EMPLOYMENT TRIBUNALS

Claimant: Miss A Brooke

Respondent: National Crime Agency

Heard at: Leeds Employment Tribunal
On: 6 and 7 December 2021, 28 January 2022 and 8 April 2022

Before: Employment Judge Dobbie (sitting alone by video)

Representation
Claimant: In person
Respondent: Mr Ryan (Counsel)

JUDGMENT and reasons having been delivered orally on 8 April 2022, and judgment having been sent to the parties on 11 April 2022, and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, on 13 April 2022, the following reasons are provided:

REASONS

Parties and claims

1. The Respondent, the National Crime Agency ("NCA") is a non-ministerial government department, established in 2013, which replaced the Serious Organised Crime Agency, taking over its duties as well as undertaking additional duties under the Crime and Courts Act 2013. The NCA started operating on 7 October 2013.

2. The Claimant was engaged by the Respondent from 13 March 2017, latterly as a Grade 5 Analyst on Operation Stovewood, a law enforcement investigation into non-familial child sexual exploitation and abuse in UK. She was summarily dismissed on 4 September 2020 for alleged gross misconduct.

3. By a claim form presented to the Tribunal on 25 November 2020, the Claimant brought a claim for unfair dismissal, annual leave and other payments. In a case management hearing on 20 September 2021, it was confirmed that the Claimant only pursued a claim for unfair dismissal and the other claims were dismissed upon withdrawal. The Claimant applied to

amend her claim to include a claim of automatic unfair dismissal (whistleblowing dismissal), but this was refused.

Procedural History

4. The full merits hearing was listed for three days, scheduled for 6-8 December 2021, but when it came before me, it had been reduced to two days.

5. At the outset of the hearing, the Respondent applied for Orders under Rule 50, which were dealt with and are the subject of separate Orders and Reasons. These applications took up some of the (already reduced) time left for hearing the substantive case. I have already reminded the Respondent of the correct way to bring applications under Rule 50 (both orally and in my Reasons).

6. There was a bundle of evidence comprising 809 pages. In addition, the Claimant had produced her own bundle index which included an additional 16 documents (sent as separate electronic attachments). There were six witness statements, but one witness did not attend to give live evidence.

7. I heard live evidence from Mr Long (the disciplinary officer) and Mr Smart (the appeal officer) for the Respondent and from Mr Sayer, Mr Hatton and Claimant for the Claimant. Judgment was reserved due to the lack of time. The matter was listed for 28 January 2022 to hear submissions on the parties' applications for further orders under Rule 50 and deliver judgment on liability. By this time, both the Respondent and the Claimant sought permanent orders under Rule 50 in respect of various individuals and the BBC and Rotherham Advertiser opposed such applications.

8. On 28 January 2022, the majority of the day was occupied by oral submissions from the parties, but predominantly from Counsel for the BBC. As a result, the matter had to be further listed for another day (on 8 April 2022) to deliver judgment on liability and decide the applications.

9. This procedural history is far from ideal. At the point at which the Respondent decided to make applications under Rule 50 (which should have been raised when the ET3 was presented or at the case management preliminary hearing at the latest) the Respondent should have raised this and ensured adequate time was factored in to allow for all matters to be dealt with in one listing. As a result of raising applications late, and the lengthy submissions from the press on 28 January 2022, the matter was delayed and further delayed to the detriment of all parties, which meant that the Claimant had to wait for the decision until 8 April 2022 when it could have been delivered orally in December 2021 if matters had been dealt with timeously.

Findings of Fact

10. The Claimant's employment started on 13 March 2017 [224] and was uneventful (insofar as the facts of the case are concerned) until 28 October 2019. On 28 October 2019, the Claimant expressed concerns that the trainer engaged to deliver certain cultural awareness training events (one of which she was due to attend the next day and which was to be held on site at NCA premises) was closely associated with a suspect in

Operation Stovewood. I shall refer to the trainer as "X" and the known suspect and associate as "XB". The Claimant also believed that X was a person of interest in Operation Stovewood.

11. The Claimant raised her concerns about X with senior management and was told there had been a risk assessment and it was deemed to be appropriate. However, she doubted the thoroughness of the risk assessment and was not reassured. She did not want to attend the training but was told she was required to.

Training event 29 October 2019

12. At the training on 29 October 2019, certain slides were used and exercises / problem questions were carried out or discussed [235-247]. The Claimant says she felt very uncomfortable due to her knowledge of X's associations / involvement and this made her very nervous and uncomfortable during the event.

13. During the event, X encouraged people to participate saying it was a "safe space" to discuss issues relevant to the session (which was about cultural awareness) but what was specifically meant by "safe space" was not clarified.

14. During the session, the Claimant participated in various discussions. She later explained during an interview on 29 January 2020 that in her group at the training event was herself, Ms Timmington, Robert Burgess and Andrew Jones and that in that small group, they had to do some exercises together. She said the trainer was a few feet away, across the desk [297].

15. There is a dispute of fact as to what the Claimant actually said. The Respondent advanced evidence that the Claimant was reported to have said words to the effect that "In a Muslim country she wouldn't expect an explanation, why expect one here?"; "If I were there and my husband was arrested, I wouldn't expect an English speaking Christian officer to be on the search. If I knew why he'd been arrested I'd leave"; "In their country they wouldn't expect this, why should they expect it here?"; and "They can always go home". The Claimant disputed this and stated she only ever made comments to the effect that "I know from my own professional experience Law Enforcement in Countries world-wide are not as good as we are in the UK" [312-313] and that such comments could have been misconstrued [314].

16. I do not need to resolve the dispute of fact as to what was said by the Claimant during this training event, because as will become clear from the discussion on the law below, when considering claims for unfair dismissal, the Tribunal is concerned with whether the Respondent genuinely and reasonably believed in the misconduct, not whether it was actually committed.

17. Mr Burgess (G1, Regional Head of investigations) challenged the Claimant on her comments during the training session itself. The Claimant accepts this in her claim form and accepted it in her evidence. However, she stated that she felt his interventions were out of place based on what she says she had said.

18. Later that same day, around 12:45, not long after the training session, Rob Burgess made a handwritten note of the comments he said the Claimant made as follows: “The opinions expressed by Abby Brooke were extremely disappointing with comments / opinions shared such as; If I didn’t like the way I was being treated in a different country then I’d go back home / my country” and “if I was in another country I wouldn’t expect a translator / Christian awareness” [248].

19. Later on 29 October 2019, around 13:30, Mr Burgess again challenged the Claimant on her comments (this time in the presence of Steve Ashmore) and made notes shortly afterwards [249-251]. The Claimant is reported as having said: “they were meant to be comments made in a “safe” environment and were based on her putting herself in others’ shoes, based on her experiences living abroad”.

20. Andrew Jones made a hand-written note of the Claimant’s alleged comments at approximately 12:40 on 29 October 2019 [252] and recorded the Claimant as having said:
    a) “In a Muslim country she wouldn’t expect an explanation, why expect one here?”
    b) “If I were there and my husband was arrested, I wouldn’t expect an English speaking Christian officer to be on the search. If I knew why he’d been arrested I’d leave”
    c) “In their country they wouldn’t expect this, why should they expect it here?”
    d) “They can always go home”.

21. Ms Timmington made a short undated, unsigned statement at [254] in which she recorded that the Claimant had said: “something along the lines of that if this situation was being carried out in a Muslim country then the law enforcement officers there wouldn’t be as considerate to the family of the person being arrested.”. This was said to have been in response to a problem question encouraging participants to consider ways in which NCA officers could better support the families of a suspect when making an arrest.

22. By 31 October 2019, the concerns about the Claimant’s comments had been considered by Rob Burgess (a G1) and the Claimant’s line manager, Mr Jadidi. By that date, they had was decided that the correct way to resolve the matter was for the Claimant to undergo further training and management counselling but no formal process [255]. An email to this effect was sent from Phillip Marshall, a Senior Investigating Officer in Operation Stovewood to the Professional Standards Unit (PSU) on 31 October 2019. It very much reads as though this was intended to be the end of the matter and that the referral is in case of *future* conduct. For example it states [255-6]:

    “The purpose of this email is to refer a matter to CAB to ensure corporate awareness <u>in the event of any further instances of a similar nature</u>. The matter outlined <u>has been robustly addressed and remedial actions put in place</u>… Remedial actions concerning cultural awareness training and unconscious awareness [sic bias?] training <u>have been implemented</u>, the

incident has been evidenced within her PDS, and the situation is subject of active monitoring within her line management structures". [emphasis added].

23. The Claimant did undergo additional training and she believed that was the end of the matter. In an undated unsigned statement from Steve Ashmore (G3) attached to Mr Burgess' later report of 25 November 2019, Mr Ashmore confirmed that on 31 October 2019, he met with the Claimant and Martin Jadidi (her manager) and that training was discussed as the appropriate solution and that she undertook such training [285].

24. Mr Jadidi was later interviewed and confirmed that he considered the matter had been concluded and resolved by 31 October 2019 also, reporting that on that day: "Steve led the discussion and stated that he had spoken to Rob Burgess and the matter would be dealt with internally within Op Stovewood. Steve explained to Abbey that the comments / allegations etc had been discussed by SLT [senior leadership team] and whilst they had been viewed as serious, it had been agreed that Abbey should be warned of her future conduct and provided further diversity training. My understanding at that point was that the matter had been dealt with" [340].

25. Despite this, on 1 November 2019, the PSU made a referral to the Independent Office for Police Conduct (IOPC) describing the incident as a "Recordable Conduct Matter" and noted that the allegations raised issues of race or religion and belief [257-262]. This is most likely explained by Rob Burgess' later internal statement (of 25 November 2019) in which he said: "following an initial assessment, I directed that Abbey complete further training in both diversity and unconscious bias. Later, I was advised by Philip Marshall that comments that could be construed as racial content carried a mandatory referral to the NCA Professional Standards Unit. As such, the matter was duly reported" [282] [emphasis added]

26. Accordingly, whilst Burgess, Jadidi, and the relevant SLT had considered the matter resolved at a local level and informally, the PSU considered there was mandatory escalation to the IOPC and this was therefore carried out.

27. On 5 November 2019, Andrew Jones provided a formal statement at page [263] where he confirmed the comments he had written down by hand on 29 October 2019 (as above).

28. On 6 November 2019, the IOPC reported back to the PSU that the matter "should be subject to a local investigation…" and that "It is important that the force investigates the allegations of discrimination robustly." [266] On the same day, Michael Prince of the PSU informed the Claimant that there would be an investigation meeting and listed the comments alleged against her as reported by Andy Jones (set out above). The letter informed the Claimant that if proven, such comments might be held to breach NCA values and could amount to gross misconduct. She was advised that she was required to reply in writing within 10 days and given other procedural information for the ensuing investigatory process [268-9].

29. The Claimant replied stating, amongst other matters, that since the matter had already been resolved at a local level, it cannot be so serious as to amount to gross misconduct. She further stated "During the training I did not say anything which could be considered to be offensive in nature. All quotes in relation to this allegation are either incorrect, misleading, or out of meaningful context" [272] but she did not advance the alternative comments that she contended might have been misconstrued.

30. On 25 November 2019, Rob Burgess produced a report, which is more of a statement where he reported [281]: "I was immediately concerned and shocked by comments made by Abbey Brooke, comments such as…" and he reports the same comments he had written in his report book on 29 October 2019, recorded above.

31. Damien Fawsett, G4 Senior Investigator in the PSU was appointed to investigate the allegations. He was a higher rank than the Claimant and had no prior involvement in the matter.

32. On 19 December 2019, Rob Burgess and Damien Fawsett met with X informally and X reported to having heard some comments made at the training event in question, along the lines of "Muslims have it easy over here" and "They wouldn't be so traumatised if they spoke English" but that "he was not offended by the comments as he is "hardened to it" and regarded the training environment as a "safe" environment where people could comment freely" [287]. This informal interview was not signed by Rob Burgess or X.

33. On 28 January 2020, Lisa Timmington stated in an email to Damien Fawsett that she had already given her account and did not want to be contacted again. [292]

Investigatory interview 29 January 2020

34. On 29 January 2020, the Claimant was interviewed and at that stage, the allegation was that the comments were "racist" [296]. The Claimant explained that she had made comments which were misconstrued, such as that in "law enforcement agencies overseas, they are not as good as in the UK" [298].

35. Later in same interview, whilst denying specific comments alleged, she stated that the only comment she had made was that "I know from my own professional experience Law Enforcement in Countries world-wide are not as good as we are in the UK" [312] and that such comments could have been misconstrued [314].

36. In this interview, Damien Fawsett informed the Claimant of his discussion with X and Rob Burgess in which X recalled that in the same training session with Rob Burgess, a female officer made comments along the lines of "Muslims have it easy over here" [324]. The Claimant denied making such a comment and challenged the integrity of Mr Fawsett's record because it was not signed by X and Rob Burgess was present when X was questioned.

37. The Claimant explained she had lived and worked in an Arabic speaking country and considered herself to be culturally aware and tolerant.

Subsequent investigations

38. On 6 February 2020, Andy Jones confirmed by email to Damien Fawsett that his statement and notes made shortly after the training event were accurate and that he had no prior knowledge of the Claimant before this event [337].

39. Martin Jadidi provided an email statement to Damien Fawsett on 18 March 2020, stating his recollection of the events including that he had spoken to the Claimant at the time and she had explained she had said that when she was living in a muslim country, if she was not happy with the way the laws were enforced, she would "go back home". Mr Jadidi stated that he explained to her that any "go back home" comment may be perceived as racist, and the Claimant acknowledged this, but denied she was racist [339]. Mr Jadidi also reported (as stated above) that himself, Steve Ashmore and the Claimant had met and agreed that the matter would be dealt with internally within Op Stovewood and that he had understood this was the end of the matter [340].

40. Mr Fawsett made further enquiries of others (at least four) who attended the training event but they reported they had not heard any comments and had been working in separate break out groups from the Claimant [343, 345, 347, 351]. Mr Fawsett also made enquiries as to whether X was a suspect and was informed that X was closely associated with someone who had been arrested by Operation Stovewood (who shall be referred to as XB) but that X was not a suspect [350].

Investigation report

41. On 6 April 2010, some five months after the events in question, Damien Fawsett submitted an investigation report advising that the matter go forward as possible gross misconduct to a disciplinary panel. He stated:

    "…three people report that they have heard comments that were inappropriate. Officer Brooke's position is that the comments made have been misinterpreted or fabricated from the evidence available… I consider therefore it would be a matter for a panel to decide whose evidence they preferred. If the allegation is proven, it appears Officer Brooke has failed to act in accordance with NCA Professional Standards, these state that we must; Represent the NCA in a professional manner, mindful of the image we portray to others, ensuring our behaviour reflects on the NCA and does not discredit the agency or our partners or undermine public confidence. The comments reportedly made by Officer Brooke may lead to an inference that she may fail to act and carry out her role with fairness and impartiality. I consider that this would cause significant damage to the public's trust and confidence in the Officer and the NCA and for that reason I conclude that this matter, if proven would amount to Gross Misconduct" [385]

42. On 21 April 2020, Michael Price, a G2, Head of the PSU, confirmed his agreement with the report that the allegations were potentially very serious and should be taken forward to a formal disciplinary hearing [390].

43. On 24 April 2020, almost six months after the incidents in question, the Claimant was advised that the matter was being escalated to a disciplinary stage and that it was being treated as potential gross misconduct. She was informed she would be invited to a meeting and the disciplinary pack would be sent in due course [396]. It was not until 18 June 2020, that the Claimant was invited to a disciplinary hearing, scheduled for 29 July 2020. The letter stated that the charge was:

    "On 29 October 2019 at a cultural awareness event you breached NCA professional standards by making inappropriate comments". [397]

44. No comments were specified and the specific NCA standard was not specified, which should have been set out in the letter (even though such detail followed with the disciplinary pack sent to her later). In the invite letter, the Claimant was warned that if the allegations were proven, she might be summarily dismissed. Mr Long was identified as the disciplinary Chair. At that time he was either a Grade 1 or 2, hence more senior than both the investigatory officer and the Claimant.

45. The meeting was rescheduled due to Mr Long's inability to attend on the original date as a result of the need to self-isolate. It proceeded on 3 September 2020. The Claimant was sent a disciplinary pack which included all of the witness accounts, discussion with X, investigatory interview notes with the Claimant and the relevant policies, as well as the Investigation report.

Disciplinary Hearing 3-4 September 2020

46. At the disciplinary hearing on 3 and 4 Sep 2020, the Claimant was accompanied by her Trade Union representative. The hearing was chaired by Mr Long. Rob Burgess, Andy Jones and Lisa Timmington were called to give live evidence and the Claimant had a chance to ask them questions. In respect of Lisa Timmington, the questions were largely put by Mr Long because she was considered to be particularly sensitive and Mr Long felt that the Claimant's representative was asking the questions in an inappropriate manner which upset her further.

47. The meeting was recorded in the way an official police interview would be. There is a near verbatim transcript running to many pages. However, the transcript largely omits the part where the Claimant made her statement in defence. Mr Long reported in his evidence that this was noticed at the time and the Claimant was asked if she wanted to re-do that part of the interview, once the recording equipment was working again, but she declined. There was in any event, a note taker also taking minute type notes (rather than verbatim ones) for the Respondent. Subsequently however, the written notes of the meeting were said to have been lost. Therefore, ultimately, there was no record of the part of the hearing in which the Claimant advanced her submission in defence. This formed part of the Claimant's later appeal.

48. Notwithstanding the loss of the record, it was plain that the Claimant's representative did argue that escalating the matter to a disciplinary hearing was an abuse of power because she had been told it had been

dealt with locally and that the matters did not amount to gross misconduct [694]

49. At the hearing itself, there was an adjournment on 4 September 2020 for approximately 40 minutes to deliberate. Then at 18:48, Mr Long informed the Claimant that the accounts of Lisa Timmington, Andy Jones and Rob Burgess were accepted by the panel, along with the account from X and that whilst they noted areas of inconsistency in the witnesses' accounts, overall they considered them adequately consistent to find that the comments were made by the Claimant. She was informed that they had decided she was guilty of gross misconduct and that she would be summarily dismissed [692]. The Effective Date of Termination is thus 4 September 2020.

50. A very short statement of reasons given orally (as recorded by the transcript on 4 September 2020) was augmented by a slightly more detailed written outcome dated 11 September 2020. In the written outcome, the Claimant was informed of her right of appeal within five working days [697].

The appeal

51. The Claimant appealed the disciplinary outcome and was invited to an appeal hearing on 4 March 2021, by a letter dated 21 January 2021 [707]. The appeal was by way of a review, not a rehearing. The points raised by the Claimant on appeal were:
    a) The weighting given to two witnesses' comments that the Claimant's comments were racist was inappropriate and wrong;
    b) The sanction was disproportionate and the Claimant had no prior disciplinary matters and the panel did not consider the distress she was in during the training event;
    c) There was new evidence impacting on the case, namely phone records showing that the Claimant's representative called Lisa Timmington fewer times than alleged and the Claimant said this should give the Respondent cause to doubt Lisa Timmington's veracity;
    d) There were serious procedural errors, including –
        i) Escalating to a disciplinary stage after informing her it would be resolved informally and locally;
        ii) Having X questioned with Burgess (another witness) present which could have influenced what X said (tainted X's evidence);
        iii) Notes of the Claimant's part of the disciplinary interview were not fully captured;
        iv) Discrepancies between witnesses' accounts were not fully considered;
        v) The panel conducted questioning of Lisa Timmington, not allowing the Claimant or her representative to do so;
        vi) There was bias towards Mr Burgess by the panel chair who called him "mate";
        vii) X did not give evidence directly to panel; and
        viii) Inappropriate weighting was given to witnesses' accounts including no consideration given to the fact that Andy Jones knew Burgess well and that X was questioned with Burgess present.

52. The Appeal Chair was Mr Steve Smart, Director or Intelligence. The appeal proceeded on 4 March 2021. By this time, approximately 16 months had passed since the incident in question. The appeal panel invited the Claimant to clarify what she had said in the disciplinary hearing that had not been recorded and to comment on the recording itself and Claimant did so, e.g. [740].

53. At the end of the appeal hearing, the panel informed the Claimant of the outcome, namely that the appeal was not upheld. The short explanation given to the Claimant on that day was that "the comments you made at the training event were inappropriate and had the potential to cause serious harm or damage to public trust and confidence in the NCA" [772].

54. The written outcome was sent to the Claimant on 10 March 2021, with slightly lengthier reasoning [773]. Although succinct, it does cover the points made by the Claimant in the appeal meeting. The conclusion was that:

> "on balance of probabilities, the comments you made at the training event were inappropriate and in breach of the NCA Code, demonstrating a failure to respect different cultures and the community the NCA serves. We also note and support the view of the original panel that your conduct had the effect of bringing the NCA into disrepute and damaging public confidence in the NCA, which is of particular importance in Operation Stovewood." [775]

Law

55. Under s.98 ERA it states:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) ….
>
> (2) A reason falls within this subsection if it— …
>
> (b) relates to the conduct of the employee ... ...
>
> (4) ... where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

56. In cases of ordinary unfair dismissal, where the employee has at least two years' service, the Respondent carries burden of proof as to the reason for dismissal. There is then a neutral burden on the issue of whether the dismissal for that reason was fair or unfair in all the circumstances (Boys and Girls Welfare Society v McDonald [1996] IRLR 129).

57. I reminded myself that, following Sainsbury's Supermarket Ltd v Hitt [2003] IRLR 23 and Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, I am not asked to consider what I might regard as fair, but what a reasonable employer might consider in same circumstances. This is known as the "range of reasonable responses" test.

58. In British Leyland UK Ltd v Swift [1981] IRLR 91, Lord Denning MR stated:

> "The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him."

59. Given that the Respondent relied on conduct as the reason for dismissal, I reminded myself of the guidance in the case of British Home Stores Ltd v Burchell [1978] IRLR 379, which essentially requires a Tribunal to consider each of the three following questions when determining whether the decision to dismiss was within the range of reasonable responses:
    1) Did the Respondent genuinely believe the Claimant had committed the misconduct?
    2) Was such a belief reasonable?
    3) Was the belief formed and maintained after a reasonable investigation?

60. I also reminded myself however that the overarching test to apply is that set out in the statute.

61. In Sarkar v West London Mental Health NHS Trust, [2010] IRLR 508, the Court of Appeal upheld a tribunal's decision that the Trust had unfairly dismissed the employee for gross misconduct under its formal disciplinary procedure when it had initially taken the view that the misconduct could be dealt with under its 'Fair Blame Policy' (FBP), a procedure designed to deal with matters that were deemed to be less serious. The Court of Appeal held that the Tribunal was entitled to regard the initial use of the FBP as an indication of the Trust's view that the misconduct was relatively minor and that it was prepared to deal with it under a procedure that could not result in the employee's dismissal. The Court of Appeal further held that the Tribunal did not err in law in concluding that it was inconsistent of the Trust to then charge the employee with gross misconduct based on the same matters.

62. In Christou and anor v LB Haringey [2013] ICR 1007, the Court of Appeal had to consider the fairness of an employer re-opening a disciplinary process after employees had already been disciplined at a lower level. They were initially disciplined under the Council's simplified disciplinary procedure, which was for relatively minor misconduct, and were given a written warning for the way in which they had dealt with the case of "Baby P" (a highly publicised incident in which a child under the Council's supervision had sadly died as a result of parental neglect and abuse). Following the trial of Baby P's abusers, the new Director of Children's Services concluded that the previous disciplinary procedures were inadequate, and instigated fresh disciplinary proceedings that resulted in dismissals for gross misconduct. The Tribunal rejected the claims of unfair dismissal, finding that the new management was entitled to take a different view of the material facts and instigate a second set of disciplinary proceedings. Sarkar was considered by the EAT in Christou but at para 106 it stated:

    "The ET in the appeals before us rightly considered the question of the second disciplinary proceedings as one of fairness under ERA section 98(4) and not of *res judicata*. Sarkar is an example of an ET taking into account the fact that a respondent initially considered it appropriate to take disciplinary action against an employee under a procedure designed for less serious cases before pursuing formal proceedings which led to dismissal. Assessing the fairness of a dismissal in all the circumstances is a paradigm of a fact specific decision. In our judgment Sarkar does no more than establish that previous disciplinary proceedings are to be taken into account in assessing the fairness of dismissal following second disciplinary proceedings based on the same facts. There is no rule of law which establishes that it will be fair to take such proceedings if the first disciplinary proceedings are shown to be inadequate or that they came about after a change of management. Conversely there is no rule of law that dismissal following second disciplinary proceedings brought on the same facts as had been relied upon in a procedure appropriate for misconduct of a minor nature would be unfair. In each case the fact that a view had previously been taken by an employer that the misconduct was not serious and was to be dealt with under a procedure which could not lead to dismissal is to be taken into account in determining the fairness of the dismissal."

63. The Court of Appeal in Christou upheld the EAT decision and implicitly endorsed this reasoning at paragraph 58 where it was stated:

    "The complaint of unfair dismissal arises out of an actual dismissal. In this case it is taken as a result of the second (and on this premise) illegitimate process. Section 98 of the Employment Rights Act still requires the tribunal to find the reason or principal reason for that dismissal and to ask whether the employer acted reasonably in all the circumstances in treating that reason as a fair reason. The tribunal cannot ignore the dismissal and the circumstances giving rise to it simply because had there been no second process there would have been no dismissal at all. Plainly the fact that there is a second dismissal which on common law principles should never have been carried out would be relevant, and no doubt highly relevant, when assessing the question of fairness. But Mr Carr submits,

and I agree, that there is no reason to assume that it should be decisive of the fairness issue in every case."

Application of Law to Facts

64. When deciding what the sole or principal reason for dismissal is, I remind myself that it is the factor that weighed on the mind of the decision maker at the time of the decision. The Claimant argued it was because she had raised concerns to management about the suitability of X providing training. The Respondent argued it was misconduct.

65. I note that whilst the Claimant did not have whistleblowing claims, that did not preclude her from arguing that the real reason was something other than potentially fair one under s.98 ERA. In this way, she is entitled to argue that real reason for dismissal was because she had challenged management on the decision to engage a trainer that she considered inappropriate or dangerous (quite aside form whether this was a protected disclosure). If she succeeded in proving this, then the claim for unfair dismissal would succeed at first hurdle - not as a claim under s.103A ERA (which was not before me) - but on principles of ordinary unfair dismissal. This would be on the basis that such a reason is not one of the potentially fair reasons. Hence this is a relevant consideration and it does not require the Claimant to prove that she made protected disclosures. Of course the burden of proof rests on the Respondent as to the reason for dismissal.

66. Notwithstanding the above, having heard the evidence, I accept Mr Long's testimony that the reason he decided to dismiss the Claimant was his belief that the Claimant had made the comments of a nature reported by Andy Jones, Rob Burgess, Lisa Timmington and X. I accept this because he is best-placed to know what the reasons he had in mind and I found him to be a broadly credible witness. Further, I noted that Mr Burgess (who the Claimant alleged was the person seeking to retaliate against her for having made complaints about X) had been content for the matter to be resolved informally at the local level. Further, there was nothing to suggest that Burgess had played any part in the decision making. As such, in light of all of the evidence presented, I find that the reason for dismissal was a conduct reason, and it thus falls within s.98(2) ERA.

67. In respect of the reasonableness of the decisions to dismiss, which I remind myself carries a neutral burden of proof and is subject to the range of reasonable responses test, the Claimant made a series of arguments:

68. The Claimant argued that the allegations against her are not true - she never made the comments alleged – and that they have been fabricated because she had alleged it was improper to have X on site delivering training when he is a suspect or associated with suspect. It must be recalled that for the purposes of unfair dismissal claims, the Tribunal is not deciding whether the misconduct in fact occurred, but whether the Respondent genuinely believed it had occurred and whether such belief was reasonable and formed after reasonable process. Therefore, I do not make any finding about whether the Claimant in fact made the comments alleged, but I accept Mr Long's evidence that he genuinely believed she had made such comments, on balance of probabilities, based on the four

witness accounts and the degree of correlation between them (albeit they were not identical). Even if Mr Burgess had falsified allegations to punish the Claimant or retaliate against her for the concerns she had raised, that does not mean that Mr Long made his decision on the same basis. Mr Long considered that the statements were made in good faith and he genuinely believed the Claimant had made comments which were the same as or similar to those alleged by the four witnesses. Such a determination was reasonable on the facts (given the degree of corroboration and the fact that there was no reason why Andy Jones or Lisa Timmington would lie).

69. To succeed in such a contention, the Claimant would need to have demonstrated that the three others who testified as to the comments she made (which were broadly of the same nature) had colluded with Rob Burgess or acted on the same basis (motivated by her complaints) to be able to establish an argument that the allegations against her were somehow polluted by this reason. Such an argument would be akin to the principle in the case of Jhuti v Post Office, which was in the context of whistleblowing detriments found against a line manager that formed the basis of a later capability dismissal by a subsequent manager who unwittingly believed the reports of inadequate performance were genuine.

70. The present case is not akin to Jhuti in many respects: firstly, it is not a whistleblowing claim; secondly, there is no evidence that Rob Burgess was motivated by the Claimant's complaint; thirdly, there is no evidence that the other three witnesses (who made similar allegations) colluded to fabricate the allegations (and indeed in case of Lisa Timmington even the Claimant could not advance a reason why she would lie); and fourthly, there is no finding of fact that the allegations were made up for a false reason (as was the case in Jhuti where it was found that the performance scores were artificially depressed because of the disclosures). Further, Mr Long was not an unwitting agent of Mr Burgess. Indeed, he considered the Claimant's complaints that Mr Burgess had a motive to making up the allegations and he considered this properly. Mr Long did test Mr Jones, Mr Burgess and Ms Timmington's accounts in the live part of the disciplinary hearing and he formed the view, based on the content of the answers and their demeanour, that they believed what they were reporting.

71. I also note that Mr Burgess had initially been content for the matter to be resolved informally at local level. If he had been trying to target the Claimant in the way she alleges, for having raised issues about X as a trainer, it would be surprising if he would have let the matter rest there. It was Philip Marshall who reported the matter to Stuart Cropper of the PSU and Stuart Cropper who reported it on to IOPC. Rob Burgess had no hand in that, or in subsequent events (other than to give witness evidence). Mr Long was entirely separate from the referral processes to the PSU and IOPC too. Accordingly, I accept Mr Long's evidence that he believed the Claimant had made the comments alleged and that he believed they amounted to a contravention of the NCA Code. I also find that this was the sole reason in his mind when he took the decision to dismiss the Claimant. As such, he had a genuinely-held belief in the misconduct alleged.

72. In considering whether the Respondent's belief was reasonable, I find that Mr Long was entitled to conclude that the four witnesses had not lied. He did investigate the Claimant's assertion that the allegations were made up to punish her for having complained about the suitability of X, but he formed view that this was not the case based on his perception of the witnesses; that there was no evidence to support a finding of collusion of that kind (their accounts were broadly consistent but not identical); there was no basis why Ms Timmington would lie when she was the Claimant's friend and there had been no falling out; Andy Jones did not know the Claimant and had no "axe to grind"; Rob Burgess had challenged the Claimant during the training session itself and shortly afterwards (contraindicating that he had decided after the event to dress the comments up as inappropriate ones); Lisa Timmington also described that she and others felt uncomfortable during the event [619]; Jones had made his notes shortly after the event; and Jadidi also corroborated that the Claimant had accepted she had made some comments (albeit not the ones alleged) and she acknowledged that one of the phrases she accepted using could be perceived as racist [339].

73. Accordingly, I find that the belief that the Claimant had made the comments alleged (or similar such comments) fell within the range of reasonable responses.

74. I find that Mr Long did consider the Claimant's argument that Mr Burgess had tainted the evidence and that his and X's accounts were therefore unreliable, but in light of the other factors (listed immediately above) he believed that she had made similar such comments. His decision was within the range of reasonable responses on the evidence available to him.

75. The Claimant had also argued that Mr Jones' evidence was unreliable because Burgess knew Jones. Mr Long discounted this as a serious possibility because he believed the various witness accounts were broadly corroborative (though noting they were not identical) and there was no basis for the belief that they had all colluded. He considered that the weight of the evidence (four witnesses) tended to indicate the evidence was to be preferred to the Claimant's denials. Had their accounts been identical or repeated the same turns of phrase, this might in fact have indicated there was collusion. The fact they were not identical but similar rendered them more credible.

76. It is also notable that the Claimant described Ms Timmington as someone she was friendly with and she did not advance any reason why Ms Timmington might have lied. In re-examination Mr Long stated that he had asked Ms Timmington about the truthfulness of her accounts and he pointed to pages [637-640] of the bundle where her account had been tested and probed for veracity during the disciplinary hearing. Based on her answers, Mr Long formed the view she was a credible witness. On the evidence, that conclusion was within the range of reasonable responses.

77. In his live evidence, Mr Long stated he had asked both Jones and Burgess about possible collusion and that both he and the Claimant's representative questioned Burgess and Jones on the veracity of their

accounts. From this, Mr Long stated he was satisfied with their answers and that they were providing their honest account. Such a conclusion was within the range of reasonable responses.

78. The Claimant further asserted that her guilt was predetermined and that Mr Long did not have an open mind. I do not accept that assertion and I find that Mr Long did explore the evidence properly during the disciplinary interview and that the Claimant had the opportunity to ask the witnesses about their accounts (save for X who did not give live evidence in the disciplinary proceedings), albeit that the questions for Timmington were put by Mr Long (not the Claimant or her representative). Based on the evidence given to the Tribunal, there was nothing to suggest that Mr Long had a closed mind or that the outcome was predetermined.

79. The Claimant also argued that Mr Long was biased by his relationship with Mr Burgess but I accepted Mr Long's evidence that he had only had a few interactions with Rob Burgess some 3-4 years prior in a work context and there was no social interaction between them. There was no evidence to suggest that Mr Long was biased or closed minded.

80. The Claimant further argued that no consideration was given to the fact that at the training event the delegates were told it was a "safe space", then she was criticised for her language. I do not consider this to be a relevant factor that would need to be taken into account unless the Claimant accepted she had made the comments, which she did not. In any event, being encouraged to talk openly did not mean that participants could make racially / culturally insensitive comments with impunity.

81. On the issue of whether X was a suspect, both Mr Long and Mr Smart (appeal officer) gave oral evidence of their efforts to determine whether he was a suspect or not. Mr Long stated he received confirmation from two sources, including from the Gold Commander, that X was not a suspect in Operation Stovewood. Mr Smart stated his panel also made enquiries of this issue and were told X was not a suspect. I accepted their evidence. The Respondents witnesses stated that it was difficult to understand this argument as a point in mitigation given that the Claimant maintained she had not made the comments. If she accepted she had made the comments and explained that they were made under stress and pressure, that would have been different, but she did not say this. Mr Smart also stated that In any event, even if X had been a suspect, this would not have been adequate mitigation to have changed his mind about the Claimant's conduct. He would still have believed she made the comments and would still have upheld the decision. That analysis / decision was within the range of reasonable responses.

82. The Claimant also suggested that the lack of equality and diversity training was not adequately considered, but Mr Smart noted in his oral evidence that because the Claimant was not accepting she made the comments, he did not see the relevance of this. I consider that analysis to fall within the range of reasonable responses. Further and in any event, the nature of the comments alleged to have been made are not nuanced ones that an omission in training might lead one to make. Therefore, the lack of training is somewhat of a red herring.

83. At the appeal, the Claimant also argued that there was new evidence - phone records - which demonstrated Ms Timmington had lied about being harassed by the Claimant's representative and that this should cast doubt on her credibility generally. I find that it was within the range of reasonable responses to continue to have regard to Ms Timmington's statement and oral testimony to the panel and to place weight on it despite the phone records. Even if she had exaggerated the extent of the contact made by the Claimant's representative, that would not mean she had necessarily falsified or exaggerated what the Claimant had said in the training session. Mr Long did test Ms Timmington's evidence and his decision that it could be relied on was within the range of reasonable responses given the fact that three other witnesses testified to similar such comments having been made.

84. On balance therefore, I find that on the evidence available to each officer (Mr Long and Mr Smart) at the relevant time, the decisions they reached were within the range of reasonable responses.

85. As to the fairness of the investigation and impartiality, Mr Long confirmed in his oral evidence that he was independent in that he did not have any prior interactions with the Claimant and had had no social interactions with Burgess, he had only ever worked with him on a few occasions 3-4 years prior.

86. More broadly, the investigation did comprise of an investigation stage where witnesses were interviewed and an investigation report produced. The Claimant was given a copy of the investigation report before the disciplinary hearing. She was given advance warning of the charges in the investigation report and disciplinary invite letter and was warned of the risk of dismissal in those documents. Further, she received all the underlying evidence as part of the disciplinary pack, along with relevant policies. All such documents were sent to her in good time to prepare for the disciplinary hearing. At the disciplinary hearing itself, three of the four witnesses were called to give live evidence and the Claimant had the opportunity to ask questions of them (save for Ms Timmington in respect of whom questions were put through Mr Long as above). The Claimant was made aware of her right to bring a companion to meetings and did so. Recordings were taken and transcripts made, save where the machinery failed and some of the recording was lost. There were separate and more senior decision makers at each stage of the process. The Respondent investigated the Claimant's allegations that X was a suspect and that Mr Burgess was biased. Mr Long and Mr Smart gave reasoned conclusions for their decisions (albeit they were succinct). Both Mr Long and Mr Smart considered mitigation, including whether if X was a suspect, this would make a difference to outcome. In all these respects, the procedure was within the range of reasonable responses.

87. The Claimant also complained about the procedure being unfair in that Urvisha Mistry was involved at an earlier stage and should not have sat on disciplinary panel. My understanding is that she was the HR advisor. It was within the range of reasonable responses to not have a completely independent HR advisor at each stage of the process. She was not a

decision maker and there is no evidence she influenced the decision improperly or at all.

88. The Claimant argues that relying on Ms Timmington and X's accounts is also unreasonable because they were written some time after 29 October 2019. I find that it was within the range of reasonable responses to rely on these sources of evidence. It would have been preferable if they were closer in time to the events, but the fact that they were provided later does not mean they had no evidential value and/or that it was unreasonable to rely on them. Once the Respondent had them, and saw their relevance, it was within range of reasonable responses to have regard to them. Mr Long did consider the risk of tainted evidence and therefore he was aware of this when he placed reliance on them.

89. As to the faulty recording / missing transcript, the Claimant had the opportunity to reiterate what she had said during the disciplinary hearing itself or follow up in writing and she did not. Mr Long did hear her points, but he did not have transcript to refer back to. On balance, whilst this is a serious error in the context of a law enforcement agency where all other formal interviews are captured, it was an error that the recording machinery. Further, Mr Long took the decision on the same day, hence the lack of notes is not likely to have impacted his decision. He would not have read any transcripts between the oral hearing and the decision and did not have time to do so.

90. The loss of the handwritten notes taken by the note taker is a serious procedural flaw. The recording mistake was known at the time of the disciplinary hearing and the Respondent still failed to ensure that the handwritten notes taken by its note taker were retained / secured. Knowing that the recording had failed to capture the Claimant's submissions during the interview, the Respondent should have been that much more careful to retain the notes.

91. However an even greater procedural flaw is that the Claimant was originally told there would be no formal process, and the matter was said to have been resolved informally at a local level (and the Claimant had undertaken the remedial training). This was said to have been an outcome agreed in discussion with the SLT. The matter was then of course reopened and escalated to a disciplinary process through which she was dismissed.

92. The SLT saw fit to resolve the matter through informal training, but were later advised that there was a mandatory requirement to refer the matter to the PSU because the allegation was racial or potentially racially discriminatory. I find that in this respect, the Respondent's actions fall outside the range of reasonable responses. That is not to say that the allegations were not of a type that no reasonable employer could have (from the outset) treated them as serious matters and convened a disciplinary process, they plainly were sufficiently serious. What was outside the range of reasonable responses was that managers within the Respondent (Burgess, Jadidi and the SLT) did not know its own processes sufficiently well to know that due to the comments having a racial element, there was a mandatory referral to the PSU. If they did know, it was

unreasonable to assure the Claimant that the matter had been resolved without that referral.

93. It was unreasonable for management to indicate to the Claimant that the matter would not be taken further, then to subsequently escalate it. In that sense, the case is similar to Sarkar. However, the matter is also similar to Christou in that one set of managers saw fit to resolve it at a lower level (Burgess, Jadidi, Ashmore and the SLT) but the PSU and others took a different view.

94. On balance, I do not find that this is a matter which renders the dismissal unfair in terms of the equity or substantial merits of the case (as was the finding in Sarkar) i.e. using the phrase often used by counsel, this does not make it "substantively" unfair. However, I also do not consider it to be within the range of reasonable responses in the circumstances, to have conducted the process in this way. Unlike Christou, there was not in fact a change in management (just different managers taking different views at the same time) and this was not a case (as was the situation in Christou) where the extent of the failings was later regarded as being far more serious than had previously been understood and which was subject to public outcry.

95. I consider, on the facts of the present case, that the assurance initially given (which was then reneged upon and the matter escalated) amounts to a serious procedural failing. Therefore, whilst it renders the disciplinary process unfair, I consider it appropriate to consider a Polkey deduction for the chance that Respondent would or could have dismissed the Claimant fairly if the Respondent had not made the initial error of indicating to her it would not be escalated to a disciplinary and would be resolved by informal training.

96. I also find that the length of the process is outside the range of reasonable responses on the facts of this case. The Claimant had to wait until 4 September 2020 to get an outcome. That was approximately 10 months after the matter was referred for a disciplinary investigation. The allegations were simple straightforward ones and taking 10 months to decide if the Respondent considered them to be proven is outside the range of reasonable responses given that: the Respondent is very well placed to reach determinations on disputed facts (given what it does); the allegations themselves were simple comments made at a one-off event and the determination was merely whether they were said or not; only a few witnesses were involved, all of whom could have been interviewed within a matter of a few weeks. This was not, for example, some complex fraud investigation which might be paper heavy and require careful analysis. It was a simple "he said she said" matter which the Respondent (as a crime agency) is very well placed to determine. The Claimant then had to wait until 4 March 2021 for an appeal outcome. The process overall took 16 months.

97. There was no adequate explanation as to why the process took so long. Short delays have been explained due to the needs of both Mr Long and Mr Smart having to self-isolate, but that only explains very short periods of delay. There is no adequate explanation for why the process took 16

months and this timeframe is outside the range of reasonable responses in the circumstances, having regard to the resources and size of the Respondent.

98. The Claimant also argued that the decision was "too harsh" on the basis that she "had a great record and had never made inappropriate comments before". I do not consider this to be a fair criticism of the decision. The Respondent had four witnesses broadly corroborating the others' allegations that the Claimant had made inappropriate comments that could be construed as having a racial element. Treating this as potential gross misconduct was within range of reasonable responses particularly given the nature of the work undertaken in Operation Stovewood and the need to foster good relations with the Muslim community. The fact that the Claimant had no record for similar prior behaviour does not change fact that these were serious allegations that could have brought the Respondent into disrepute if they were made public. X had heard certain comments and therefore there was a risk to the Respondent's reputation and a risk of damage to relationships with community stakeholders, which was a real concern.

99. The allegations were for a serious act of misconduct; the alleged comments had shocked and offended various people at the training session; such comments as were alleged could be liable to offend others and could have damaged community race relations in an already tense community; the Respondent considered alternatives to dismissal but discounted them on reasonable grounds; the Respondent considered the Claimant's mitigation (her length of service and clean record) but also noted her lack of acknowledgement which could have indicated that the Claimant might make similar such comments in the future. I therefore find that the outcome was not "too harsh". Some reasonable employers would not have dismissed the Claimant in the same circumstances. Some reasonable employers would have dismissed the Claimant in the same circumstances. Therefore the sanction of dismissal is within the range of reasonable responses.

Polkey

100. A 'Polkey' deduction (following Polkey v AE Dayton Services Ltd [1987] IRLR 50) can be made where the dismissal is held to be unfair, but the Tribunal finds that the employer could have dismissed fairly in any event. It may take the form of a percentage reduction, or it may take the form of a finding that the employee would have been dismissed fairly after a particular period of employment. The question for the Tribunal is whether the particular employer would have dismissed the Claimant in any event had the unfairness not occurred (not whether a hypothetical reasonable employer would or might have done so).

101. This assessment is not an exact science. It requires the Tribunal to consider the evidence and speculate as to what would have happened but for the matters which rendered the dismissal unfair. In some cases, this may be so speculative that no meaningful assessment can be made.

102. In cases where there is also scope for a deduction for contributory fault, the Tribunal might consider which type of deduction is most apt and

whether, in the light of that overlap, it is just and equitable to make a finding of contributory conduct, and, if so, what its amount should be. This is to avoid the risk of penalising the claimant twice for the same conduct (per Lenlyn UK Ltd v Kular UKEAT/0108/16/DM).

103. I have considered both types of deduction and deem it just and equitable to make both such deductions on the facts of the case. However, I have considered the fact that I am making both types of deduction when setting the level of each such deduction, to avoid the risk identified in Lenlyn.

104. I have found various failings by the Respondent above, some of which were serious. I have to consider what is likely to have happened if such failings had not occurred. Given that I have also found above that the Respondent's ultimate sanction of dismissal was within the range of reasonable responses based on the evidence available to it and in all the circumstances, I find that it might nonetheless have dismissed the Claimant fairly in any event. Indeed, I find that there was a good chance, in the region of 60%, that the Respondent might nonetheless have fairly dismissed the Claimant. I therefore find that there should be a 60% reduction to the Compensatory Award to reflect this chance.

Contribution

105. I also find that the Claimant did contribute to her dismissal. Whilst I do not find that she made any of the specific comments alleged, she did make comments that four others construed as being racially offensive. She accepted making one comment during the disciplinary process, namely that "I know from my own professional experience Law Enforcement in Countries world-wide are not as good as we are in the UK" [312-313] and she accepted to her manager, Mr Jadidi, that she had said "she had lived in a Muslim country previously and she would go back home if she was not happy with how the laws were enforced". She had also acknowledged to him that a phrase that included the words "go back home" could be perceived as racist [340].

106. This was said in the context of a training session in which officers were supposed to be considering ways in which the NCA's approach to arresting members of the Muslim community might be improved. In that context she appears to have taken the contrary stance of defending existing NCA standards as being better than other countries, as if to deny that improvements could be made. The comments which she admits to having made could be seen as insensitive in the context of the purpose of the training session. Also, by suggesting she would "go back home" if she was unhappy with how law enforcement handled her in an overseas country, the implication was that anyone outside of their country of origin should "go back home" if they did not like the way things were done in the UK. She does not need to have expressly said others should "go back home", the implication was there from what she said she would do. Rather than engaging in a discussion as to how to improve NCA procedures to cater to cultural needs, the Claimant's comments indicated a lack of interest in seeking to do so.

107. Therefore, I find she did make comments of a nature that others perceived to be racist and this carried a risk of reputational damage and

damage to community relations. I consider it is thus appropriate to reduce the compensatory and basic awards by 50% for her contribution to the dismissal.

ACAS adjustment

108. Due to my finding on the unreasonable period of time the process took, for which there was no adequate explanation, I also make an uplift of 10% under ACAS Codes for Compensatory Award only. This is on the basis of the unreasonable delay at various stages, which is expressly required under various paragraphs of the ACAS Code.

Employment Judge Dobbie

Date: 10th May 2022

REASONS SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE