



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Lopez  
**Respondent:** The Secretary of State for Justice

**Before:** EMPLOYMENT JUDGE CORRIGAN  
Sitting alone

## Representation

**Claimant:** In person  
**Respondent:** Ms J Gray, Counsel

**Heard by CVP**  
**(Ashford)**

**On: 29 September & 4 November 2020**

## RESERVED JUDGMENT

*This was a remote hearing which was not objected to by the parties. The form of remote hearing was V – Video (CVP). A face to face hearing was not held because it was not practicable. I was referred to the hearing bundle and the parties' witness statements and submissions.*

1. The Claimant was not unfairly dismissed by the Respondent.
2. The Claimant was not wrongfully dismissed by the Respondent.
3. The Claimant's claims are dismissed.

## REASONS

1. This matter was originally listed as a face to face full merits hearing. It was converted to a CVP hearing due to the Covid-19 pandemic.

**Claim and issues**

2. The Claimant complains of unfair dismissal. As anticipated by the Response he also wishes wrongful dismissal to be considered. The Respondent did not object and therefore wrongful dismissal was also included.

3. The issues were discussed with the parties at the outset and agreed to be:

**Unfair dismissal**

4. What was the reason for dismissal? The Claimant accepted it was the potentially fair reason of misconduct.

5. Was the dismissal reasonable in all the circumstances? In particular, did the Respondent have a genuine belief in misconduct, held on reasonable grounds after a reasonable investigation? Was dismissal within the range of reasonable responses?

6. If the dismissal was unfair is there a chance the Claimant would have been dismissed in any event? Did the Claimant contribute to his dismissal?

**Wrongful dismissal**

7. Was the Claimant's conduct sufficiently serious to justify dismissal without notice?

**Hearing**

8. The Claimant had not received the communication that the hearing was converted to CVP and on the first day he and his witness attended Ashford Employment Tribunal. Although the Tribunal was not yet open to the public he was accommodated in a Tribunal room and able to access CVP via his witness's phone. This enabled the hearing to proceed.

9. On behalf of the Respondent I heard evidence from Ms Sara Pennington (Governor of HMP Elmley at the relevant time), and Mr Nick Pascoe (Director of Kent, Surrey and Sussex Group at the relevant time). I heard evidence from the Claimant on his own behalf. I also heard evidence from his witness Mr Rolfe (Trade Union Representative).

10. There was a bundle of 535 pages.

11. Both parties prepared written submissions and both made oral submissions.

12. Based on the evidence heard and the documents before me I found the following facts.

**Facts**

13. The Claimant commenced work as a Prison Officer at HMP Elmley Prison on 10 September 2001. At the time of the relevant events he had 17 years' service and worked on the reception team. He had a clean disciplinary record and was also a hostage negotiator and negotiator coordinator. He had also provided information in relation to an internal trafficking investigation that led to the criminal conviction of a colleague.
14. The Respondent's conduct and discipline policy states (at page 430) that relevant staff are "expected to meet high standards of professional and personal conduct. All staff are personally responsible for their conduct. Failure to maintain the required standards can lead to action, which may result in dismissal from the Service". Annex A contains the professional standards statement which has a similar statement that failure to comply with the standards can lead to dismissal. It states that discrimination and harassment is not acceptable and will not be tolerated, "Staff must not discriminate unlawfully against individuals or groups...because of their sex, racial group, sexual orientation, disability, religion, age or any other irrelevant factor...[or] [h]arass others through behaviour, language and other unnecessary and uninvited actions". The statement goes on to say that "staff must not take any action on or off duty that could affect, cast doubt on or conflict with the performance of their official duties. For example, outside activities or membership of organisations which promote racism. Staff must not bring discredit on the service through their conduct on or off duty. Staff must challenge and report any possible suspicion of misconduct to their manager or the reporting wrongdoing telephone line".
15. The Respondent has had a policy on using social media responsibly since at least July 2013. The purpose of the policy is to ensure that online activity by staff, whether in a personal or professional capacity, does not conflict with their professional role. The policy does not specifically refer to Whatsapp however it does contain generic guidelines. The policy advises staff to "think before you post....Ask yourself whether you would feel comfortable if your manager, colleague, family member or a journalist saw or quoted your post? If the answer is no, don't post it...Don't make derogatory remarks..." There is a warning that online posts can be passed on by others and so material may not remain private and to be careful who to interact with online. There is a warning to check that a group's views are appropriate and not incompatible with the organisation values. There is a reminder of the civil service code and that the standards of behaviour are expected online and offline, in work or personal time. The policy explicitly states: "Do not act online in a way that you wouldn't in day to day life. For example by being offensive, displaying offensive images....re-posting offensive information that has been posted by others". Staff are warned that failure to comply could lead to disciplinary action and also informed of the expectation that they report inappropriate postings by other staff to their Line Manager.

16. In around October 2017, following an allegation by a prisoner that he had been assaulted and racially abused by two prison officers, there was a report by another prison officer (the whistleblower) to the Claimant's manager that prison staff on the reception team were part of a WhatsApp group on which there had been posted highly offensive material. This included material that was overtly racist and derogatory in respect of other protected characteristics. The whistleblower provided screen shots of some of the messages.
17. Although the group was not a public group it did involve a number of prison staff including prison officers, supervisory officers and at least one member of the senior manager team. The Claimant accepts there would have been at least 15-16 members of the group, all work colleagues. Neither side disputes that there was such a WhatsApp group, of which the Claimant was a member, and that staff on the group participated in highly offensive posts. In fact from the documentation there appears to have been more than one group and the Claimant accepts being a member of one, referred to as "Stag Do". Not all of the posts in question were posted within that group.
18. Steps were taken to protect the whistleblower from reprisals and the police were involved. They reviewed the WhatsApp posts as part of the investigation into the assault and reported to the Respondent that there were racist posts and extreme pornographic posts including sexual violence and degrading behaviour. They also said there had been no dissenting voices or protests at the contributions (see email dated 20 December 2017 at pages 84-85).
19. Initially 4 officers were suspended for their involvement, and eventually this increased to 11, including the Claimant, who was suspended on 14 November 2017. The Respondent also took steps to implement a programme of equalities training.
20. The Respondent was not able to access the group directly and relied on officers involved to report material on it. There was also additional information provided later from an anonymous source. I have only been shown a limited number of the posts. However the scale is reflected in the fact the whistleblower had 600 messages of "similar content" (p41).
21. I note that the Claimant's line manager recorded in an internal email that the above material "strikes right at the heart of what we are trying to eradicate".
22. The Claimant was not one of the most frequent posters. He was told he made 15 posts. Of these there were only two of concern. These included a video which was eventually discounted as he had not viewed it during the disciplinary process and it could not be proved that he had opened it.

The other is, as he accepts, extremely offensive on multiple levels as it depicts a person with Down's syndrome wearing a shirt saying "at least I am not a nigger" (pp139 and 142). Ultimately he faced disciplinary proceedings in respect of that single post.

23. The Claimant attended an investigatory meeting on 8 December 2017. He was accompanied by Mr Rolfe. In that meeting he confirmed he had been in a WhatsApp group with colleagues entitled "Stag Do". He described himself as a technophobe and said he had not really been involved. He said he did not tend to interact heavily in any sort of social groups or even social media. He said he could not remember what he had posted. The Claimant was presented with material from his phone number. One he could not remember but in respect of the second, the picture described above and at 142, he said "I will admit I did post that which I am a bit disgusted in myself to be honest because my [Dad] was disabled for 19 years and I have got black cousins....well I am a bit disgusted in myself but I can't see any other comments that I have made" (page 65).
24. He was asked to explain why he posted it and he said the only thing he could think of was that it was a stag group and he wanted to feel part of it. He then said he had probably had the realisation it is not the right thing to do and not participated in anything else. He said again he was a little disgusted with himself because of his father having a disability and because he goes to the Paralympics. He accepted he could see how it could be perceived as bringing discredit on the Prison Service. He said it was not in his mind a public place and suggested he had only posted once as he probably had the feeling afterwards he should not have done that. He was asked if he had seen some of the other offensive material and he said he could not say either way. He said that there were a lot of messages so he would mute the notifications and then clear the chat on a weekly basis.
25. He was asked what he would have done about it if he had seen it. He initially said in his mind it was not work related. After a break requested by his representative the Claimant said that in his professional capacity, had he seen the material, he was aware the onus may well have been on him to report it. He said he was aghast and ashamed at the picture he posted but he could not say he had seen the rest.
26. It was put to the Claimant that he had posted a picture which fits in with the theme of the conversation of the group and that he would only feel safe to post such a picture if the context of other conversation was also racist and mocking people with disabilities...the Claimant responded saying without seeing the whole context he could have just put that up in "a moment of madness". He did not accept that he was aware of the nature of the group. He said he did not know what more he could say in terms of regret for the one image that he had knowingly posted. He said

again it was not work related, and it had not interfered with the job he does as a Prison Officer.

27. He confirmed he was aware of the professional standards statement but not the social media policy. He accepted that diversity and equality was of high importance to the organisation. He accepted that an independent person looking at the content might find it hard to accept him in his professional capacity.
28. There was press interest in the case, see for example page 91. The suspensions were on the front page of the local press on 10 January 2018. The Respondent clearly anticipated national interest (p102).
29. On 26 January 2018 following an anonymous letter a further member of staff, a supervisory officer, was suspended.
30. The Claimant attended a disciplinary hearing on 19 March 2018 with Ms Pennington. He provided written statements (pp276-277 & 283) in which he accepted his WhatsApp post could be considered unprofessional conduct and bringing discredit on the Prison Service. He queried whether he was being treated more harshly than others and relied on his otherwise good record and his achievements for the Service as summarised above (p283). Ms Pennington decided that although the Claimant's case involved only one post it was one of the most shocking posts of all and that it was sufficiently serious on its own to dismiss for gross misconduct.
31. The Claimant appealed. The appeal hearing took place on 3 May 2018. Mr Pascoe dealt with the appeal and upheld the decision.
32. Of those investigated there were 5 others dismissed and 1 who resigned prior to conclusion of the process. There were 4 officers who retained their jobs but received extensive final written warnings and in some cases a bar on promotion. There was an additional second investigation of others not included in the first investigation in which there was a further dismissal and another was given a written warning. In total 6 other officers were dismissed, meaning the majority who were involved were dismissed.
33. The Claimant raised a number of issues during the disciplinary process which he repeats now. He did not dispute that he had posted it. He said his involvement in the group was very limited and mostly he deleted the posts without reading them, though he accepted he had seen the picture in question before he posted it. He says now, though he did not say it then, that he was forwarding a post sent by a Governor. He said in evidence that he did not know about the nature of the group's posts but I find it incredible that he would knowingly pass on a post of such a highly offensive nature without being aware of the type of comments on the WhatsApp group and having confidence that its other participants would appreciate his contribution. I find he must have been aware of the nature

of the comments. He relied on his good record and additional roles as negotiator and involvement in the prosecution of a colleague for trafficking. He said he did not have up to date knowledge of the policies and disputed that WhatsApp is covered by the social media policy. He said it was a private group and sought to rely on the fact there had only been limited national coverage in the press.

34. Tellingly the Claimant said in evidence that he would not be here if everyone involved had been dismissed. His complaint is not really that he was dismissed for his part in the group, but about the 5 officers who were not dismissed, though they did receive lengthy final warnings. He does not accept that they should have retained their jobs when, for some, their involvement was as serious or more serious than his own.
35. Ms Pennington explained why those 5 retained their positions, albeit with lengthy warnings. She said one had not posted on the group and had in fact been the subject of racist comments which he had found offensive and upsetting. She had accepted the account of another that he had tried to indirectly challenge inappropriate comments in a roundabout way, though he had still received a lengthy warning. Another had particular personal circumstances which were taken into account, including experiencing workplace bullying. Another two officers would have been dismissed if all of their posts were taken into account, but for each certain evidence was disregarded, on HR advice, as unsafe to rely on. One of these officers had also reported himself as being part of the group and she said he was very remorseful. She considered he was also repeating another post rather than the initiator. The other such officer had been nominated as Prison Officer of the year by young black men which was unusual. The Claimant also raised the issue of a further member of staff who posted as per page 234 but was not even investigated. All the others involved were dismissed, save one who resigned before the process was concluded.
36. The Claimant also compared his case to a case of a Governor who was not dismissed, but was given a disciplinary warning, despite making a post on Facebook after disappointment in a ruby match as set out in the press article on pages 34-36. The article quotes a source as saying "racism is usually a sackable offence".
37. The Claimant also suggested to Ms Pennington that she was particularly harsh in respect of his one post because of her own personal circumstances. Her response was she was personally offended by it as many people would be but she had not been unduly influenced by this.

**Relevant law**

**Unfair dismissal**

38. The law in relation to ordinary unfair dismissal is contained in section 98 of the Employment Rights Act 1996. Section 98 provides:

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

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and**
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**

**(2) A reason falls within this subsection if it-**

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

**(3) . . .**

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

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



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

39. In considering reasonableness in cases of dismissal for suspected misconduct the relevant test is that set out in *British Home Stores Ltd v Burchell* 1978 IRLR 379, namely whether the employer had a genuine belief in the employee's guilt, held on reasonable grounds after carrying out as much investigation into the matter as was reasonable in all the circumstances of the case.
40. In applying section 98(4) the Tribunal are not to substitute their own view for that of the employer. The question is whether the employer's decision to dismiss fell within the range of reasonable responses open to the employer, or whether it was a decision that no reasonable employer could have made in the circumstances. The range of reasonable responses test applies as much to the investigation as to the substantive decision to dismiss *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23.
41. The Respondent's representative referred to **Hadjoannous v Coral Casinos** [1981] 1WLUK 473 and **MBNA v Jones** [2015] 9 WLUK 7, and the principle that in a consistency of treatment case the treatment of other employees is only relevant (1) if there is evidence that the dismissed employee was led to believe he would not be dismissed for such conduct; (2) where the other cases give rise to an inference that the employer's stated reason for dismissal is not genuine; or (3) in "truly parallel" circumstances, when an employer's decision can be said to be unreasonable having regard to decisions in other cases.
42. The Respondent's representative also referred to **Wells & Anor v Cathay Investments 2 Ltd & Anor** [2019] EWHC 2996 (QB) as authority for the principle that participating in a WhatsApp Group of employees distributing offensive material is capable of amounting to gross misconduct. Finally she referred to **C and Others v Chief Constable of the Police Service of Scotland and Others** [2020] CSOH 61, which found that in deciding whether or not a person may reasonably expect a conversation to remain private, there is a distinction between 'ordinary members of the public' and those who are required to comply with specific professional standards, whether or not they are at work (as applies in this case).

### Conclusions

43. As set out above the Claimant accepted the reason for dismissal was the potentially fair reason of misconduct.

*Was the dismissal reasonable in all the circumstances? In particular, did the Respondent have a genuine belief in misconduct, held on reasonable grounds after a reasonable investigation? Was dismissal within the range of reasonable*

*responses?*

44. There is no dispute that the Claimant posted the deeply offensive image. In the disciplinary process he accepted that he should not have done so and said he was “disgusted”, “aghast” and “ashamed” for doing so. He does not dispute it was misconduct. The Respondent’s witnesses clearly had both a genuine belief and reasonable grounds for finding he had committed this misconduct based on his own admissions. He had the opportunity to say anything he wanted in mitigation in the investigation, the disciplinary and the appeal. He also provided two statements in addition to his appeal. He was represented by his union during the process. In my view the investigation was reasonable. Indeed he was initially accused of posting two offensive posts but the second was disregarded after hearing from him and his representative.
45. It is a very serious matter in the public interest that Prison Officers had WhatsApp groups involving such prolific posting of highly offensive material that was overtly racist and derogatory in respect of other protected characteristics. Such views are clearly incompatible with holding that position and the posts, including that of the Claimant, were serious breaches of the Respondent’s professional standards. It is well within the range of reasonable responses to dismiss the Claimant for a post of this nature. Indeed the Respondent had little alternative given the Claimant’s role.
46. That is really the crux of the Claimant’s case, namely that others involved should also have been dismissed and were not, particularly as some of those not dismissed were responsible for many more posts on the groups and/or held more senior positions. As I have said above it is telling that the Claimant said that if everyone had been dismissed he would not have contested the dismissal. I agree with the Claimant that, on the face of it, it is surprising that not all those who were involved were dismissed. However this is not the forum to examine the adequacy of the Respondent’s response to the WhatsApp groups in general. I am only to consider whether the decision to dismiss the Claimant for his involvement was unreasonable.
47. Applying the principles from **Hadjioannous** and **MBNA v Jones**, firstly, there is no evidence that the Claimant was led to believe he would not be dismissed for posting such an offensive post. The policies are clear that the Claimant was to behave with high standards in his personal and professional life. The policies overtly warn against outside activities which promote racism, and against making derogatory remarks or posting offensive images. I do not accept the argument that this was a private group as it consisted of 15 or more work colleagues, but even so there is a warning against private posts of this nature as they can be forwarded and become public. In my view the policies are clear that posts of this nature are incompatible with the Claimant’s position. The Claimant does not say

that the previous incident of the Governor's Facebook post led him to believe he would not be dismissed for his own post. The article itself postdates his post, but in any event in my view that incident and the media article show that even one post of this nature is a disciplinary matter and would usually lead to dismissal. Secondly, there is no basis in this case to draw an inference that the Respondent's stated reason for dismissal is not genuine. Thirdly, the majority of those involved were dismissed. The Respondent would have dismissed two of the others if they had not disregarded some of their posts as unreliable evidence under HR advice. The Claimant also benefitted from this leniency having one of his own posts disregarded for similar reasons but his remaining post was still one of the most offensive posts. For each of the other three treated more leniently the Respondent has offered a distinguishing feature from the Claimant's case, such as very different personal mitigating circumstances or not taking part in the offensive posts, or challenging them. It is not for me to comment on the adequacy of the distinguishing features in those cases as this is not the forum to judge the Respondent's response to the WhatsApp groups generally. All that is relevant is that those treated more leniently therefore were not in "truly parallel" circumstances. Those cases cannot be said to render the decision in the Claimant's case unreasonable. The decision in the Claimant's case was well within the range of reasonable responses in all the circumstances.

48. As said above, the Claimant also suggested to Ms Pennington that she was particularly harsh in respect of his one post because of her own personal circumstances. Her response was she was personally offended by it as many people would be. I do not find this renders the dismissal unreasonable. The dismissal decision was reviewed at appeal by Mr Pascoe who upheld the decision. It was not therefore just Ms Pennington's decision. The decision was not unduly harsh given the nature of the Claimant's WhatsApp post, but in any event, the test is not whether a decision was harsh, but whether it was outside the range of reasonable responses. I find it was not. Indeed the fact that the Claimant's post caused offence to a colleague, the Governor or otherwise, because of her own personal circumstances could reasonably be considered an aggravating feature.

### **Wrongful dismissal**

*Was the Claimant's conduct sufficiently serious to justify dismissal without notice?*

49. The Claimant deliberately posted a highly offensive image on the WhatsApp group of colleagues. It is behaviour that seriously breaches the Respondent's code and is incompatible with the role of a Prison Officer. It is conduct sufficiently serious to justify dismissal without notice.

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Employment Judge Corrigan

Date: 09 April 2021

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