



EMPLOYMENT TRIBUNALS

Claimant:

1. Raffaele Nigro
2. Jarek Bak
3. Chris Schneider
4. Heinrich Grethe

Respondent: Knightsbridge Residents Management Company Limited

Heard at: London Central (by video)

Dates: 7-11 February 2022

Before: Tribunal Judge McGrade acting as an Employment Judge (sitting alone)

Appearances

For the First, Second and Fourth Claimants: L Caller (solicitor)

For the Third Claimant: In person

For the Respondent: E Grace (of counsel)

RESERVED JUDGMENT ON LIABILITY

The judgment of the Tribunal is that the respondent unfairly dismissed the claimants.

REASONS

Introduction

1. These are claims for unfair dismissal lodged by four claimants, all of whom were dismissed in more or less identical circumstances. The hearing was conducted by Cloud Video Platform.

Evidence and submissions

2. I was provided with a joint bundle of documents extending to 740 pages and witness statements extending to 75 pages from the four claimants and the Respondent's three witnesses, namely Chris Barrass, Jo Meredith and Tony Stedman. The evidence was concluded within five days, but there was insufficient time for submissions. I therefore ordered and received written submissions from all parties.

The issues

3. The issues to be determined by the Tribunal were identified as follows: -
 1. What was the reason for each claimant's dismissal under s.98 ERA 1996?
 2. Was it one of the fair reasons falling within section 98(2) of ERA 1996 or alternatively, SOSR?
 3. The Respondent contends it was gross misconduct and / or some other substantial reason ("SOSR").
 - 1) The gross misconduct was as follows:
 - a. Breach of the Respondent's Email and Internet, and Social Media policies.
 - b. Displaying their agreement to unsubstantiated defamatory comments made against the senior management team
 - c. Failure to report the unsubstantiated defamatory comments to a member of the management team
 - d. Displaying agreement to comments which were likely to bring the Respondent into disrepute
 - 2) The respondent contends some other substantial reason was a serious breach of trust and confidence arising from the actions of the claimants described above.
 - 3) The claimants contend the reason for dismissal was that the managers were upset by the comments made and/or emojis used by the claimants.
 4. If the reason was as the Respondent contends, was the dismissal, having regard to that reason, fair or unfair within the meaning of s. 98(4), ERA 1996?
 5. If the reason relates to conduct, then is the test in *British Home Stores Ltd v Burchell* [1978] IRLR 379 satisfied?:
 - 1). Did the Respondent genuinely believe the Claimant was guilty of the alleged gross misconduct?

The claimants contend the respondent could not have had a genuine belief that the claimants were in breach of the relevant policies.
 - 2). Did the Respondent have reasonable grounds to sustain that belief?
 - a. The claimants contend that the respondent did not have reasonable grounds for concluding the claimants agreed with the alleged defamatory comments.

b. The claimants contend that the respondent did not have reasonable grounds for considering the claimants to be under a duty to report the conduct.

3). At the time the belief was formed, had as much investigation as was reasonable in the circumstances of the case been carried out?

a. The claimants were not provided with an opportunity to test the evidence of Ms Meredith at the disciplinary hearing before Mr Stedman, by questioning her directly.

b. Mr Schneider contends that the respondent had failed to properly investigate all the issues that arise in this case by holding a further investigatory hearing with him.

6. Was the dismissal fair in all the circumstances? To include an assessment of whether the dismissal was within the range of reasonable responses to the misconduct.

1) The claimants contend that the sanctions applied were unreasonable, given the reporting requirement did not apply in the particular circumstances of this case.

2) The claimants contend that the sanctions applied were unreasonable, given the length of service and extent of participation in the alleged gross misconduct.

3) The claimants contend that the dismissal and refusal of the appeal was predetermined.

4) The claimants contend that Anthony Stedman was instructed by Mr Barras and/or Ms Kurcheka to dismiss the claimants either on 18 August 2020 or on some other date?

7. Further or alternatively, if the reason relates to SOSR:

1). Is the reason for dismissal capable of justifying the dismissal of an employee holding the job in question?

2) Was the decision to dismiss reasonable in all the circumstances, in accordance with equity and the substantial merits of the case?

a. The claimants contend that this was not the reason for dismissal given by the respondent.

b. The claimants contend that dismissal for some other substantial reason is inconsistent with the R's failure to pay in lieu of notice.

8. If the Tribunal finds that the relevant Claimant's dismissal was procedurally and substantively unfair, is it appropriate to exercise its discretion to award a decrease in compensation of up to 25% for unreasonable failure to follow the ACAS Code?

1) The respondent contends a decrease in the award of up to 25% should be made in respect of Heinrich Grethe and 15% in respect of Raffaele Nigro as a result of their unreasonable failure to comply with the ACAS code of practice on disciplinary and grievance issues by appealing against their dismissals.

2) The claimants contend that an increase in the award of up to 25% should be made in respect of the failure of the respondent to comply with the ACAS code of practice on disciplinary and grievance issues by failing to give the claimants the opportunity to question the investigating officer, in accordance with paragraph 12 and by predetermining the outcome of the disciplinary process, as evidenced by the short hearings, in accordance with paragraph 23.

Remedy

9. If any of the complaints of unfair dismissal and breach of ACAS Code of Practice are well-founded, how much (if any) compensation should the relevant Claimant receive?

10. If successful in his claim, did the relevant Claimant contribute to his dismissal? If so, by how much?

11. If successful in his claim, has the relevant Claimant mitigated his loss?

Polkey

12. Should the Claimants' compensation be reduced to reflect the chance that, even if the Tribunal finds that the Respondents did not carry out a fair procedure, the Claimant's employment with the Respondents would have ceased in any event?

In the case of Mr Nigro, the Respondent contends he would have left of his own accord within a reasonable period of time.

In the case of Mr Schneider, he would have left within one year.

13. If so, at what point would such a dismissal have taken place?

14. If so, what was the percentage chance of this occurring?

Findings in fact

4. I found the following material facts to be admitted or proved. The respondent is a limited company responsible for the management of the Knightsbridge Residential Property ("the Knightsbridge") situated at 199 Knightsbridge, London SW7 1RH. All of the directors, with the exception of the managing director, Christopher (Chris) Barrass, are owners of individual properties within the Knightsbridge.
5. The Knightsbridge consists of 201 properties designed by Squire and partners. Many of the residents are extremely wealthy individuals, with interests in high-profile businesses, including media organisations.
6. The respondent prides itself on maintaining a low profile, as privacy is very extremely important to the residents. It also seeks to maintain the very high standard of service that is expected by residents.
7. Security is a very important consideration for residents. The respondent carries out detailed vetting procedures, including Disclosure and Barring Service (DBS) checks on all prospective employees. This is regarded as particularly important for those working within the security department, as they have access to sensitive information, including CCTV.

8. The respondent employs around 70 employees. There are four departments, headed by housekeeping manager, resident services manager, engineer/technical services manager and security manager. The security department consists of around 16 employees, split into four teams. Each team consists of four people and is led by an assistant security manager. They are responsible for all security issues within the Knightsbridge 24 hours per day. Other than personal security staff working for individual residents, there are no other security staff operating within the premises.
9. Christopher (Chris) Schneider commenced employment with the respondent in July 2010 as a supervisor/assistant security manager. He had responsibility for four members of staff. He remained in that role until his dismissal.
10. Raffaele Nigro commenced employment with the respondent in August 2005 as a concierge. He remained in that role until his dismissal. In June 2020, he was placed on furlough. He did not return to work prior to his dismissal.
11. Jarek (Jarek) Bak commenced employment with the respondent in March 2013 as a security officer. By the date of his dismissal, he had been promoted to the role of contractor liaison coordinator.
12. Heinrich Grethe was employed by the respondent between 19 June 2013 and 26 June 2016 as a security officer. He returned to their employment as a security officer on 9 January 2017 and remained in employment until his dismissal. He received a company Gold Star award from the respondent on 16 January 2019 for his work and contribution.
13. On 14 July 2020, Jonathan (Jon) Pope, the respondent's technical services manager, passed away. He was an extremely popular and hard-working individual. His health had been poor for some time and the respondent had sought to assist him deal with those health issues.
14. On 20 July 2020 Chris Barrass was approached by a member of staff who advised him that various members of staff were suggesting he was responsible for Jon Pope's death. Chris Barrass did not pay particular attention to this remark, as he considered it was baseless. The member of staff then showed him a number of WhatsApp messages which had been sent by various members of staff, as part of a WhatsApp group that had been created, entitled Voicesunited 199.
15. The first message displayed was from Chris Schneider, stating "I'm in," sent at 21:56 on Sunday 19 July 2020. This was followed by a series of messages from the same date. There was a message from Heinrich Greta stating "I am in," and a message from Jarosław Bąk , stating "Me2," both sent at 22:07 and a message from Abdu Khalifa stating "Me as well," sent at 22:11. The following message, with no clearly identified sender, was sent at 22:16:-

Hi all, we have created this group chat to see what your views are on requesting the KMRC board to suspend and investigate the conduct and poor management of the following managers: Chris Barrass, Elena Kurcheika, Andrew Meads. Having spoken to some of you, there is agreement that you can no longer work in this toxic environment where you are under constant

monitoring on CCTV and subjected to bullying and harassment resulting in some of you being under a lot of stress. Recently Jon Pope passed away due to a heart attack and we know that he was also under a lot of stress because of Chris Barrass. We need something to be done about this now. Unfortunately they are the senior managers so we cannot raise our concerns to them. We need our voices to be heard. We must all unite and raise this to the KMRC board of directors and request they suspend and investigate these managers immediately. If we all stand together then we will be able to change this management. However if we do nothing, then we will always be working in this terrible environment. Please let us know in this chat if you agree to a letter being sent to the KMRC directors to start an investigation. Failure to have these managers in investigation and suspension would result in a protest 7 days from the day the letter is sent for a period of 3 days. If you do not agree, please leave this chat.

16. Chris Schneider and Raffaele Nigro submitted thumbs up emojis in response to the above message at 22:20. Thumbs up emojis were also submitted by Heinrich Greta at 22:22, Abdu Khalifa at 22:23, Gift Echikwa at 22:43 and Jarosław Bąk at 22:48.
17. Chris Barrass was extremely concerned by this message. He considered various members of staff were seeking to remove him and other senior colleagues from their positions in the company. He was also extremely concerned by the threat of a protest taking place, if their demands were not met.
18. Chris Barrass approached Joanne Meredith (Jo Meredith), an independent HR consultant, and asked that she conduct an investigation. Jo Meredith had previously been HR director at the Ritz Hotel in London. She agreed to conduct an investigation.
19. Chris Barrass met with Jo Meredith on 28 July 2020. The notes of the meeting appear at pages 340 – 342. She was provided with the screenshot of the WhatsApp messages, along with the standard contract of employment and disciplinary procedure, the social media policy and the email and Internet policies. She later requested and was provided with the CCTV and whistleblowing policies.
20. The respondent has in place an email and internet use policy, which was issued to all of the claimants. This includes the following information: -

introduction

The Knightsbridge provides all staff with the communication resources they need to perform the functions effectively. These resources include telephones, computers and other facilities such as email and Internet access...

You must not use the e-mail system in a way that may offend others. In particular, you must not create, send or disseminate any image, text or material which:

is or might reasonably be considered to be indecent or obscene; or

- is or might be offensive or abusive in that its content can be considered to be a personal attack, rude, sexist, racist or generally distasteful; or

- may be defamatory or incur liability on the part of The Knightsbridge or adversely affect the image of The Knightsbridge.

— Please also remember that email etiquette is vital for a harmonious working environment...

Social media

Employees' use of social media is governed by the rules of this policy together with the social media policy...

Use of instant messaging for work

The introduction of instant messaging has re-defined the communication at work. Employees of The Knightsbridge, in particular, use TELEGRAM and WhatsApp instant messaging services. When using messaging applications for any business purpose (whether privately or in a group) please be reminded that communication must be kept professional at all times and that the principles of information governance still apply.

Employees are also encouraged to bear in mind that neither TELEGRAM nor WhatsApp are the most secure of methods for transferring information, therefore, it is strictly forbidden to use these platforms for exchanging sensitive information or for sending confidential documents.

For any group messaging activities, group administrators are reminded to ensure that:

- Group membership is appropriate for the purpose of the conversation;
- All members recognise their information governance responsibilities; particularly

when sending messages, for instance, no identifiable information should be included.

Administrators should remind members regularly of this fact.

- Groups should be closed when there is no further need for them to remain open;
- The group is being used appropriately and in line with other related policies such as

Data Protection Policy and Social Media Policy.

- Emojis must be used sparingly.

21. The respondent has in place a social media policy, which was issued to all of the claimants. This includes the following information: -

Scope and purpose of the policy

This policy deals with the use of all forms of social media, including Facebook, LinkedIn, Twitter, Wikipedia, all other social networking sites, and all other Internet postings, including blogs and wikis.

All staff are responsible for the success of this policy and should ensure that they take the time to read and understand it. Any misuse of social media should be reported to the Head of HR. Questions regarding the content or application of this policy should be directed to the Head of HR.

Compliance with related Policies

Social media should never be used in a way that breaches any of our other policies. If an internet post would breach any of our policies in another forum, it will also breach them in an online forum. For example, employees are prohibited from using social media to:

Breach our Email and Internet Use Policy.

Breach any obligations they may have relating to confidentiality.

Breach our Code of Conduct.

Defame or disparage The Knightsbridge or its affiliates, customers, clients, residents, business partners, suppliers, vendors or other stakeholders.

Breach our Harassment in the Workplace Policy.

Breach our Equal Opportunities Policy.

Breach our Data Protection Policy (for example, information about a colleague or a resident online).

Breach any other laws or ethical standards (for example, never use social media in a false or misleading way, such as by claiming to be someone other than yourself or by making misleading statements) ...

Responsible use of social media

Employees are prohibited from posting disparaging or defamatory statements about:

- the Knightsbridge;
- its residents or any other client;
- other employees;
- suppliers and vendors; and
- other affiliates and stakeholders

... remember what you publish might be available to be read by the masses, including the Knightsbridge itself, future employers and social acquaintances) for a long time. Keep this in mind before you post content...

If you see content in social media that disparages or reflects poorly on the Knightsbridge audit stakeholders, you should contact head of HR. All staff are responsible for protecting our business reputation...

Respecting colleagues, residents, partners and suppliers:

- ✓ do not post anything that your colleagues or our customers, clients, residents, business partners, suppliers, vendors or other stakeholders would find offensive, including discriminatory comments, insults and obscenity

- ✓ do not post anything related to colleagues or customers, clients, residents, business partners, suppliers, vendors or other stakeholders without the written permission.”

Breach

Disciplinary action may be taken regardless of whether the breach is committed during working hours, and regardless of whether equipment or facilities are used for the purposes of committing the breach. Any member of staff suspected of committing a breach of this policy will be required to cooperate with their investigation, which may involve handing over relevant passwords and login details.”

The disciplinary investigation for Chris Schneider

22. Joanne Meredith conducted an investigatory interview of Chris Schneider on Friday 31 July 2020. He was given no advance notice of this meeting.
23. This meeting was recorded. The notes of the meeting appear at pages 363-372. He was questioned in considerable detail regarding his own involvement and the comments made on the WhatsApp group. Chris Schneider accepted he had been a member of this group and made the comments and posted the emojis which appear there. He explained that he believed the group had been created by Abdu Khalifa. He also explained that he did not agree with the group being set up as he considered it “was just going to open a can of worms that didn’t really, did not, should not be opened.” He explained the views expressed in the WhatsApp group were not his, but people felt their concerns were not being listened to. He gave the example of three people being on shift since lockdown and the additional pressure this placed people under. He explained that he was not given a work phone and had been criticised for using a phone during working hours. He indicated that he had no experience of bullying and harassment. He refused to disclose the names of others involved in the group. When questioned regarding the proposed protest, he explained that he did not think it would have happened. He also repeatedly explained that he was trying to shut this group down.
24. Arthur Brulinski, the respondent’s security manager, emailed Chris Schneider on 3 August 2020 suspending him on full pay while the company carried out an investigation.

The disciplinary investigation for Raffaele Nigro

25. Jo Meredith conducted an investigatory interview of Raffaele Nigro on Friday 31 July 2020. This meeting was recorded. The notes of the meeting appear at pages 354-362. He was on furlough at the time. He was asked to attend a meeting with his new line manager, Benjamin Harling, on 31 July 2020, and did so. Immediately after this meeting, he was told he was to attend an investigation meeting with Joanne Meredith. He was given no advance notice of this meeting. It was explained that he was being questioned regarding the WhatsApp group and was shown screenshots of the messages. He was questioned in considerable detail regarding the messages which appeared and his own involvement. Raffaele Nigro admitted that he was part of the group, but that he had subsequently left. He was asked why he had posted a thumbs

up. He explained "I support whatever need supported, whatever it is, but of course it needs to be truth, proved... I need to see the fairness and justice. I would be in, if I see something and then, you know." He suggested he had deleted the group from his phone. He was told these were serious allegations and was asked whether he was aware of what slander was. He was asked whether he had any concerns and expressed his dissatisfaction with being placed on furlough for four months. He was advised he was fortunate not to be made redundant, but explained he was willing to be made redundant. He expressed some concerns regarding the use of CCTV monitoring. He accepted that he had not been bullied or harassed, nor had he witnessed bullying and harassment.

26. Following this meeting, Arthur Brulinski emailed Raffaele Nigro on 7 August 2020 suspending him on full pay while the company carried out an investigation.

The disciplinary investigation for Jarek Bak

27. Arthur Brulinski emailed Jarek Bak on 7 August 2020, suspending him on full pay and inviting him to an investigation meeting with Jo Meredith on 11 August 2020. No steps had been taken to suspend him in the period of almost three weeks since Chris Barrass first became aware of the terms of the messages. The meeting was recorded. Minutes of the meeting appear at pages 383-387. He was questioned regarding his role and his involvement in the group. He accepted his role as a contractors liaison co-ordinator was a junior management role. He explained he received an invitation during the night on his day off, while with friends, and accepted it. He was questioned regarding the thumbs up emoji sent by him and suggested he did this to stop his phone buzzing. He explained he had exited the group when he saw things which Jo Meredith did not have. He was asked if he was willing to share this information with her. He declined to do so as he indicated it was private and did not wish to put others in a serious situation. He denied posting any other messages. He suggested he had left the group after two or three days. He denied having any issues with the use of CCTV, bullying and harassment. He suggested he was under the influence of alcohol when the message came through and had not read it before responding.

The disciplinary investigation for Heinrich Grethe

28. Arthur Brulinski emailed Heinrich Grethe on 7 August 2020, suspending him on full pay and inviting him to an investigation meeting with Joanne Meredith on 11 August 2020. No steps had been taken to suspend him in the period of almost three weeks since Chris Barrass became aware of the terms of the message. The meeting was recorded. Minutes of the meeting appear at pages 374-382. He was questioned as to why he had joined the group. He gave various explanations, including that he thought it was a security thing, a football thing, that he did not know what it was about and that he saw Chris Schneider joining and therefore joined. He explained that he found it very strange that a picture of Jon Pope appeared on the group. He suggested he was intrigued and wanted to know more. He also explained that he had nothing against Chris Barrass, Elena Kurcheika and Andrew Meads, and neither liked nor disliked them. However, he was of the view that Elena Kurcheika may not like him. He denied the atmosphere was toxic, but accepted it could be stressful, because of the pandemic. He also explained that he had been on holiday since 21 July 2020. He suggested he left the group at 06:05 on 21 July 2020. He suggested there were a number of further accusations made on the WhatsApp group of bullying and racism. He accepted CCTV cameras were

there in part to protect him, that he had no personal experience of bullying and harassment nor had he witnessed this. He had been told that someone had complained of bullying and harassment. He also described himself as being inquisitive as to who the author of the letter was and accepted he had not made his managers aware of this group. He read out what he said appeared in the message posted very shortly before he left the group. This was as follows: –

'We are the employees of KRMC Limited at the Knightsbridge Apartments. We would like all of you to know, that we have experienced and witnessed, one or more of the following issues from Chris Barrass, Elena Kurcheika and Andrew Meads over many years. Threats, abuse, bully, victimised, unfair dismissal of former employees, unfair disciplinary, discrimination, racism, work stress - excessive and unreasonable, damage to health - physical, mental and emotional, spying on staff using CCTV, insufficient staff, excessive workloads, cuts of staff bonus' and sick payments, toxic work environments, breach of job descriptions, Christmas gifts cash from residents for staff detected stolen by some members of the management team, misuse of spending resident service charges on unnecessary items, work and projects. Therefore, we are requesting these three personnel be removed from their positions as we believe they have committed so many serious breaches of the company policy and employment law. Now we suggest KRMC Limited to suspend them immediately, carry out a formal and independent investigation. We have been very hardworking, to give the very highest standard of service for all of you but cannot continue to suffer under these three personnel anymore. Sadly, this week Jonathan Pope, Engineering Technical Services Manager died of a heart attack and we suspect he suffered enormous work stress and abuse from these three personnel over the years, contributed to his early death.'

29. He suggested there were 27 people in this group and expressed surprise that some had not been suspended. Jo Meredith explained that they could not identify all the members of the group and asked whether he was willing to provide the names of members of the group. He declined to do so.
30. Jo Meredith emailed Chris Barrass on 18 August 2022 providing him with a summary of her investigation along with transcripts for the interviews that she had conducted (p399-409). This includes summaries of the comments made by all of the individuals whom she interviewed. It also contained excerpts from the respondent's Email and Internet Policy and Social Media Policy. Various sections of those policies were highlighted in yellow. She identified four possible disciplinary allegations, which were in more or less identical terms to the terms of the letters of invitation to the disciplinary hearing.

The invitation letters to the disciplinary hearing

31. Letters of invitation to disciplinary hearings were issued to Chris Schneider (p420-421) and Heinrich Grethe (p423-424) on 19 August 2020 and to Raffaele Nigro (p411-412) and Jarek Bak (p440-441) on 25 August 2020. All four letters of invitation contained allegations in identical terms : –

The purpose of the hearing is to consider the question of disciplinary action against you in light of the following allegations:

- Breach of the following policies - Email and Internet, and Social Media
- Displaying your agreement to unsubstantiated defamatory comments made against the Senior Management team
- Failure to report the unsubstantiated defamatory comments to a member of the management team
- Displaying agreement to comments which are likely to bring The Knightsbridge into disrepute
- Serious breach of trust and confidence

32. The letters all attached notes from investigation meetings, the email and internet use and social media policies and screenshots of the 'voiceunited199' correspondence. The letters advised them of their right to be accompanied and made clear one of the potential outcomes could be termination of employment.
33. All of the claimants attended the disciplinary hearings. None of them requested the presence of any additional witnesses, including Jo Meredith. No instruction was given to Tony Stedman at any point as to what the outcome of the disciplinary hearing should be. By the date of the disciplinary hearing, no protest of any kind had taken place, nor did any protest take place subsequently.

The disciplinary hearing for Chris Schneider

34. The disciplinary hearing for Chris Schneider took place on 21 August 2020 at 10am. It was conducted by Tony Stedman, who was accompanied by Ellie Hance. Chris Schneider attended alone. The meeting was recorded. Minutes of the meeting appear at pages 425-431. Tony Stedman questioned Chris Schneider regarding his involvement and whether he accepted the use of the words "I'm in" could be construed as meaning it was something that he absolutely wanted addressed. Chris Schneider agreed with this, but suggested it had to be seen in the context that he was trying to bury the situation and needed to be in so that he knew what was going on. Tony Stedman asked him whether he planned to report the group to management. Chris Schneider explained that he wanted the group deleted and "didn't want any of this coming out." He explained he believed he had achieved that objective as he was told by the person who created the group that it had been deleted. He was asked whether, with hindsight, this was the best strategy to adopt. He said at that point he did, but not with hindsight. He accepted what he had uncovered had potential to do a lot of damage to his employer. He suggested his actions were motivated by a desire to protect the business. He was asked whether he had breached the respondent's email, internet and social media policies. He explained that WhatsApp groups are not privy to any other person unless you are part of the group. He was asked whether he had displayed his agreement to unsubstantiated defamatory comments against various managers. He explained that he could not stop something unless he was involved. Tony Stedman commented upon the failure to report by stating he understood Chris Schneider felt by being in, he had the ability to shut the group down. The disciplinary hearing concluded at 10:26. Tony Stedman reconvened the meeting at 10:57, and advised Chris Schneider that he believed he had seriously breached the trust and confidence of the respondent. He accepted Chris Schneider's intention was to bury the allegations, but considered this was a serious misjudgement. He therefore explained Chris Schneider

was to be dismissed on the grounds of serious breach of trust and confidence without notice.

35. By letter dated 25 August 2020, Tony Stedman set out the reasons for Chris Schneider's dismissal as follows:

In expanding on my decision I explained that your admitted actions indicating support of the group may well have spurred the group on to action, rather than 'buried' the group as you stated was your intention. I have reviewed the Knightsbridge's internet and social media policies, which specifically mention WhatsApp involvement and the use of emojis and I conclude that you have breached...these policies in a way which could have led to damage to the reputation of The Knightsbridge.

In making my decision I took account of the fact that you are in a supervisory role and that a higher level of support for management was inherent in such a role. I also took account of your length of service and your career record with The Knightsbridge but concluded that, notwithstanding, the termination of your employment was a proportionate response to the misconduct.

The disciplinary hearing for Heinrich Grethe

36. The disciplinary hearing for Heinrich Grethe took place on 21 August 2020 at 2pm. This meeting was recorded. The notes of the meeting appear at pages 432-436. Tony Stedman conducted the hearing. He was accompanied by Ellie Hance. Heinrich Grethe was not accompanied. He was questioned as to his beliefs when he joined the group on 19 July. Heinrich Grethe recalled there was a group name and a photograph of Jon Pope. He explained he was intrigued and gave a thumbs up as he wanted to know what the group was about. He was asked when he realised the group was malicious in its intent. He indicated this was when he left, on 21 July. He explained he had nothing against the managers and only used a thumbs up. He referred to the website www.brussel.com, which suggested thumbs up can be used sarcastically. He also explained that if he had agreed with the group, he would not have left. He accepted that thumbs up could be taken to indicate agreement.
37. Heinrich Grethe was asked why he had not made his manager or anyone else aware of the group. He explained it was a closed group and the letter was sent confidentially. He described the remarks as "verbal diarrhoea in a closed group." He also explained that WhatsApp is encrypted from start to end, and that he was in a closed group. Therefore, what is said in the group is meant to stay in the group.
38. Heinrich Grethe was asked whether he wished to make any other comments. He stated that he believed management had lost trust in him, as they expected him to inform them about the group and therefore there was now a serious trust issue. The meeting ended at 2:33pm. Tony Stedman reconvened the meeting at 2:47pm to communicate his decision. He explained he thought it was reasonable for Heinrich Grethe's actions to indicate support for what was being proposed. He considered this was a serious error of judgement and that the company can no longer trust him going forward. He was therefore terminating his employment.
39. By letter dated 25 August 2020, Tony Stedman set out the reasons for Heinrich Grethe's dismissal as follows:

In expanding on my decision I explained that your admitted actions indicating support of the group could not be considered as passive and may well have spurred the group on to action. You stressed that in your view an emoji can be interpreted in different ways, depending on context and you showed me a definition of the 'thumbs up' emoji as 'general contentment'.

I have reviewed The Knightsbridge's internet and social media policies, which specifically mention WhatsApp involvement and the use of emojis and I conclude that you have breached these policies in a way which could have led to damage to the reputation of The Knightsbridge.

In making my decision I took account of the fact that, during the period of time you were in the voicesunited 199 group, you were in a supervisory role which demanded a higher level of responsibility to behave in a manner supportive of management and to report any perceived wrongdoing. I also took account of your length of service and your career record with The Knightsbridge but concluded that, notwithstanding, the termination of your employment was a proportionate response to the misconduct.

The disciplinary hearing for Jarek Bak

40. The disciplinary hearing for Jarek Bak took place on 1 September 2020 at 12pm. This meeting was recorded. The notes of the meeting appear at pages 448-455. Tony Stedman conducted the disciplinary hearing. He was accompanied by Ellie Hance. Jarek Bak was reminded of his right to be accompanied, but indicated he was happy to proceed. It was put to him that he had breached the email and internet and social media policies. Jarek Bak disagreed. He explained he was not on any social media and that he was with a friend at a party when he received the invite. He also disagreed that he had given his agreement to accept unsubstantiated defamatory comments on the same basis as the previous allegation. He also disagreed that he failed to report the comments to a member of the management team, as he muted the group after a few days and wasn't even at work. He explained that he did not go through the message as he was at a party and under the influence of alcohol. Finally, it was put to him that he had displayed agreement to comments likely to bring the company into disrepute. Again, he disagreed. He accepted that when he went through the allegations later, if they had been substantiated, they could constitute a breach of trust and confidence. He was questioned as to what he meant by using the words "I'm in" and explained he hadn't seen, and didn't know the purpose of the group.
41. He was questioned as to what happened in the group during the days that he had been a member. He indicated he could not speak to anyone about the group and that he disagreed with what the group was trying to achieve. He went on to explain that he accepted he should have reported it to his line manager, Arthur Brulinski, but did not want to pour petrol on the fire. He was asked whether he had any issues with management and indicated that he did not. He was also asked whether he knew who was at the forefront of this and indicated he was unsure. The meeting ended at 12:42pm. It reconvened at 1:30pm. Tony Stedman advised Jarek Bak that he had concluded that he had breached the company's email, internet and social media policies, and that he displayed his agreement to the comments, albeit he was not thinking straight because of his alcohol intake. He noted Jarek Bak had accepted that

he had failed to report the defamatory comments and that there was no doubt the comments were likely to bring the company into disrepute. He considered the allegations were a serious breach of trust and that his employer had a right to expect high levels of behaviour from a responsible supervisor, albeit he acknowledged his career record had been a good one over many years. He concluded his employment should terminate by reason of gross misconduct.

42. By letter dated 2 September 2020, Tony Stedman set out the reasons for Jarosław Bak's dismissal as follows:

I explained that your admitted actions indicating support of the group could not be construed as passive acknowledgement of the group's existence but rather as reckless behavior which could have brought the Knightsbridge in to disrepute. I have reviewed the Knightsbridge's internet and social media policies, which specifically mention WhatsApp involvement and the use of emojis and I conclude that you have breached these policies in a way which could have led to damage to the reputation of The Knightsbridge.

In making my decision I took account of the fact that you are in a supervisory role and that a higher level of support for management was inherent in such a role and that your failure to bring the intentions of this group to the attention of senior management was a serious mis judgment.

I also took account of your length of service and your career record with the Knightsbridge but concluded that, notwithstanding, the termination of your employment proportionate response to the misconduct.

The disciplinary hearing for Raffaele Nigro

43. The disciplinary hearing for Raffaele Nigro took place on 1 September 2020 at 2pm. This meeting was recorded. The notes of the meeting appear at pages 456-463. It was conducted by Tony Stedman, who was accompanied by Ellie Hance. Raffaele Nigro attended alone.
44. Tony Stedman asked Raffaele Nigro whether he accepted he had breached the respondent's policy by posting on social media. Raffaele Nigro replied that he thought this was private chatting, that it was not going anywhere and that he did not pay it much attention. He was asked whether he was suggesting that WhatsApp was a private means of communication and he suggested that it was, as it required an invitation for someone to join.
45. Tony Stedman also questioned Raffaele Nigro as to whether he was displaying agreement to unsubstantiated defamatory comments. Raffaele Nigro suggested that his finger up was just an acknowledgement of the group and that he did not pay much attention to what was being said as he assumed people were gossiping.
46. He was asked whether he accepted that he failed to report these comments to a senior manager. He accepted that he did not do so. He was asked whether he accepted that these comments could have brought the company into disrepute. He accepted they could have, if they had gone out, but he understood nothing had gone to the residents.

47. He was questioned as to how long he had been in the WhatsApp group. He suggested it was one week. It was put to him that he had indicated at the investigatory meeting that he had been a member for two weeks. He suggested he was unclear as to whether it was one or two weeks, but he was not participating. He suggested he gave a thumbs up to acknowledge the group. He understood the group had been created to bring about some fairness and a better environment. He accepted placing a thumbs up was a mistake and that he did not agree to the points being made, especially the comments regarding Jon Pope. He explained that he had been given no notice of the investigatory meeting. He was advised that there was no requirement to give him notice, as it was an investigatory meeting. He suggested he had no intention of harming anyone and that he had always been respectful. He was asked why he did not leave the group earlier and report this matter to his employer. He explained that he did not create the group and that his life was difficult at present. He also asked whether it be possible to speak with Chris Barrass, as he would like to remain on furlough and then to be made redundant. Tony Stedman advised him that this was not his decision.
48. The meeting concluded at 2:39pm. It resumed at 3:12pm. Tony Stedman explained that he had received a letter from Raffaele Nigro's pastor, Father William, and had taken account of his difficult circumstances. However, he was satisfied that he had breached the internet and social media policies, displayed his agreement to unsubstantiated defamatory comments and failed to report comments likely to bring the Knightsbridge into disrepute. He suggested his misconduct was a serious breach of trust and confidence and that his employment was to be terminated on the grounds of misconduct.
49. By letter dated 2 September 2020, Tony Stedman set out the reasons for Raffaele Nigro's dismissal as follows:
- I explained that your admitted actions indicating support of the group could not be construed as merely passive acknowledgement of the group's existence but rather as reckless behavior which could have brought the Knightsbridge in to disrepute. I have reviewed the Knightsbridge's internet and social media policies, which specifically mention WhatsApp involvement and the use of emojis and I conclude that you have breached these policies in a way which could have led to damage to the reputation of The Knightsbridge.
- You stated that you hoped that the group would be a force for good but this was a serious misjudgement given what you knew about their motivation and their plans. Failing to report this to a member of The Knightsbridge's management team, in your words because it was not worthy of reporting, was also a significant failure on your part.
- I also took account of your length of service and your career record with the Knightsbridge and the reference submitted by your pastor but concluded that, notwithstanding, the termination of your employment was a proportionate response to the misconduct.
50. Tony Stedman had no information to suggest that the contents of the WhatsApp group had been disclosed to others beyond the group and those to whom the respondent chose to disclose the information, when he made his decision. He considered the

claimants' actions breached the social media and use of instant messaging for work sections of the respondent's email and internet use policy. He did not consider the internet and email use policy and social media policy to be separate policies, but as the coming together of two things. He viewed the WhatsApp group as being an aspect of social media, albeit not specifically mentioned there, on the basis that it is an electronically based technology.

51. Tony Stedman considered the remarks also breached the email guidelines contained within the email and internet use policy, as this prohibited making comments which may be defamatory. He accepted a distinction can be drawn between Facebook and WhatsApp in that WhatsApp is encrypted and therefore closed to those beyond the group. However, he did not consider this entitled those participating in a WhatsApp group to say whatever they wished to say.
52. Tony Stedman considered that companies can benefit from whistleblowing, but not in the manner of the Voices United WhatsApp group. He considered the proposed protest was inconsistent with any proper grievance complaint. He accepted that if someone had concerns regarding the actions of a senior employee, such as the HR manager, it would have been appropriate to raise the issue with the board of directors. He considered the claimants' actions to be entirely inappropriate and "reckless beyond belief."
53. Tony Stedman considered trust and confidence had broken down in part because of the allegations resulting in dismissal. He considered the only appropriate result was dismissal, given the severity of the misconduct and the risk of repetition.

The appeal process involving Chris Schneider

54. Chris Schneider appealed against the decision to dismiss him by letter dated 1 September 2020 (p 464). The letter set out that he did not feel the investigation was carried out by an independent organisation and Tony Stedman had decided on, or had been instructed on the result, before the meeting started. He explained his actions had been designed to stop a situation which could have disastrous consequences, yet his explanation had been ignored. He outlined that reporting the matter would have been counterproductive as he believed the problem had been removed.
55. Peter Driver emailed Chris Schneider on 25 September 2020, inviting him to an appeal meeting, to be conducted by Zoom, on 2 October 2020 at 9:30am. He was advised of his right to be accompanied. He was also advised that Peter Driver, client services director of London Registrars Limited, the respondent's company secretary, would conduct the appeal, assisted by Joy Mazhambe from London Registrars Limited and Tim Howe, an independent HR advisor. He was also advised the meeting would be recorded.
56. The appeal hearing took place on 2 October 2020. It was conducted by Tim Howell, who was accompanied by Peter Driver and Joy Mazhambe. Chris Schneider chose not to be accompanied. He was asked, at the outset, to clarify his grounds of appeal. He stated that the investigation had not been sufficiently detailed, and that his employer should have gone back to those involved to get a better understanding of what was happening. He suggested Tony Stedman was not interested in his

explanations and that the outcome was predetermined. He felt that Chris Barras may have been of the impression that he created the group. He also set out that some members of staff did not feel particularly valued, but that he had planned to shut the group down. He explained that many members of staff were emotional following the death of another member of staff and wanted to get things off their chest. He suggested the proposed protest was not going to have the desired effect and would backfire.

57. Tim Howell questioned Chris Schneider regarding his grounds of appeal. Chris Schneider indicated he did not believe he had breached the internet and social media policy as the group was created to let off some steam. It was also by invitation only, so he did not believe that breached the policy. He accepted that it could look like he was displaying his agreement to unsubstantiated defamatory comments regarding management. However, he repeated that he had gone on to get the group shut down. He accepted that he had not reported the issue to management, but considered he had a valid reason for doing so. When he was questioned regarding the loss of trust and confidence by management as a result of his actions, he suggested he had shown management and residents nothing but loyalty during the 10 years of employment. He therefore considered dismissal was too harsh.
58. He was questioned as to when the group started and ended. He suggested it came into effect around 19 July and he had shut it down by 22 July. He was asked whether he would provide any further names of group members, but declined to do so, as he wished to protect them. He was questioned regarding the number of members and suggested around 30% of the workforce, consisting of 20 to 25 people, were involved. He was asked whether by joining, he may have encouraged others to join. He explained he had gone on to be a voice of reason and to have the group closed down. He explained that people were very emotional as John Pope was a well-liked manager member of staff.
59. Tim Howell questioned Chris Schneider as to why he was one of the first to give a thumbs up. He suggested he wanted the trust of the people who had been invited to join the group. He suggested he planned to leave employment on a voluntary basis next year. He explained that at the time, he did not consider joining would make matters worse.
60. Tim Howell suggested to Chris Schneider that he had a particular responsibility as a member of middle management. Chris Schneider explained that his position as an assistant security manager really only came into effect during the night and during the day, he was just a supervisor. Therefore, he did not see himself as a manager. He was asked who his manager was and why he did not go to him. He explained that he did not feel he could go to any of the managers.

The appeal process involving Jarek Bak

61. Jarek Bak appealed against the decision to dismiss him by letter dated 4 September 2020. He questioned the fairness of the disciplinary procedure and suggested he had been accused of a lack of loyalty based on a fragment of conversation from a private conversation. He also stated that he had been blamed for not informing management, but he did not participate in the conversation, and did not know all the contents.

62. Peter Driver emailed Jarek Bak on 25 September 2020, inviting him to an appeal meeting to be conducted by Zoom, on 2 October 2020 at 12:30pm. He was advised of his right to be accompanied. He was also advised that Peter Driver, client services director of London Registrars Limited, the respondent's company secretary, would conduct the appeal, assisted by Joy Mazhambe from London Registrars Limited and Tim Howe, an independent HR advisor. He was also advised the meeting would be recorded.
63. The appeal hearing took place on 2 October 2020. It was conducted by Tim Howell, who was accompanied by Peter Driver and Joy Mazhambe. Jarek Bak was not accompanied. Jarek Bak was questioned regarding his allegation that Jo Meredith and Tony Stedman were not independent. Jarek Bak outlined that he did not consider the investigation to be sufficiently detailed as there were many others involved, who were not interviewed. He explained his involvement in the group was minimal and that he was under the influence of alcohol and at a party with a friend when he received the invitation to join the group. He explained that he later left the group and that he had no problems with colleagues in management during his eight years of employment, which had not been taken into account. He therefore considered the penalty to be too harsh. He believed that Tony Stedman had been given an instruction to dismiss him. He denied making comments which were damaging to his employers or of displaying agreement to these comments. He did not dispute failing to report the contents of the message to his manager. He was questioned regarding the identity of the person who created the WhatsApp group, but declined to name him.

The appeal process involving Raffaele Nigro

64. Raffaele Nigro appealed against the decision to dismiss him by email dated 7 September 2020 (page 472-474). He explained that he was being summarily dismissed for passive involvement in a WhatsApp group chat in which his contribution was extremely limited. He also considered the penalty was too harsh, as he had 15 years' service and did not consider his conduct came close to gross misconduct.
65. Peter Driver emailed Raffaele Nigro on 25 September 2020, inviting him to an appeal meeting to be conducted by Zoom, on 2 October 2020 at 2pm. He was advised of his right to be accompanied. He was also advised that Peter Driver, client services director of London Registrars Limited, the respondent's company secretary, would conduct the appeal, assisted by Joy Mazhambe from London Registrars Limited and Tim Howe, an independent HR advisor. He was also advised the meeting would be recorded.
66. Raffaele Nigro attended the appeal hearing on 2 October 2020. He was accompanied by Fernando Cembalo, a fellow employee. Peter Driver referred to a long email that Raffaele Nigro had prepared for the appeal hearing. Raffaele Nigro refused to answer a number of questions asked of him. He complained of not having been given the screenshots of the WhatsApp messages. He was told these could be provided to him, and a further hearing fixed. He declined this offer.

Further investigation undertaken by Peter Driver

67. Following the conclusion of the appeals, Peter Driver emailed Tony Stedman with additional questions. Tony Stedman replied on 17 November 2020.

Peter Driver's report to Chris Barras

68. Peter Driver prepared a very detailed report for Chris Barras dated November 2020. This outlined the background to the four appeals. It explained that those who had appealed were interviewed, as were Chris Barras and Tony Stedman. It outlined the documents that had been considered. It suggested the issue to be considered was whether, in light of the individual's actions, a reasonable employer would have continued with employment. It then dealt with the issues raised by each individual and the conclusions reached.
69. The report listed 10 issues which had been considered as part of the appeal by Chris Schneider. These were as follows: –
- a. CS claims as grounds for appeal that the investigation was not carried out by an independent organisation or person.
 - b. In his statement CS says that Tony Stedman's decision was pre-determined.
 - c. CS stated that his actions in connection with voicesunited199 (the 'Group') was to stop a situation which could have had disastrous consequences for all within The Knightsbridge and it would have been counterproductive for him to have reported the Group to the management while he was trying to shut it down. In support of his claim, he supplied me with a copy of posts to the group by email in which he states 'I think the group has been compromised, CB knows what was going to be done and by who'
 - d. CS challenged the investigation process.
 - e. That CB believed him to be the creator of the group.
 - f. CS confirmed it was his belief that there were good reasons why the group was created and he supported those reasons and therefore that justifies why the group came into being.
 - g. CS accepted that the email, internet use and social media policies existed and he knew about them but he did not believe that he had materially breached them in any way.
 - h. Displaying agreement to unsubstantiated defamatory statements made against the senior management team.
 - i. Displaying agreement to comments which are likely to bring the Knightsbridge into disrepute
 - j. Trust and confidence
70. The report commented upon each of the issues raised and explained why they had been rejected.
71. The report listed 6 issues which had been considered as part of the appeal by Jarek Bak. These were as follows: -
- a. He believed the process was biased as he was interviewed by people already known to KRMC, in particular Tony Stedman who he said has been used in other dismissal cases
 - b. Failure by the Company to conduct a proper investigation as to the activities of the group and individuals in group instead of just relying on Screenshots
 - c. Lack of loyalty as the basis of the dismissal was based on screenshots

from private messages to which he did not participate and length of service was not taken into account.

- d. JB also alleges that his dismissal is unjustified because his two posts to the group (ME2 and the thumbs up emoji) were private.
 - e. JB alleges that his length of service with the Company was not taken into account. Tony Stedman who conducted the disciplinary hearing on 1 September 2020 confirmed in his letter to JB of 2 September 2020 that when coming to his decision he took into account his length of service and career record.
 - f. JB believed that the decision to dismiss was premeditated and Tony Stedman did not give him a chance to state his case and position.
72. The report listed 9 issues which had been considered as part of the appeal by Raffaele Nigro. It also referred to Raffaele Nigro's unwillingness to answer questions and his request that his appeal should be based solely on an email statement submitted shortly before the appeal. The 9 issues were as follows: -
- a. The investigation process was unfair.
 - b. RN was not given screenshots of the messages.
 - c. The authenticity of the messages can be called into question.
 - d. There was a failure to consider his length of service and exemplary conduct.
 - e. Dismissal was premeditated.
 - f. The messages were from a private chat and did not breach the relevant policies.
 - g. There was no objective evaluation of the circumstances.
 - h. The real reason for dismissal was to save costs.
 - i. RN was an easy target as he is a mellow person.
73. The report commented upon each of the issues raised and explained why they had been rejected.

The appeal decisions

74. Following receipt of the report from Peter Driver, Chris Barras spoke with various board members individually. No documentary evidence has been produced regarding any of those discussions. Chris Barras then issued three letters dated 3 December 2020 on behalf of the Board of Directors to Chris Schneider (page 550 - 554, Jarek Bak (page 556 – 560) and Raffaele Nigro (page 562 – 566) advising them that their appeals had been refused.

The appeal outcome for Chris Schneider

75. The letter of outcome to Chris Schneider noted that he had been aware that Abdu Khalifa was the creator of the WhatsApp group and involved in disciplinary proceedings. He should therefore have reported the group to management. It was also considered that Chris Schneider was fully aware of the risks of being involved in the group and his participation was important in encouraging others to become involved. Although he claimed his intention was to "bury it," as an assistant security manager, he should have reported the proposal to stage a three-day protest as a security threat. It was not accepted that he intended to "bury it," and that he was considered to be a willing participant in a group which intended to defame the three most senior employed

managers. It was considered his actions breached the Security Industry Authority Code of Conduct, and that he had not reacted appropriately to the disclosure of the WhatsApp group by the whistleblower. It was not accepted the disciplinary process was unfair. It was noted there had been no expression of remorse and a refusal to provide more information. The fact that he began early conciliation before notification of the outcome of the appeal suggested he was not interested in being reinstated. In these circumstances, it was no longer reasonable to continue to employ him.

The appeal outcome for Jarek Bak

76. The letter of outcome to Jarek Bak noted he claimed to have been unfairly treated during the interviews. However, this was not accepted, nor that the investigation was conducted improperly. It was considered he had actively participated in the WhatsApp group and that the explanation provided by him that he was intoxicated was not accepted. In addition, he had the opportunity to report the group to management in the following days and did not do so. It was not accepted that this message was private, as the WhatsApp group comprised of 20 employees. Any of these participants could have re-posted the messages or leaked them online. It was considered he was an active participant in the group that aimed to defame the three most senior employed managers. It was considered his actions breached the Security Industry Authority Code of Conduct. It was not accepted that dismissal was a foregone conclusion. It was noted there had been no expression of remorse and a refusal to provide more information. The fact that he began early conciliation before notification of the outcome of the appeal suggested he was not interested in being reinstated. In these circumstances, it was no longer reasonable to continue to employ him.

The appeal outcome for Raffaele Nigro

77. The letter of outcome to Raffaele Nigro noted he had suggested his involvement in the WhatsApp group was passive and extremely limited. However, he had posted a thumbs up emoji and agreed that he had spoken to colleagues to obtain more information. It was also noted that he failed to engage with Peter Driver at the appeal, preferring to rely on a written submission. His allegation that the messages may have been fabricated was rejected. Although he had complained of a lack of notice of investigatory meeting, this was not considered to have resulted in any unfairness. It was not accepted that this message was private, as the WhatsApp group comprised of 20 employees and any of these participants could have re-posted the messages or leaked them online. He claimed to never have been reprimanded, but had in fact received a final written warning in August 2018. It was considered he was an active participant in this group and breached the email and internet policy and social media policy. It was not accepted his dismissal was premeditated. It was noted there had been little expression of remorse and a refusal to provide more information. The fact that he began early conciliation before notification of the outcome of the appeal suggested he was not interested in being reinstated. In these circumstances, it was no longer reasonable to continue to employ him.

The information that came to light after the dismissal.

78. In the course of these proceedings, two sets of printed copies of the WhatsApp messages extending beyond 19 July 2020 were produced. This disclosed two almost

identical letters had been produced by the group administrator, which set out in more detail the concerns of staff and requested the suspension and investigation of Chris Barras, Elena Kurcheika and Andrew Meads. It suggested action would be taken by way of protest and strike, if a resolution was not achieved.

79. Chris Schneider took an active part in the discussion. He pointed to an error in the date of the first letter and suggested that were legal issues for the letter not having been sent. He responded to the second letter with a thumbs up emoji and expressed concerns regarding their positions becoming untenable, if they were unsuccessful in their request. Raffaele Nigro also responded with a thumbs up emoji to the second letter.

The law

80. The right not to be unfairly dismissed is set out in section 94 of the Employment Rights Act 1996 (ERA). The Tribunal must consider whether the respondent is able to establish a fair reason for that dismissal (as defined by section 98 of the ERA). The fairness or otherwise of any dismissal will depend upon whether in the circumstances (including the size and administrative resources of the employer) the employer acted reasonably in treating that reason as sufficient for dismissal. This is to be determined in accordance with equity and the substantial merits of the case.
81. I have referred to **Burchell** above. In determining reasonableness, I have to consider “the way in which a reasonable employer in those circumstances, in that line of business, would have behaved” (**NC Watling and Co Ltd v Richardson [1978] ICR 1049**). I also recognise that I must not substitute my view for that of the employer and that my proper function is to determine whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. (**Iceland Frozen Foods Ltd v Jones [1982] IRLR 439** and **Foley v Post Office and HSBC Bank Plc v Madden [2000] ICR 1283 at 1292**).
82. I recognise that in considering the policies relied upon by the respondent, I should not interpret them as I would a statute, with only one possible meaning. **Thompson v Informatica Software Ltd [2021] UKEAT 2020-000463**.

Conclusions

What was the reason for each Claimants’ dismissal under s.98 ERA?

83. It is for the respondent to show the reason for dismissal. The claimants contend the reason for dismissal was that the managers were upset by the comments made and/or emojis used. It is the respondent’s position the reasons for dismissal of all four claimants was conduct, failing which some other substantial reason.
84. The claimants’ position is not substantially different from the position taken by the respondent. All parties accept that the respondent dismissed the claimants because of the comments made and/or the emojis used. I accept the decision to initiate a disciplinary process was no doubt influenced by the fact that the senior managers, including Chris Barras and Elena Kurcheika, were upset by the comments made. However, I do not consider this properly reflects what was in the mind of the dismissing officer, when he reached his decision. By the point of dismissal, specific applications had been made against the claimants. I am satisfied that the reason or principal reason

for dismissal for each of the claimants is as set out in the letters of dismissal, namely conduct.

85. Having established a potentially fair reason for dismissal, I shall now consider the three-stage test outlined in **British Home Stores Ltd v Burchell [1980] ICR 303**.

Did the respondent genuinely believe the claimants were guilty of misconduct?

86. It is submitted on behalf of the claimants that the respondent did not have a genuine belief that the claimants were in breach of the relevant policies. Much of the criticisms relate to a potential misapplication of the policies. It is submitted that the respondent was clearly aware of the difference between instant messaging and social media, and therefore it was disingenuous of them to suggest WhatsApp was covered by the policies.

87. I am not satisfied those dealing with the disciplinary allegations deliberately misapplied their own policies. I accept that criticisms can be made of the conclusions they reached, which I will consider later in this judgment. However, I am satisfied those dealing with the disciplinary allegations genuinely believed that each of the claimants was guilty of the four allegations made against them. I shall therefore consider whether they had reasonable grounds for that belief and whether the investigation was reasonable in the circumstances of the case.

Did the respondent have reasonable grounds to sustain that belief?

88. In relation to the breach of policies, it is the claimants' position that it was not reasonable for Jo Meredith or Tony Stedman to misread and/or misapplied the respondent's policies and that neither of them had considered the distinct nature of WhatsApp.

89. It is the respondent's position that it was open to the respondent to interpret the policies as they did. They also refer to the explanation offered by Tony Stedman in cross-examination, where he outlined why he believed WhatsApp formed part of social media, as social media is electronic-based technology that allows people to share views through smartphones. It is also the respondent's position that there were reasonable grounds for the belief that the policies were breached. I accept the respondent's position that I should not treat the policies as a statute, but should consider whether it was open to the respondent to interpret the policies as they did.

90. I am not satisfied there were reasonable grounds for the belief that the policies had been breached. In the letters of dismissal, the explanation Tony Stedman offers for breach of both policies is that he "reviewed the Knightsbridge's internet and social media policies, which specifically mention WhatsApp involvement and the use of emojis and I conclude that you have breached these policies...".

91. The difficulty with the explanations put forward in the letters of dismissal is that the only reference to the use of WhatsApp is in the email and internet use policy, where it appears twice under the heading "Use of instant messaging for work", with a warning not to use this for exchanging sensitive information or sending confidential documents. The claimants were not using instant messaging for work, when this exchange took

place. Similarly, the only reference to emojis in either policy is a suggestion that they be used sparingly, again under “Use of instant messaging for work”. I do not accept that as WhatsApp is an electronic-based technology, it forms part of social media, as this is not consistent with the respondent’s own policies, which draws a distinction between social media and WhatsApp.

92. Both Jo Meredith and Tony Stedman took the view that a WhatsApp group created by one employee who then issued invitations to other employees, should be treated in the same manner as a social media post, as both were public. However, this ignored the fact that the Respondent’s own policies drew a distinction between social media and instant messaging. In addition, unlike social media posts, for the WhatsApp messages to become public, someone would have to take steps to disclose this information. The evidence before me is that the messages were only disclosed to the Respondent. In cross-examination, Tony Stedman also accepted a distinction can be drawn between Facebook and WhatsApp in that WhatsApp is encrypted and therefore closed to those beyond the group.
93. In relation to the agreement with the defamatory comments, the claimants’ written submissions state that a single thumbs up emoji cannot be said to be a wholesale agreement with a detailed grievance. It is also submitted that whether the allegations were true was not something the claimants were in a position to know.
94. I am not satisfied there were reasonable grounds for the belief that the claimants had displayed their agreement to unsubstantiated defamatory comments. All four claimants were asked by the person who created the group to indicate whether they agreed to a letter being sent to the KRMC directors to start an investigation into the areas of concern detailed in the email, failing which a protest of some kind would take place. However, Jo Meredith proceeded on the basis that the thumbs up emoji was sufficient to indicate complete agreement with everything in the detailed message from the group administrator and that what was contained in the messages was both unsubstantiated and defamatory. When questioned, the claimants distanced themselves from the allegations of bullying and harassment. In addition, the claimants were unlikely to be in a position to know whether the allegations were unsubstantiated or defamatory, as they originated from a third party whose identity was not known to at least some of them.
95. In relation to the failure to report, it is submitted on behalf of the claimants that the letters of dismissal do not specify which policy imposes an obligation to report, or how the obligation arose. It is also submitted that the social media policy does not cover WhatsApp and that it was unreasonable to expect the claimants to report content they did not know was either defamatory or untrue. Finally, the claimants were in relatively junior positions, and therefore under no obligation to report grievances from other employees.
96. The social media policy made clear that employees should contact head of HR, if they see content on social media which disparages or reflects poorly on the Knightsbridge. However, at no point does the respondent’s social media policy contain any reference to WhatsApp messages and I consider WhatsApp messages cannot be considered to be social media. There were therefore no reasonable grounds for asserting the claimants were under a duty to report.

At the time the belief was formed, had as much investigation as was reasonable in the circumstances of the case been carried out?

97. The claimants' submissions raise a number of points as to the adequacy of the investigation generally. In particular, they raise the failure to allow the claimants the opportunity to test the evidence of Jo Meredith by questioning her at the disciplinary. Chris Schneider suggests a further investigatory hearing should have been heard. It is submitted that Jo Meredith's investigation was perfunctory and tainted by the personal feelings of Chris Barras and Elena Kurcheika. It involved a misreading of the policies and failed to distinguish between the actions of the group administrator and others. The claimants all made clear to Jo Meredith that they did not share the sentiment expressed in the long message and could not give specific examples of mismanagement. Perversely, this led her to conclude the claimants were guilty.
98. It is submitted that Jo Meredith could have interviewed other participants in the group and made further enquiries as to how WhatsApp groups work. It is also submitted that Tony Stedman did not have an open mind and was unwilling to consider any evidence in the claimants' favour, as evidenced by the speed at which he reached his decisions. Finally, Tony Stedman failed to consider the minimal nature of the claimants' contributions to the WhatsApp group.
99. The claimants' submissions also raise a number of issues under the heading procedural unfairness. It is submitted that the respondent cannot be free to dismiss, simply because of the wealth of the client group involved. If the respondent wishes to rely on special disciplinary rules, such as an obligation to report the misconduct of others, this must be made clear. If it were found the social media policy did apply to this situation, the policy failed to make clear that not reporting was misconduct, let alone gross misconduct. The respondent also appeared to rely on an implied duty to report, which they were not entitled to do. If the claimants were to be dismissed for what were in effect first offences, the disciplinary policy should have made this clear. Although the social media policy suggested that serious breaches may be regarded as gross misconduct, there was no specification to what a serious breach was. Finally, it is submitted that the claimants were not provided with screenshots or transcripts of the conversation during the disciplinary and investigation meetings.
100. It is the respondent's position that Jo Meredith carried out an extremely thorough investigation, which involved interviewing all the claimants and others involved. What hampered her investigation was the unwillingness of the claimants to provide additional information, as they did not wish to reveal the true extent of their involvement. In addition, the thumbs up emoji can mean only one thing, namely agreement. Finally, it was plainly open to Jo Meredith to conclude the claimants were under a duty to report, both because of the terms of the policies and the roles that they held.
101. I am not satisfied a reasonable investigation required the attendance of the investigating officer, Jo Meredith, at the disciplinary hearings. The claimants' solicitor accepted in her submissions that there is no general right to question the investigating officer at the disciplinary hearing. The ACAS code of practice imposes no such obligation. There is no specification as to what difference would have been made by

the presence of Jo Meredith at the disciplinary hearings. The allegations were that the claimants had failed to act in accordance with policies operated by the respondent. The policies had been provided to the claimants, along with transcripts of the investigatory interviews. I do not consider the presence of Jo Meredith at the disciplinary hearing would have been of particular assistance. I am also not satisfied the investigation by June Meredith was perfunctory or tainted by the views of others. She produced a detailed report.

102. I consider a reasonable investigation of the alleged breach of policies would have involved examining the relevant policies carefully and identifying exactly which policies applied, what parts of the policies may have been breached and in what way, and setting these things out in the letters of invitation to the disciplinary hearings. The report produced by Jo Meredith contained extracts from both policies and highlighted various aspects of the policies in yellow. However, I am not satisfied that this constituted fair notice of the manner in which the policies were breached. A reasonable investigation would also have involved giving careful consideration to the explanations offered by each of the claimants before deciding whether to uphold the individual allegations of breach of the policies at the stage of the disciplinary hearing. I am not satisfied that this happened.

Did the appeal cure any defects?

103. I accept that I have to have regard to the whole process to determine reasonableness *Taylor v OCS Group Limited [2006] ICR 1602*. I also accept that there are no limitations on the nature and extent of deficiencies that can be cured by appeal *Khan v Stripestar Ltd UKEAT/0022/1*. However, I am not satisfied the appeal process cured the deficiencies I have identified above. The report by Peter Driver indicates he took the view the WhatsApp messages were covered by the social media policy and that the email and Internet use policy covered private WhatsApp messages between members of staff. I am not satisfied he was entitled to take this view, for the reasons I have outlined above. He also failed to consider properly whether the use of the thumbs up emoji indicated agreement with only some aspects of message and indeed went as far as to say "... in my view there is only one interpretation namely that CS agreed with the defamatory comments in the text."

104. I also consider it is of some significance that Chris Barrass chose not to become involved in the original disciplinary process, as the allegations had been made against him, yet was the decision maker or at the very least had a significant influence on the appeal. Although the letters of outcome from the appeal refer to the Board of Directors making the decision, there are no minutes or other documents before me, indicating the involvement of any directors other than Chris Barrass. Chris Barrass clearly wrote and signed the appeal outcome letter and accepted that the extent of involvement of the other board members was that he spoke to various other board members individually.

105. Chris Barrass also relies on a number of issues in the appeal outcome letters which did not form part of the original disciplinary proceedings, such as breach of the Security Industry Authority Code of Conduct and the decision to begin early conciliation, as a basis for refusing the appeals.

Was dismissal within the range of reasonable responses?

106. The claimants' solicitor has advanced a number of grounds on which dismissal on the grounds of misconduct was not within the range of reasonable responses.
- a. She has pointed to the length of service of the claimants that she represents, namely 15 years for Raffaele Negro, seven years for Jarek Bak and six years for Heimlich Grethe, albeit with a six month break in service. Chris Schneider had 10 years' service.
 - b. All had unblemished records, with the exception of Raffaele Negro, whose single warning had expired in August 2019.
 - c. Hans Grethe had been commended by his employer and was in receipt of the respondent's Gold Star award.
 - d. She pointed to the very limited extent of their participation in the alleged gross misconduct.
 - e. She also relied upon the inapplicability of the policies and the absence of any training on the applicability of those policies.
 - f. She suggested no mitigating factors had been taken into account and referred to **Department for Work and Pensions v Coulson (UKEAT/0572/12/LA)** as authority for the proposition that mitigation must be taken into account.
 - g. She submitted that the absence of remorse should not be relied upon where the claimants genuinely did not believe they had done anything wrong.
 - h. She has relied upon the fact that Jarek Bak and Heinrich Grethe were allowed to continue to work for two weeks after the allegations came to light and caused no difficulties during this time.
107. The respondent has advanced a number of arguments as to why dismissal was within the band of reasonable responses.
- a. In determining whether dismissal was within the range of reasonable responses, I have to consider the size and unique nature of the respondent's business.
 - b. The explanations provided by the claimants for their conduct are not credible.
 - c. The claimants showed no remorse.
 - d. The claimants had been disloyal.
 - e. There was a risk of repetition.
 - f. There was potential damage to the respondent's reputation.
 - g. Account had been taken of the claimants' length of service.
 - h. There is no evidence the appeal outcome was predetermined.
108. I accept in deciding whether dismissal was within the range of reasonable responses, I have to take account of the particular circumstances of the case. The respondent is a relatively small employer. I accept that three of the four claimants were involved in security, which required their employer to trust them. Similar considerations apply to the role of concierge, as they have regular contact with residents. Jarek Bak accepted at the investigator interview that he was a junior manager. Chris Schneider was an assistant security manager, with responsibility for four members of staff. Given the wealth of a number of the residents, maintaining security for the residents can legitimately be viewed as an extremely important consideration. It is also very important that matters are dealt with discreetly, as this is clearly what the residents want and expect.

109. In determining whether dismissal was within the range of reasonable responses, I have also taken account of the fact that the respondent has suggested there was a breakdown of trust and confidence. However, I note that Jarek Bak and Heinrich Grethe were allowed to continue to work for almost three weeks after the allegations came to light and caused no difficulties during this time.
110. As I have indicated above, I do not consider a reasonable employer would have taken the view that the policies on which the respondent sought to rely did in fact apply, as the messages had not been posted on social media and the use of instant messaging for work section of the email and internet use policy, which did refer to WhatsApp, did not apply as the messages were private exchanges between various employees. If I am wrong that the respondent did not have reasonable grounds for concluding the claimants were guilty of the alleged misconduct after a reasonable investigation, I also consider dismissal was outwith the band of reasonable responses.
111. I consider a reasonable employer would have taken into consideration the particular background to this case, which was that one member of staff had recently died. This resulted in some people reacting emotionally to his death. Some members of staff were unhappy regarding various aspects of the working environment, for example Chris Schneider and Heinrich Grethe's concerns regarding changes arising from lockdown and Raffaele Nigro's concerns regarding being placed on furlough.
112. I also consider a reasonable employer would have taken into consideration all the circumstances of this case, including when and how the messages were sent, exactly what each member of staff was being asked to do, the extent of their involvement and whether any damage was done to the employer's business. Each of the claimants had responded to a message on their phone which they received on a Sunday evening when some of them were away from work, with the comment "I'm in" or a thumbs up emoji, in response to a message from another member of staff who complained about the actions of management and suggested that a letter of grievance be submitted to the board of directors.
113. What was being sought in the message was an agreement to approach the board of directors with a view to requesting the suspension and investigation of three senior managers. Tony Steadman accepted that if an employee had concerns regarding a senior member of staff, such as the HR manager, it would have been appropriate to raise this issue with the board of directors. I consider a reasonable employer would have taken the view that employees should be encouraged to raise concerns, and have them addressed, without fear of retribution.
114. I accept the messages also proposed that an unspecified three-day protest would take place 7 days after the date of the letter, if no investigation and suspension taken place. However, the message also made clear that the protest would only take place if the board of directors failed to respond to the grievance in the manner requested. No protest took place.
115. A reasonable employer would also have taken into account that the only people who appear to be aware of the existence of the messages were various members of staff, the employer and those requested by the employer to investigate matters. There

was therefore no dissemination of this information or actual damage to the employer's reputation.

116. Even if I were satisfied that a reasonable employer would have taken the view that the claimants had acted inappropriately by responding with thumbs up emojis, it is difficult to imagine a more limited form of action or participation than that undertaken by the claimants. Therefore, any employer acting reasonably would regard such misconduct as being a one-off action meriting a sanction other than dismissal, particularly when their lengths of service, the absence of any previous or at least any current disciplinary record and the various other factors that I have identified above were taken into account.

A serious breach of trust and confidence

117. The respondent has advanced an alternative potentially fair reason for dismissal, namely some other substantial reason. I have accepted the reason, or at least the principal reason, for dismissal was misconduct. I therefore, I do not consider it is appropriate to consider this.

118. In the circumstances described above, I am satisfied all four claimants were unfairly dismissed.

Failure to follow the ACAS code

119. The claimants' solicitor has sought an increase in the award of up to 25%, on account of two specific failures to comply with ACAS code. Firstly, the failure to give the claimants an opportunity to question the investigating officer, in breach of paragraph 12. Secondly, predetermining the outcome of the disciplinary process, in breach of paragraph 23. I am not satisfied the failure of Jo Meredith to attend the disciplinary hearing breaches paragraph 12, particularly when none of the claimants specifically asked that she attend. I am also not satisfied that the outcome of the proceedings was predetermined.

120. It is the Respondent's position that any compensation should be reduced by 25% in the case of Heinrich Grethe, because of his failure to appeal, and by 15% for Raffaele Nigro, due to the limited extent to which engaged in the appeal.

121. Heinrich Grethe indicated he did not appeal as he had no faith in process, considering the outcome to be a "done deal." It is clear that the ACAS code of practice did apply and Heinrich Grethe failed to comply by not appealing. I consider it was unreasonable not to appeal, as his colleagues all appealed and he could not have known what the outcome of the appeal would be. However, given the manner in which the respondents dealt with the earlier parts of the disciplinary process and in particular their unwillingness to carefully consider the explanations put forward, I can understand why Heinrich Grethe felt he may not receive a fair appeal. In these circumstances I consider a reduction of 10% on any award is appropriate.

122. Raffaele Nigro attended the appeal, but chose to limit his participation to a prepared statement, which he submitted in advance of the appeal. The respondent's submissions describe him as being obstructive throughout. There is no specification

as to the manner in which the code has been breached. I am not satisfied his limited participation breaches the ACAS code of practice.

Contributory conduct

123. In assessing contributory conduct, I have considered the factors outlined in **Nelson v BBC (No.2) [1980] ICR 110**. I accept blameworthy conduct can include being dishonest or casting ill-founded aspersions of dishonesty on the employer (**Nelson v Clapham and Clapham t/a Claphams Solicitors UKEATS/0037/11**). It can also include refusing to reveal the names of fellow employees involved in misconduct (**Simpson v British Steel Corporation EAT 594/83**). I accept the submission by the respondent that if I find the claimants engaged in culpable blameworthy conduct that contributed to dismissal, I must reduce the compensatory award (**Optikinetis Ltd v Whooley [1999] ICR 980**).
124. The respondent's counsel has sought significant reductions in the compensatory award on a number of grounds. Firstly, that the claimant's participation in the WhatsApp group was obviously blameworthy conduct. Secondly, that they provided no exculpatory evidence during the investigation and disciplinary meetings. Thirdly, that they withheld the names of other participants. Fourthly, that they alleged that the outcome of the disciplinary process had been predetermined. Finally, that Jarek Bak and Raffaele Nigro alleged that elements of the charges against them had been fabricated.
125. I am not satisfied the claimants' very limited participation in the WhatsApp group was obviously blameworthy conduct, nor do I accept that they provided no exculpatory evidence during the disciplinary process. I accept they failed to provide the names of other participants, but I do not consider they were under any obligation to do so. I accept Raffaele Nigro suggested the allegations may have been fabricated, to provide a pretext for dismissal, as an alternative to redundancy. All of the claimants also suggested that the outcome of the proceedings was predetermined. However, I consider these were issues they were entitled to raise and do not regard them as culpable or blameworthy.
126. It has also been suggested that any basic award should be reduced for the same reasons and for three additional reasons, namely that the claimants were dishonest as to their involvement, had created excuses which did not reflect the real reasons for their participation in the WhatsApp group and that the fuller WhatsApp group threads show their involvement was more extensive than the respondent was aware of.
127. I am unable to hold that the claims were dishonest or had created excuses which did not reflect the real reasons for the participation. I accept they sought to minimise their involvement, as they faced the possibility of dismissal. The additional threads do show further involvement on their part. However, I do not accept that that further involvement shows conduct that justifies a reduction in the basic award.

Polkey

128. In assessing any Polkey reduction, I have considered the guidance in **Software 2000 Ltd v Andrews [2007] ICR 825**. I have identified a number of procedural failings, including the failure to specify exactly what parts of the procedures had been breached. I am also satisfied the dismissals were substantively unfair. In these circumstances, I do not consider there is any likelihood that a fair procedure would have resulted in a fair dismissal.
129. Chris Schneider accepted that he intended to leave the respondent's employment early to mid-2021, irrespective of whether he had another job. I therefore consider any compensatory award for Chris Schneider up should not extend beyond 1 April 2021.
130. I accept Raffaele Nigro had asked the respondent to make him redundant. However, it is clear the respondent had no intention of making staff redundant. I am not satisfied that Raffaele Nigro would have left the respondent's employment, had no offer of redundancy been forthcoming.
131. I accept Heinrich Greta advised Tony Steadman during the disciplinary interview that management had lost trust in him as a security officer. However, he made clear that he believed management had lost trust in him as he had failed to inform them of the existence of, or what had been said in the WhatsApp group, which he was unwilling to do. I do not consider he was under any obligation to do so.

Tribunal Judge McGrade

Date 12 April 2022

JUDGEMENT SENT TO THE PARTIES ON: 12/04/2022