submitted that it was open to Mr Austin, who conducted the disciplinary hearing, to decide what was likely to cause offence to the average person, provided his conclusion was not irrational; consequently, the Tribunal erred in concluding that this needed to be *'put'* to the Claimant. Further, it was submitted that the Tribunal had drawn an inference that, had the Claimant been given an opportunity to respond on this issue, Mr Austin could not reasonably have reached the conclusion he did, alternatively, had drawn an inference that Mr Austin's own interpretation of the video clip was unreasonable. It was submitted that this inference was evidenced by the fact that first, the Judge set out matters which the Claimant might or could have raised, had that possible interpretation been put to him, and secondly, by raising the fact that the media had not adopted the interpretation Mr Austin did.

54. In any event, it was submitted that the Claimant had been informed of the nature of the misconduct alleged, because at the heart of the allegation was the contention that his comments had had the potential to bring the Council into disrepute.

55. As to the Tribunal's finding that the issue of a warning had not been raised with the Claimant, it was submitted that there was no obligation for Mr Austin to do so: it was within the dismissing officer's discretion to decide whether a warning would have been an appropriate sanction.

56. The Claimant's response was that it was a fundamental part of a fair disciplinary procedure that an individual should know the case against them. This was repeatedly set out in different ways in many authorities. There was no error of law in the Judge's conclusion that the failure by the dismissing officer to allow the Claimant to know, or respond to his interpretation of the words spoken was one of the reasons why the dismissal was unfair. The facts demonstrated that Mr Austin only developed this interpretation after the disciplinary hearing.

57. Further, the Judge did not substitute her decision for the dismissing officer's. Her conclusion was limited to criticism that it was not based on objectively reasonable grounds.

58. Finally, it is a fundamental tenet of fairness that when undertaking a disciplinary process and investigation an employer hears whatever an employee wishes to say in his defence, by way of explanation or by way of mitigation. In this case, this required the dismissing officer to ask the Claimant if he would abide by a warning. In addition, prior to dismissal, the Claimant had in fact apologised for his words and recognised that they were capable of causing offence. The Claimant's length of service and previously good record required this to be given full consideration, including raising it with the Claimant.

Ground 2

59. The second ground of appeal was that the Tribunal misdirected itself by relying upon **Smith v Trafford Housing** [2013] IRLR 86, without first alerting the parties to that authority and inviting them to give submissions before concluding its decision. It was not suggested that the guidance in that case provided by Briggs J was either irrelevant to the issues in this case, or unhelpful. It was submitted that it was an error not to raise the case with the parties because the application of the guidance turned on the specific facts of the case.

60. It was submitted that, *"the parties could not reasonably have anticipated that it would consider the cases to be so factually similar that the conclusion in both was bound to be the same"*. Further, whilst the Judge identified factual similarities between the **Smith** case and the present case, she did not have the benefit of submissions identifying the striking differences between the two,

which could, it was submitted, have led to the Judge distinguishing **Smith,** and, arguably, change her mind. It was submitted that it was plain from the structure and conclusion of the Reasons that *"the Tribunal's conclusion was literally bound up in its analysis of Smith".*

61. The Claimant submitted that in the part of the Reasons where the Judge considered this case, she set out the reasons why she considered that the dismissal was substantively unfair. Even if the EAT concluded that the Judge erred in this part of her findings there were numerous other reasons why the dismissal was found to be substantively unfair. In addition, the Judge expressly recorded that the decision in **Smith** only augmented or reinforced conclusions she had already reached.

62. After the conclusion of evidence, the EAT invited the advocates to consider the authority of **Stanley Cole (Wainfleet) Ltd v. Sheridan** [2003] IRLR 885 regarding this issue and, if so advised, to file further written submissions in respect of it. Both parties did so and the panel has considered those submissions. The Council contended that the authority supported the submissions it had made. The Claimant repeated the points already made and submitted that it was important to consider the other basis upon which the Tribunal found that the dismissal was substantively unfair.

Remedy decision

63. Ground 1. The first ground of appeal in respect of the remedy decision was that in concluding that, "it was plain that the Council had not lost trust and confidence in the Claimant," the Tribunal erred in law in that it misdirected itself by reaching a conclusion that was inconsistent with the facts found, particularly in the liability judgement. In the liability decision the Tribunal found that the Claimant had been dismissed for *"serious misconduct arising from a breach of the Code of Conduct for employees in that (he had) brought the Council and its reputation into disrepute."* It was submitted that the Tribunal failed to properly take this into consideration; that the Tribunal's conclusion that there had been no breakdown in trust and confidence was *"simply wrong on its own findings".* That was all the more so in light of the fact that there was no suggestion that Mr Austin had anything other than a genuine belief in the Claimant's misconduct. The fact that he was dismissed because of that misconduct demonstrated that the Council had lost trust and confidence in the Claimant.

64. The second ground of appeal was that, having set out the relevant guidance from the case law, the Tribunal erred in law by misdirecting itself in failing to follow that guidance in the context of its previous findings of fact. This was in respect of the (accurate) self-direction in respect of authority that reinstatement or reengagement may be impracticable where the employer genuinely believes that

the employee was guilty of misconduct, even if that was in the absence of reasonable grounds on which to base that belief or a reasonable investigation. It was submitted that that was the situation in this case, yet the Tribunal had failed to explain why it remained practicable to reinstate given the appellate guidance suggesting that such a remedy would be exceptional in such circumstances. Similarly, it was submitted that the Tribunal failed to take account of the evidence that the Claimant had previously felt himself to be the victim of a conspiracy, because he had believed that the disciplinary process had been 'politically driven' from the start.

65. The Claimant asserted that it did not follow that just because the dismissing officer had actually dismissed the Claimant and found him guilty of serious misconduct, that trust and confidence had broken down. The Judge clearly set out factual findings about why, although there had been a dismissal for misconduct, in her view, there had not been a breakdown in trust and confidence. These were factual findings which could only be challenged through an assertion that they were perverse. Similarly, the Judge made findings that the Claimant did not believe himself to be a victim of a conspiracy, had sustained good relations with colleagues, gave evidence rationally, made appropriate concessions and agreed to restrict future comments on sensitive subjects. He also stated he felt no hostility to managers, something which the Council accepted.

The law

66. There was no real dispute between the parties as to the relevant legal principles. Further, it was not contended that the Judge had misstated those principles in the judgment. The basis for the appeal was that the Judge erred in the application of those principles and, in respect of the decision in **Smith v Trafford**, erred in not notifying the parties of that case and its relevance, given that neither had addressed it in their submissions.

67. In those circumstances, it is not necessary to set out in detail the authorities referred to by the Judge. It is, however, appropriate, and useful to reflect back on some of the basic tenets of employment law when considering the grounds of appeal in this case.

68. The right not to be unfairly dismissed is set out in s.94 of the Employment Rights Act 1996 (ERA 1996). It is currently afforded to employees with two or more years of continuous service with an employer.

69. The fairness of a dismissal is determined in accordance with the principles set out in s.98 of the ERA 1996. An employer bears the burden of establishing that the dismissal is for a potentially fair reason within the meaning of s.98(2) ERA 1996, and then, if that is established, the Tribunal will determine whether that dismissal was fair or unfair, (having regard to the reason shown by the employer). That determination will depend upon *"whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and, shall be determined in accordance with equity and the substantial merits of the case".* The critical question, therefore, is whether, having regard to those matters, the employer acted reasonably or not in treating the particular, potentially fair reason, as a sufficient reason for dismissing a particular employee.

70. It is implicit within those words that the question the Tribunal must address, is not whether the Tribunal members themselves would have made the decision to dismiss the employee; they must not simply substitute their view for that of the employer (**Morgan v Electrolux Ltd** [1991] IRLR 89 CA; **London Ambulance Service NHS Trust v Small** [2009] IRLR 563, CA). Over the years, Tribunals have been reminded that they must judge the standard of a fair dismissal, not by that which they would, or might have done, but by reference to the options open to a reasonable employer, in other words by an objective standard. A dismissal is only to be held to be unfair if it was outside the range of reasonable responses open to a reasonable employer. This assessment, of whether the decision to dismiss this particular employee in respect of a particular matter or issue, came within the range of reasonable responses open to a reasonable employer lies at the heart of the law relating to unfair dismissal; it is the litmus test by which each stage of the dismissal process and the decision to dismiss is to judged. **Sainsbury's Supermarkets v Hitt** [2003] IRLR 23, particularly para. 30.

71. In the context of a conduct dismissal it is clearly established that that test requires a Tribunal to address the following three matters:

a. Whether the employer genuinely believed that the employee was guilty of the relevant misconduct; and, if so,
b. Whether that belief was based on reasonable grounds; and
c. Whether that genuine belief on those reasonable grounds had been formed after having carried out a reasonable investigation.

72. This, oft cited statement, or one similar to it has its origins in the following passage from Arnold J.in **British Homes Stores v Burchell** [1978] IRLR 379:

> "The case is one of an increasingly familiar sort in this Tribunal, in which there has been a suspicion or belief of the employee's misconduct entertained by the management, it is on that ground that dismissal has taken place, and the tribunal then goes over that to review the situation as it was at the date of dismissal. ... What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question … entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure," …[or] .. "beyond reasonable doubt." The test, and the test all the way through, is reasonableness;"

73. A fair process requires that an individual should know the case against them and have an opportunity to respond to it. See **Spink v Express Foods Ltd** [1990 IRLR 320:

> "Fairness requires that someone accused should know the case to be met; should hear or be told the important parts of the evidence in support of that case; should have an opportunity to criticise or dispute that evidence and to adduce his own evidence and argue his case."

To similar effect see **Boyd v Renfrewshire Council** [2008] SCLR 578 at 586G-587A; **K v L** UKEATS 0014/18 at para 30-3.

74. Statutory provisions relating to remedy are set out in sections 111 and following of the ERA 1996. Where a Tribunal finds that a dismissal was unfair, s.111 directs the Tribunal to explain the orders which could be made under s.113 of that Act to the Claimant, and the circumstances in which they can be made and ask the claimant if s/he wishes such an order to be made. The orders which can be made pursuant to s113 ERA 1996 are for reinstatement (an order that an individual is to go back to work for the same employer in the same role, as if they had never been dismissed) or for

reengagement (an order that the individual go back to work for the same employer but not to the same role according to the same terms). These are the 'primary remedies' for unfair dismissal.

75. Section 116 sets out the following provisions:

> **116 Choice of order and its terms.**
>
> (1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—
>
> (a) whether the complainant wishes to be reinstated,
>
> (b) whether it is practicable for the employer to comply with an order for reinstatement, and
>
> (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

76. From the structure of the statutory provisions, it is clear that, if a Claimant expresses a desire to be reinstated, a Tribunal must then go on to consider whether that is the order which should be made. However, a Tribunal has a broad discretion in determining whether to order reinstatement (or reengagement). It is for the employer to provide evidence to show that it is no longer practicable to employ the Claimant in his or her original role (**Port of London Authority v Payne** [1994] ICR 555.) In this context 'practicable' means "capable of being carried into effect with success", not simply 'possible' (**Coleman v Magnet Joinery Ltd** [1975] ICR 46.)

77. When considering the practicability of reinstatement, issues as to whether trust and confidence have broken down; whether the employer genuinely, albeit unreasonably, believed in the Claimant's guilt; whether the relationship has so soured to make it impracticable, will be directly relevant. It is the Tribunal which makes the assessment of practicability at first instance. This will include, for example, an assessment of whether the employer's view that trust and confidence has broken down is real and rational. It is, however the employer's view of trust and confidence, appropriately tested by the Tribunal which really matters, not the Tribunal's. See **Oasis Community Learning v Wolff** (UKEAT/0365/12) and **Wood Group Heavy Industrial Turbines Ltd v Crossman** [1998] IRLR 680; **United Linconlnshire Hospitals NHS Foundations Trust v Farren** (UKEAT/0198/16).

78. The Judge considered the decision in **Smith v Trafford Housing Trust** [2013] IRLR 86. That was a decision of Mr Justice Briggs in the High Court. In that case the Applicant contended that his employer was in breach of contract and wrongfully dismissed him when it demoted him, having found

him guilty of gross misconduct. The gross misconduct consisted of bringing his employer into disrepute by putting posts on his Facebook page in which he expressed disagreement with the (then proposed) arrangements for same sex marriages to take place in churches. The Applicant was Christian. His posts were visible to his 'friends' on Facebook, which included some work colleagues. The posts could also be seen by 'friends of friends' on Facebook. The Applicant (in one line on his Facebook page) identified the Respondent as his employer. The Applicant was bound by a 'Code of Conduct' in his employment which provided that "employees are required to act in a non-confrontational, non-judgmental manner with all customers, with their family/friends and colleagues. The trust is a non-political, non-denominational organisation and employees should not attempt to promote their political or religious views … Customers, their friends and family and colleagues must always be treated with dignity and respect … Employees should not engage in any activities which may bring the trust into disrepute, either at work or outside work". Mr Justice Briggs noted that the employer did not suggest that Mr Smith's posts about gay marriage in church were, "unlawful, unruly or derogatory". Mr Justice Briggs held that Mr Smith's posts had not been contrary to the trust's code of conduct and had not, therefore amounted to misconduct. He held that an individual's right to freedom of expression and freedom of belief, taken together, means that individuals are, in general, entitled to promote their religious or political beliefs, providing they do so lawfully. He noted, that whilst an employer may legitimately restrict or prohibit such activities at work, or in a work-related contact, it would be prima facie surprising to find that restriction extended into an employee's personal or social life through the incorporation of a contractual code of conduct. He noted that the assessment of whether there had been a breach of the code was a matter of fact and degree in each case, and stressed the importance of considering each provision of the code of conduct in its appropriate context and having regard to the rights in article 10 and 12 ECHR.

79. He noted that,

> "Statements about religion or politics may be more prone to misinterpretation than others, but I do not consider it to be a reasonable interpretation of [the Code of Conduct] that they should be taken to have been infringed if language which is non-judgmental, not disrespectful nor inherently upsetting nonetheless causes upset merely because it is misinterpreted."

He continued:

> "… Mr Smith's postings about gay marriage in church are not, viewed objectively, judgmental,

disrespectful or liable to cause upset or offence. As to their content, they are widely held views frequently to be heard on radio and television, or read in the newspapers. The question remains whether the manner in which Mr Smith expressed his views about gay marriage in church can fairly or objectively be described as judgmental, disrespectful or liable to cause discomfort, embarrassment or upset. Again, it seems to me that it was not. He was mainly responding to an enquiry as to his views, and doing so in moderate language."

80. In **Stanley Cole S(Wainfleet) Ltd v. Sheridan** [2003] IRLR 885, the Court of Appeal, (and the EAT before it, presided over by Mr Recorder Langstaff QC (as he was at that time)) considered (a) whether a failure of a Tribunal to draw a case to litigant's attention could give rise to a ground of appeal and, if it could, what the position was in that case where the Tribunal had not done so, the Appellant being a litigant in person.

81. The Claimant summarised the effect of the Court of Appeal's decision in the **Stanley Cole** decision as follows:

"The ratio in *Cole* can be found at paragraphs 30-1 and 34 in the judgment of Lord Justice Ward. Where an Employment Judge considers than an authority is relevant, they should in principle refer that authority to the parties. Failure to do so may amount to a breach of natural justice [para 30]. However, for an appellant to succeed with an appeal relying on this ground, that appellant must show (i) that the authority was central to the decision, [para 31], and also (ii) that in failing to cite the decision the aggrieved party was caused substantial prejudice, so that a material injustice had resulted [para 34]."

82. The Appellant Council drew attention to the words of Ward LJ at §38:

"The vital question, in my judgment, is whether it would have made any difference to the outcome if Dr Cohen [the Claimant] *had been armed with this authority. That is a question for this court to answer. It is not a matter we must refer back to the original tribunal."*

The Appellant contended that the authority supported its case as set out in its primary submissions.

Conclusions

Liability

Ground 1: substitution

83. We did not consider that the Tribunal fell into the error of substitution as contended by the Respondent. Reading the Reasons as a whole it is evident that the Judge concluded that the conduct dismissal was outside the band of reasonable responses in this particular case.

84. The Judge set out clearly and accurately the relevant legal principles. The Council described that part of the Judgment as *"a comprehensive summary of the principles relevant to a conduct dismissal."* We agreed with that description.

85. In our view, the Judge assiduously applied those principles to the facts which had been found. The Judge concluded in paragraph 158 that,

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

On a fair reading of the Reasons and Judgment as a whole, that reflects the Judge's conclusion that one (of several) reasons why the dismissal was unfair was that the Claimant had not been told clearly why it was said by his employer that the relevant comments would bring the Council into disrepute; alternatively, how the employer considered they would be interpreted. That did not amount to substitution of the Judge's view for that of the employer decision maker. In our view, the Judge did no more than to apply, within the context of unfair dismissal, the well-established principle that an individual should know the case against them.

86. In paragraph 158 of the Reasons the Judge reached no conclusion as to whether the particular interpretation of the Claimant's spoken words adopted by Mr Austin was legitimate or accurate. Rather, the point made was that the Claimant did not have forewarning that that was the specific interpretation and issue which he had to address, and that that was, potentially, the specific reason why his employment was in jeopardy. The Judge concluded that before reaching a decision about the Claimant's future employment, it was incumbent upon Mr Austin to, at least, have given the Claimant an opportunity to respond to the interpretation Mr Austin had reached of the words spoken. We also noted the fact that the Judge had recorded that during the disciplinary process the Claimant had specifically asked which comments were relevant to the allegations against him. (See paragraph 21 above). The Judge found that that which appellate authorities have said many times should occur, as

appropriately summarised in **Spink**, that an individual, *"should hear or be told the important parts of the evidence in support of that case; should have an opportunity to criticise or dispute that evidence and to adduce his own evidence and argue his case*," simply did not happen in this case and that that led to unfairness. We cannot fairly discern any error of law or approach in the Judge's decision in that regard.

87. Furthermore, the Judge did not criticise Mr Austin for reaching the interpretation he did of the words which the Claimant spoke or his conclusions about how others might perceive those words. Nor did the Judge substitute her own interpretation of them. However, the Judge concluded that Mr Austin did not have *reasonable* grounds upon which to sustain that belief (and possibly had failed to carry out a reasonable investigation into that interpretation for the same reasons). There were three reasons for that: first, Mr Austin did not ask for the Claimant's views upon that interpretation, inform him about it or provide him with an opportunity to comment upon it; secondly, that interpretation had not been identified as an issue within Mr Smith's investigatory report (para. 160); and, finally because, almost no other person/media interpretation had adopted that interpretation of the words spoken. The first and second of those reasons are relatively basic tenets of a fair investigation. The third reason, perhaps, comes closer to a suggestion that the Judge was evaluating the legitimacy of the belief by reference to that which others had concluded, but, even then, the Judge couched her conclusions around the concept of 'reasonable grounds' and set it alongside the other two reasons. Her assessment and analysis was objective and was one in which she sought to test the employer's actions by the correct standard: were they within the range of reasonable responses of a reasonable employer.

88. On a fair reading of the Reasons as a whole, we consider that the Judge, at this point of the Reasons, was applying the accurate self-direction set out at paragraph 104 of the Reasons and the requirements of **Burchell**. The Judge had concluded, notwithstanding some articulated reservations, that the reason for the Claimant's dismissal was conduct. We considered that, although not expressly stated in these terms, the Judge evidently reached the conclusion that Mr Austin had a genuinely held belief that the Claimant was guilty of the misconduct. Indeed, in its written submissions the Council note that there was no suggestion to the contrary. However, one reason why the Judge concluded that the dismissal because of that genuine belief in the Claimant's guilt by Mr Austin was not fair, was because, prior to dismissing for the relevant misconduct, the employer, through Mr Austin, lacked reasonable grounds for that genuine belief/ failed to carry out a reasonable investigation.

89. The fact that the dismissing officer could form his own view about how others might interpret the words spoken did not absolve him from ensuring that a fair procedure was followed. We do not accept that the Tribunal concluded that Mr Austin could not reasonably have reached that view. The Judge certainly did not say so in express terms. Further, we reject the submission that, by identifying examples of matters which the Claimant could have raised had he been made aware of Mr Austin's interpretation of the words, the Tribunal thereby inferred that Mr Austin could not reasonably have reached that view as contended by the Council. We do not consider that such an inference can be drawn from the Reasons. Nor can it be said that the Tribunal was thereby substituting its own view for that of the employer. The Tribunal set out examples of the types of points which might have been raised within a fair procedure, thereby illustrating why it is not a meaningless requirement to provide an opportunity for comment. Had they, or other points been raised, Mr Austin may still have reached the same conclusion. Yet a fair procedure required Mr Austin to provide that opportunity to the Claimant. The Tribunal's comments about how the media interpreted the video clip are set out in the Judge's review of the procedure adopted and are an addition to the other two reasons why the Tribunal concluded that that procedure was unfair. The relevance of that evidence may have been better expressed as an example of the type of issue which could have been raised had the Claimant had the opportunity to comment upon Mr Austin's own interpretation. In context, and having regard to the Reasons as a whole, the identification of this matter as a third, separate reason, did not evidence an error of law or approach by the Judge.

90. The same points can be made in respect of the failure to give the Claimant an opportunity to comment on whether a warning would have been appropriate and whether he would have heeded it. The Judge concluded that it was unfair not to do so and that a fair procedure required that matter to be raised. That would have provided an opportunity for meaningful engagement and consideration of that issue by the Claimant and for the dismissing officer to then consider the possibility of a lesser sanction in the light of what was said. Having heard the Claimant's response, Mr Austin may still have concluded that it was not appropriate. A fair procedure in this case, however, required Mr Austin to raise this. That may not only have given the Claimant the opportunity to think about that matter and respond, but also an opportunity for Mr Austin to reflect upon, and even challenge, his own initial view about this matter.

91. The purpose of a fair procedure is not a 'tick box' exercise. Within an employment disciplinary procedure, a fair procedure should seek to ensure that an individual, whose future employment may be at risk, has the opportunity to convey relevant information to the decision maker

prior to a decision being taken. It may also provide a forum within which an individual may reflect upon what has gone before and, possibly, adopt a different position, reflect, apologise, or agree to modify future behaviour. A fair procedure should also ensure that employers do not reach decisions on an inaccurate basis or without all the relevant information and thereby make precipitous decisions through which valued staff are lost to an organisation. A fair procedure is an important part of good employee relations. It enables both sides to reflect on matters relevant to the employment situation. A fair and open procedure, where there is cooperation, genuine and effective communication regarding a disciplinary charge, is far more likely to engender reflection, perhaps regret or expressions of remorse which may in turn lead to better performance in the future, than a hostile, unduly adversarial or closed procedure, particularly where one party does not know or understand properly the position of the other.

92. In this particular case, the Judge found that the Claimant's dismissal was not only procedurally unfair but also substantively unfair. Further, the Judge concluded that, even if a fair procedure been adopted, a fair dismissal would not have been possible. There is no appeal against those conclusions

Ground 2: Smith v Trafford

93. As to the second ground of appeal, at the outset we set out that we each consider that it would have been preferable for the Judge to draw to the parties' attention the authority of **Smith v Trafford** prior to reaching a conclusion. That would not necessarily have required a further hearing. Best practice, or even good practice, would have been for the Judge to have made an order, drawing the parties' attention to the authority and providing them with the opportunity to provide written submissions, if they wished, within a short period of time, on the authority. Provision could also have been made for the parties to request a hearing if either considered it necessary and the Judge agreed. Taking that step would have been unlikely to have extended the proceedings excessively or in a manner disproportionate to the issues.

94. However, we are not satisfied that the failure to do so, in this particular case, amounted to an error of law or serious procedural irregularity. Both parties were represented by legal representatives and assisted by experienced and skilled lawyers. Although none referred to the authority, there was no apparent inequality of arms. Furthermore, and more significantly, we are not satisfied that either the suggestion that the Tribunal considered, "*the cases to be so factually similar that the conclusion in both was bound to be the same"*, or that the Tribunal's conclusion was *"literally bound up in its analysis of* ***Smith****"* was well made. The Judge did set out the facts of the **Smith** case and identify

similarities between that case and the present one. She noted that there were 'striking similarities' between relevant provisions of the Codes of Conduct in each case. However, the Judge also identified factual differences, such as the fact that the comments in this case were published more widely (para 172), and that in this case the Judge concluded that the Claimant's actions amounted to 'conduct' whereas, for example, Mr Justice Briggs did not consider that Mr Smith's actions were in breach of the relevant Code of Conduct or amounted to misconduct. (See paragraph 85 above and paragraph 115 of the Tribunal's reasons). That, in itself suggests that the Judge did not regard the case as a 'binding authority'. Mr Justice Briggs had held that the employer's Code of Conduct was not sufficiently wide to encompass the conduct in the **Smith** case. Notwithstanding the similarities in the terms, in this case, the Judge found that, on its own particular facts, the Claimant's actions did come within the meaning of 'conduct', clearly focusing on the facts of this case, rather than those in other appellate authorities. (See paragraphs 133-134 of the Reasons where the Judge also reached a conclusion different to that in **CJD v Royal Bank of Scotland** [2014] IRLR 25.) The Judge also noted that in the **Smith** case it was the employee himself who posted comments on his own Facebook wall so that they could be seen by his 'friends', whereas in this case it was others who posted the video on social media, without the Claimant's knowledge or consent.

95. The Judge made one observation that the actions of the Claimant could be seen as being less blameworthy than those of the employee in **Smith**. It would not, in our view, be appropriate to focus on that one sentence and draw from it a conclusion that therefore the Judge's conclusion was bound up with that decision. A fair reading of the Reasons suggests that, rather than regarding the case as a binding authority which inevitably led to a particular conclusion on the facts of this case, instead, the Judge drew from it relevant analysis regarding the employment context and the right to freedom of expression. In our view, the primary impact of that authority upon the reasoning of the Judge was in respect of the legal principles outlined by Briggs J in the case. It is also important to note that she stated that the matters set out in **Smith** served to 'reinforce' the decision she had reached.

96. We are not satisfied that, had this authority been drawn to the attention of the parties, it would have led to a different conclusion, notwithstanding our view that the Judge should have drawn it to the parties' attention. We do not consider that this ground of appeal is made out.

Conclusions: remedy judgment

97. We have set out our conclusions on the two grounds of appeal in this appeal together. In our judgment, the Tribunal was fully entitled to reach the decision which it did, that notwithstanding the

fact that the Claimant had been dismissed for serious misconduct arising from a breach of the Code of Conduct and had brought the Council and its reputation into disrepute, it was practicable for the Claimant to be reinstated.

98. The Tribunal's conclusion was that the Council had not lost trust and confidence in the Claimant. That conclusion was one which was plainly open to the Tribunal on the available evidence. In particular, the Council's own witness, whilst explaining that some of the Claimant's actions had not helped, did not assert that the Council had lost trust and confidence in the Claimant. The Tribunal also considered other evidence before it, set out above at paragraphs 44-45.

99. In our view, it does not automatically follow, particularly in an organisation as large as the Council, that because the dismissing officer, in this case, Mr Austin, genuinely believed that the Claimant had been guilty of misconduct, that the Council, as an employer, had lost trust and confidence in him. Similarly, and self-evidently, it does not automatically follow that because an employer decides to dismiss an employee for conduct, that decision later being found to be an unfair one, that reinstatement is impracticable. If that were the case, the primary remedy of reinstatement would very rarely be able to be made.

100. The Judge considered the Claimant's own views about his dismissal. Not unreasonably, particularly given some of the social media posts, the Claimant had believed that the disciplinary charges had been politically driven "from the start". Nonetheless, the Judge accepted the Claimant's evidence at the remedy hearing that he did not believe that there was a conspiracy against him or that the Respondent was part of one. The Judge heard and saw the evidence of the Claimant, and was best placed to judge the sincerity or accuracy of that assertion. She described the Claimant as having made 'appropriate concessions'. A belief that disciplinary charges were instigated for political reasons such as political pressure, is not the same as a belief that the employing Council was engaged in a conspiracy (i.e., something akin to secretly planning to undertake some illegal or malign action) aimed at the Claimant. The evidence at the hearing was that the Claimant had maintained good relations with work colleagues, some of whom gave evidence on his behalf at the remedy hearing.

101. We consider that, having regard to the evidence and information before it, the Tribunal was fully entitled to conclude that reinstatement was practicable, notwithstanding the fact that Mr Austin genuinely believed that the Claimant was guilty of misconduct. There was no error of approach or of law in the conclusions reached. The Tribunal Judge was entitled to conclude that notwithstanding the

unfair dismissal, trust and confidence had not been broken and the employment relationship could continue and develop.

102. We dismiss the appeal in respect of the remedy decision.

103. That sets out our conclusion on the appeal. However, the Judge in this Tribunal apologises to the parties and their representatives for the delay in providing the parties with this Judgment. The reasons for that delay have been explained separately through direct correspondence with the parties' representatives.