EMPLOYMENT TRIBUNALS

Claimant: C

Respondent: The Home Office

RESERVED JUDGMENT

Heard at: Newcastle Employment Tribunal

On: 10th – 14th October 2022;

Before: Employment Judge Sweeney

Members: Derek Cattell and Steve Wykes

Representation:

For the Claimant: In person,
For the Respondent: Richard Ryan, counsel

The unanimous Judgment of the Tribunal is as follows:

1. **The complaint of race discrimination is not well founded and is dismissed**.

2. **The complaint of unfair dismissal is not well founded and is dismissed.**

REASONS

The Claimant's claims

1. By a Claim Form presented on **18 October 2021**, the Claimant brought claims of unfair dismissal and race discrimination. The Claimant was employed by the Home Office as a PO3 Examiner. He also had a separate contract of

employment with HMRC. His employment with HMPO was terminated for gross misconduct on **26 August 2021**. The Claimant contended that the dismissal was an act of direct race discrimination and, in any event, unfair. The Respondent denied this. As regards the claim for unfair dismissal, it raised an issue of jurisdiction, namely whether the Claimant had sufficient continuity of employment with the Home Office in order to qualify for the right not to be unfairly dismissed. The proceedings were listed for a telephone preliminary hearing before Employment Judge Speker on 17 January 2022 who listed the Final Hearing for 5 days commencing Monday **10 October 2022**. Pursuant to a direction made by Judge Speker, the parties agreed the list of issues

The Final Hearing

2. The Respondent called the following witnesses:

   2.1.1. DS (dismissing manager)

   2.1.2. SM (appeal hearing manager)

3. The Claimant gave evidence on his own behalf.

4. The parties had prepared an extensive bundle of documents consisting of 766 pages. They had each prepared their own chronology and an agreed cast list. The first morning was set aside as reading days for the Tribunal. The parties attended at 2pm. Evidence finished on day three, **13th October 2022**. The parties made submissions on **14th October 2022** and the Tribunal deliberated on the afternoon of that day and again on **18 November 2022**.

The issues

5. As referred to above, a list of issues had been drawn up and agreed between the parties prior to commencement of the hearing. The Tribunal spent some time on the morning discussing and clarifying those issues which were found at pages **118-120** of the bundle. For convenience, they are set out in the Appendix at the end of these reasons. From time to time, the Claimant and the Respondent are referred to in these reasons as ‘C’ and ‘R’ respectively.

Findings of fact

6. The Claimant identifies himself as Asian British, of Bangladeshi origin. He was born on **15 April 1989**, making him age 31 in **February 2021**.

7. He commenced employment at the Passport Office with a start date of **16 December 2019**. By the time he started working there, he had been employed, since **May 2016**, in a different capacity, in a different location working for HMRC. HMPO is an executive agency of the Home Office government department. HMRC is a non-ministerial department of the government. The

Claimant sought and obtained work with HMPO as a second job. In doing so, he was subject to pre-employment checks and he undertook a period of probation in the role. That meant that, as of **16 December 2016**, he was employed under two separate but concurrent contracts of employment: one with HMPO and one with HMRC.

8. The HMPO contract provides as follows:

"No employment with a previous employer will count with this new employment as a continuous period of employment for the purpose of employment protection legislation"

9. The Claimant was employed by HMPO as a PO3 examiner. His duties involved dealing with passport applications. He was and is employed by HMRC as a Business and Design Analyst.

10. As a civil servant, the Claimant's employment was with and at the pleasure of the Crown. Thus, the legal identity of the Claimant's employer in respect of both contracts, was the Crown. This is emphasised in the contractual documents (see **pages 4/152 and 6/154**). Under 'Notice', it states: "*Because of the constitutional position of the Crown, Crown employees cannot demand a period of notice as a right when their appointments are terminated….*"

11. R has a Professional Standards Unit ('PSU') whose role, among other things, is to investigate allegations of bullying, harassment and discrimination complaints which are referred to it.

12. R has a number of workplace policies, one of which is a Social Media Policy. This applies to all Home Office staff when using social media platforms, whether on official Home Office accounts or personal accounts. It applies to professional and personal use on both Home Office managed and staff personal devices where it relates to Home Office business or an individual's responsibilities under the Civil Service Code [para 3.11, **page 276**]. Other policies include a policy on bullying, harassment, discrimination and victimisation and personal conduct:

12.1. The Civil Service Code [**pages 596-601**]

12.2. Bullying Harassment Discrimination and Victimisation [**pages 602-608**]

12.3. Personal Conduct Policy [**pages 733-737**]

13. DM is an Acting Senior Officer ('SO') at HMPO, Durham. Using the language deployed by the Respondent, she was a manager in 'command D'. Each 'team' is referred to as a 'command'. On or around **18 March 2021**, Ms DM was made aware of some allegations of inappropriate conduct concerning the Claimant. The allegations concerned two female colleagues of C, ('**AB'**) and ('**IJ'**). Late in

the evening of **18 March 2021**, Ms DM had been approached by a Team Leader, HL, regarding concerns raised by IJ. She told Ms DM that another Team Leader, DC, also wished to speak to her about some concerns raised by another employee. Subsequently, DC came to speak to DM regarding AB's concerns.

14. On Friday **19 March 2021**, Ms DM spoke to AB and IJ. She asked what they wanted to do about the concerns they had raised. They said that they just wanted C's behaviour to stop. She then spoke to 'LE'. Who was one of two line managers in C's team, the other being JS. DM explained the that concerns had been raised and she asked LE to speak to C and remind him of the Civil Service Code of Conduct. At this point in time, as far as DM could see, AB and IJ were happy with how she was handling matters.

AB

15. AB was employed in a similar role to the Claimant. She was a PO3 at HMPO in Durham since about May 2018. She had been on friendly terms with C. They had both worked in the same team from about **December 2019** to about **April 2020**, under the command of DC. From **April 2020** until about **January 2021**, while still in the same team, they worked from home. From **February 2021**, they came under the command of LE and JS. AB was aged about **19** or **20** in **February 2021**.

16. In **March 2021**, AB approached DC regarding C's behaviour which she said was making her feel uncomfortable.

17. It was C who initiated contact with AB over social media, Instagram and Facebook. C is a fairly prolific user of social media.

IJ

18. IJ was also employed part time as a PO3, in command E. She was also at the time a university student. IJ did not know C. They did not work together. She was aged about 19 in February 2021.

19. In her interview with Mr Logan, she explained that C initiated contact with her via Instagram in **February 2021**. She had a public Instagram account, which means that anyone can follow her without her permission. In his first contact, C said she asked who he was and he replied that he recognised her from HMPO. They had some initial chat and he seemed friendly, so she gave into curiosity and requested to follow him. She could not explain how C had obtained her details other than to surmise that it might have been that they were both mutual followers of AB.

20. As she had never met C, she explained that she asked some colleagues if they knew him. She went on to describe the messages exchanged between them, which we have seen in the bundle. It is clear from her account that she gradually became more concerned by the contact and was especially concerned about his message at 22:46 on **08 March 2021** after seeing a car doing a 'wheel spin' out of the car park culminating in her deciding to speak to her line manager on **15 March 2021**, and then subsequently to Northumberland Police. She read to Mr Logan a prepared statement expressing how she felt about C's behaviour.

21. AB and IJ were the two complainants about matters which eventually resulted in C's dismissal. There are, however, two other individuals we need to say something about as they play a part in the overall story of what happened.

CE

22. CE is the daughter of one of C's managers, LE. As it turned out, a message which C had sent to a colleague CE, LA ('LA') was also to become the subject of a complaint against C. It is convenient to set out the message at this point. On **26 February 2021**, C wrote of CE: "*I'd dust her like. Her daughter is proper peng. She showed me a picture…..She's 17, has a bf apparently. But not for long…. LOL jk*…" [**page 332**]

23. C did not have a relationship/friendship with either AB or IJ outside work. Indeed, IJ had never met C. It was C who initiated contact with both, through social media.

AW

24. AW is/was also employed as a PO3 in the same type of role as the others so far referred to. He has been employed in that role since January 2019. He was a colleague of both C and AB. He is cited as a comparator in C's complaint of race discrimination. We need, therefore, to set out our findings in relation to AW. The best evidence we have as to the matters set out below is from the evidence of SM.

25. Sometime in 2019, AW had raised a complaint about a colleague, DW, who was an older male to whom AW had been providing 'buddying' support. DW bought AW a birthday present. He also passed messages to DW under the desk and messaged AW about problems DW was experiencing in his personal life.

26. The messages were not of a sexual content. However, AW felt uncomfortable with the attention DW was paying to him. AW had seen photos of men on DW's Instagram profile. AW had posted some photos of a stag night he had been on and DW made a comment about the photos, not directed at AW, but which AW considered to be inappropriate. One message was sent by DW at 4am on a

Saturday night. After receiving that message and given that it was sent to him at that hour, AW raised his concerns with his line manager on the following Monday. The contact about which AW complained lasted about a week.

27. AW's line manager died before the matter was raised by the Claimant in 2022. AW told his line manager that he did not want formal action to be taken against DW, as he did not wish to add to DW's personal problems. The line manager spoke to DW who subsequently apologised to AW, putting his behaviour down to a mini-stroke that he had recently suffered. AW spoke to JT about the matter but did not show JT any of the messages.

28. AW asked to be moved to a different floor, which was accommodated and there was no further contact from DW.

The lead up to the allegations against C

29. On Friday **19 March 2021**, having been apprised by Ms DM, LE spoke to C. She said that complaints had been made against him, by AB and IJ and reminded him of the Civil Code. LE said that the complainants did not want to take the complaints further.

30. On Monday **22 March 2021**, C called in sick. In his evidence to the Tribunal, he said that he did this to remove himself from false allegations, that if further allegations were made against him, he would have an alibi.

31. The following day, Tuesday **23 March 2021**, AB contacted Ms DM to say that she was privy to a text conversation relating to LE's daughter. She showed the message to Ms DM who did not understand it as it was in 'slang'. This is the text message at **page 332**. When AB translated the slang, she felt concerned that CE may be using the internet without suitable protection in place. She took advice from an HR caseworker who said she could speak to LE, which Ms DM did to ensure that her daughter (who Ms DM understood to be 16) had the appropriate mechanisms in place when using the internet. Ms DM, in her interview with Mr Logan, said that she did not mention the Claimant to LE, nor did she show her the text message. There is no evidence that she did either of these things.

32. In the week commencing **29 March 2021**, IJ returned from a period of leave, having thought things over and said to Ms DM that she was not happy to leave things as they were [para 6.48, **page 287**]. She said she wanted to raise the matter formally. IJ raised the issue regarding her car with Security. Ms DM took further advice and was advised to speak to PSU and ultimately to make a referral which was taken forward by JT.

33. On **23 April 2021**, C was contacted by JT to say that he was being suspended from work pending an investigation. He is a Service Delivery Manager based at

HMPO Durham. JT emailed a notice of suspension letter that afternoon [**pages 158 – 161**]. On **30 April 2021**, Mark Gabriel referred the matter to PSU and attached terms of reference [**page 184**].

The investigation

34. Hugh Logan was appointed to investigate the allegations against C. He is an Investigative Officer in the Home Office Professional Standards Unit, based in Salford. The terms of reference were to consider whether the alleged conduct was tantamount to sexual harassment and if it constituted a breach of Home Office policy, the Civil Service Code (honesty and integrity) or the Personal Conduct policy [see **page 275**].

35. On **05 May 2021**, Mr Gabriel wrote to C, attaching a Notification of Discipline Investigation [page **185 – 187**]. This letter erroneously included a reference to the Internal Fraud Database, which was corrected on **10 May 2021**, after C raised the matter.

36. A chronology of the investigation undertaken by Mr Logan is set out in paragraph 5 of Mr Logan's report and is not in dispute [**pages 277-278**]. We find that to be an accurate chronology in any event and do not propose setting it out here in any detail. The people interviewed are set out in paragraph 17 of DS's witness statement, which having read the report, we find to be accurate.

37. DC, in his interview, explained how AB had approached him in **March 2021** and explained that C had found her boyfriend via Instagram; that he had been showing pictures of him around the team and pictures of her from her Instagram account; that despite asking C to stop, he had not done so [para 6.55, **page 288**]. He described how AB had become quite distressed when speaking to him about C [para 6.60, **page 289**].

38. DM's interview summary is pages **371 – 373**. Among the things she conveyed to Mr Logan was that AB, whilst they enjoyed some 'banter', considered the relationship with C to have been more professional when they worked together on Mr DC's team. She explained that it was only after moving to the new teams that C's messages became more inappropriate, which AB described as relentless. DM described to the investigator that AB was upset when they spoke and initially wished to move teams.

39. At the heart of the complaints by AB and IJ was the nature of and the degree of unsolicited social media contact by C. There was an additional element to the complaint by IJ, which we refer to below. As regards the social media contact, we were referred to a number of WhatsApp messages, Instagram and Facebook posts in evidence. These were the posts that were made available to the Respondent during the investigation and which were before DS and SM for the purposes of the disciplinary hearing and appeal.

Messages/posts regarding AB

40. AB said that what she considered to be inappropriate messaging started from beginning of **February 2021** and continued to about **23 March 2021**, when she blocked C. What she expressed concern about was the change in the tone or content of the messages when they moved teams. Some of the messages which she referred to were identified by her in her interview by Mr Logan [**pages 358 – 359**].

41. In one message, posted on **24 February 2021**, C said: '*AB, I didn't know you had pierced nipples you're a dark horse*'. AB believed that C must have zoomed in on her breasts in order to make that comment. C sent this message as a comment to a photograph C had taken of herself and posted on social media. It is part of modern life that many young people take photos of themselves and put them online. In posting it, she did not make any comment herself, nor did she invite any comment. She did not invite any comment. Yet, that is what C did. He posted an unsolicited message in the terms set out above.

42. Although she had been concerned about his unsolicited contact prior to this, she felt he had crossed a line and it made her feel uncomfortable and awkward. We can readily understand that. We were not overly impressed by C's oral evidence when cross examined by Mr Ryan. He maintained that his message was not sexual. He sought to draw a comparison with, as he put it *'campaigns about 'free the nip' and 'breastfeeding in public'*, saying that the reference to AB's pierced nipples was no more a sexual reference than those. Either he is not being genuine about this or he is being obtuse. We believe that it is the latter, in the sense that he has demonstrated a refusal to see what is apparent to others, or wilful ignorance or insensitivity to the real facts of a situation.

43. On **25 February 2021** C posted a message to AB: "*Anthony was telling me you are FB with Jake….*''. That is a reference to Facebook and to AB indicating on Facebook that she was in a relationship with someone called Jake.

44. AB in her interview [**page 360**] referred to an occasion when C allegedly said '*we all know how you got that'*, referring to a urinary tract infection she had, implying that she had a sexually transmitted disease. She also said that C would say '*you have put your make up on for me, no need to make an effort'*. None of these comments was denied by C. Indeed, he has and is not contesting the content of any of the exchanges rather the interpretations placed on them.

45. Sometime later (on or about **23 March 2021**), AB told LA that C had been messaging her and that the messages had made her feel uncomfortable. It was when she confided in him that LA sent her the message regarding LE's daughter, CE (see paragraph 22 above). She explained to Mr Logan that LA also told her that C had been making comments to him about her, and that he

had zoomed in on her photo saying '*look at her breasts*'. Once LA told her these things, she blocked C on **23 March 2021**.

46. In these proceedings, C contends that LA was not deemed as a credible witness, yet R has used his evidence as credible which is contradictory. The reference to 'credible witness' is to the email of **11 June 2021** from Mark Gabriel on **page 196**. We can understand that the words 'credible witness' may suggest that someone, namely Mr Gabriel, had taken the view that LA was not 'credible'. However, that is not how we read the email. The sentence could easily have read: 'I am content for him not to be called as a witness'. The addition of the word 'credible' adds nothing to this. We would add that, given what we have seen C write about AB on **24 February 2021**, and also what he had written about CE, it is entirely plausible that C did make comments to LA about AB's appearance and about her breasts. It is objectively true that C had been looking at photos of AB and objectively true that he had commented to her on her pierced nipples.

47. AB also said to Mr Logan that LA told her that C had also found pictures of AB's boyfriend at work. In fact, she challenged C about this. He said it was because he was looking to buy a car, on the basis that her boyfriend works in a garage. She said she knew that to be untrue as C had only recently bought a vehicle. She said that C was also saying things out loud to AW about AB's boyfriend.

48. During this period in February/March 2021, C was not in a relationship. He had broken up from his then partner. As C said in oral evidence, his social media activity increases when he is not in a relationship. In our judgement, C was particularly active on social media at this time and, having broken up with his partner, was available for and open to establish other relationships and was on dating platforms, Tinder, Bumble and Hinge. Having read the messages and considered C's evidence, we infer that he was hoping to strike up a relationship with AB. He wanted to see what reaction he would get from posting things such as the message regarding the bouquet of flowers ('*did you tell Simon we were dating now'*), asking about her boyfriend, saying she looked good, and the most daring of them all, by referring to her being a 'dark horse' and having 'pierced nipples'.

49. Although AB had conveyed to Ms DM on **19 March 2021** that she was happy with the way things were being handled at that point in time (that is, by a manager speaking to C and asking him to stop) she changed her mind after speaking to LA. The most significant matter that led her to change her mind was when she saw C's message about LE's daughter, due to her age. AB took this message to Ms DM around **23 March 2021,** which was the point at which she considered the matter should be approached more formally.

Messages/posts regarding IJ

50. C started sending IJ messages in February 2021, via Instagram. He was the one to initiate contact with her. C's first contact was to say '*I recognise you'* [**page 281**]. The first few exchanges were friendly. She did not know C, had not bumped into him at work and enquired of others at work if they knew him.

51. In one message, C referred to IJ's boyfriend. He asked how they got to see each other due to their different shift patterns.

52. On **25 February 2021**, C messaged IJ. He asked her age. He told her his age and said he was not a '*creep'*. C made a comment about seeing her get in the lift; and that he was not '*chatting her up'*. He commented on her age, saying that he thought she looked 23 or 24. IJ found these comments odd. C had also learned of the identity of IJ's boyfriend and commented about him on some of the messages. They talked about where they lived and IJ mentioned that she lived in Jesmond. C suggested that she could 'take him in' (which she took to mean give him a lift to work). Although she found his contact was a bit odd, and that he had referred to 'not chatting her up' she felt that he seemed friendly enough. However, her assessment of C's behaviour changed.

53. On **26 February 2021**, C messaged IJ to say that he did not need a lift in to work, as she drives quite slow. When she asked how she knew what car she drives he said he had driven past her enough times and that she drives a Citroen or something similar (which she does). She replied '*bit sta*lkery'. IJ felt that by this, C had crossed a boundary.

54. It must be remembered that IJ had never actually spoken to or met C – or even seen him at work. All she knew was that he said he worked at HMPO. She became unsettled and felt that she was being watched. She asked colleagues if they knew him as he had been contacting her [para 6.27, **page 283**].

55. On **08 March 2021**, IJ was going home after work, when in the car park (which is about 5-10 mins walk from the office) she noticed a large black car doing a 'wheelspin' out of the carpark. At **22.46** she then received a message from C saying '*he didn't mean to scare her, it was him speeding away because she called him a stalker*'. This concerned her, and after this she got a colleague to walk with her to the carpark. None of this is disputed by C. However, as he explained to DS at the disciplinary hearing, he regarded this – and the other matters – as '*a mountain out of a molehill'* [**page 488-499**]. We will say more in our conclusions on these matters but at this juncture we would add that we can readily understand why IJ would gradually become concerned about C's conduct in approaching her in an unsolicited way through Instagram, saying that he was not a creep, asking about her boyfriend, identifying her vehicle, speeding away from her car late at night and then sending her a message shortly after to say that he hoped he had not scared her. Any young woman experiencing these behaviours is likely to find this a worrying, and gradually

unsettling state of affairs. That C cannot see this is a concern, not only to the Tribunal, but more importantly, was a concern of the Respondent's.

56. On **12 March 2021**, IJ's birthday, C posted a message regarding her appearance – referencing her eyeshadow – saying that if she were a model she could wear eyeshadow as much as she likes. As IJ explained to Mr Logan, she felt this was a bit 'pervy' and inappropriate.

57. On **15 March 2021**, she was sufficiently concerned to speak to her line manager (HL). The Sarah Everard case had been on her mind, and C's comment about not meaning to 'scare her' concerned her. She told her line manager how she felt she was putting herself at risk. Her manager advised her to send C a message to say that his behaviour was inappropriate and to stop. She did this. C apologised and he unfollowed her.

58. At her interview on **27 May 2021**, IJ explained that she had been driving back to Jesmond after work about a month earlier (so this would be sometime in late **April 2021**) when C pulled up beside her car at traffic lights before speeding off. She thought it strange that he should be around the Jesmond area at 10.30pm. She added that it may be a coincidence but considering his earlier behaviour it seemed strange. She could not think why he would be there.

59. IJ moved in with her parents for a couple of weeks and reported her concerns to the police. However, no action was taken by the police. In para 6.36 [**page 286**], she said that she saw C again in his car on the Tyne Bridge At her interview with Mr Logan, she also read a prepared statement [para 6.34 and 6.35, **page 284-285**]. In that statement, she says how C's behaviour made her feel. The statement is at **page 368**.

60. To put into context how she felt, we set out below one passage from what we consider to be a measured statement:

"Having someone know so many details about you (my boyfriend's name, my car, watching me in the office and now – through my own fault – my student address) when I do not know them whatsoever and I have never even bumped into them in the office is a very unnerving feeling. I feel as though I have been watched for god knows how long and it is really unsettling that someone who works at the civil service and should be vetted can make a young woman feel this way when I am simply coming here to get my head down and do work"

61. It is right to say that when C asked him to stop, he did so. However, in the investigation into his conduct and in these proceedings, C has not shown any indication that he recognises how largely undisputed facts would make IJ feel as she expressed. He has, instead, suggested that there was some form of concerted attempt to report his conduct (that they have got their heads together) and that these allegations have been exaggerated and falsified [see **pages 424**

– 437] describing himself as being the victim. He has tried to pick holes in the accounts given by AB and IJ, when it is apparent to us from our reading of the messages and the manner of contact, that the reported conduct is plainly not falsified or exaggerated and merited, at the very least, an investigation. There is no evidence of collusion.

62. Further, as with AB, we infer from the messages and from the evidence of C, that he was 'testing the waters' with IJ, seeing how far he could go, looking to assess her reaction to his conduct, with a view to establishing whether she might be receptive to some form of intimate relationship. Thus, his reference to 'not chatting her up', not being a 'creep', referencing her boyfriend, commenting on her appearance and age, testing whether she might agree to give him a lift, and watching her as she went to her car.

Claimant interview [para 6.81 – 6.108, **page 291- 297**]

63. C was interviewed by Mr Logan on **29 June 2021**. Following this, he sent a statement 'supplement to investigation interview' to Mr Logan on **02 July 2021** [**page 244** and **pages 234 – 243**]. Among other things, in that document, C says that he felt the questioning was very one sided and questioned whether others had been interviewed in the same way. He referred to various policies and procedures and included extracts relating to the role of the Investigating Manager ('IM'). On **page 407**, he raised what he referred to as a 'precedent'. He said: "*I am aware of a case in which an employee was receiving unwarranted and unwanted behaviour which was prolonged and ongoing. They received explicit messages and where [sic] harassed and they had gifts sent to them*." He went on to say: "*what is the reason for disparity is it due to the genders involved or is due to race/colour and creed? I would like an explanation for the disparity in treatment.*" This was a reference to AW and DW.

64. Mr Logan acknowledged receipt of C's document and advised him that it (and screenshots he had provided) would be attached to his report as appendices [**page 245**].

65. The summary of C's interview was sent to him on **07 July 2021** [**page 262**] affording C an opportunity to comment on them, which he did in an email exchange between him and Mr Logan on **7th** and **8th July**. He said his relationship with AB was jokey/banter. He denied that he obtained photos of AB's boyfriend or that he showed them round the workplace. In para 6.103, in relation to the text regarding LE's daughter, C said that 'dust' did not mean anything. Later he said that 'dust' meant 'date'.

66. C said that he believed AB and IJ were colluding in raising the complaints [para 6.106, **page 297**]. He questioned LA's motives on the basis that he fancied AB. He felt that none of his behaviour was inappropriate and it had not been brought to his attention that it was.

67. C questioned whether the failure to investigate AW's complaint against DW was due to male-to-male harassment and this was male-to-female harassment. He questioned whether it was due to his being of south east Asian origin [para 6.108, **page 298**]. C also believed the interview with Mr Logan had been biased; that the messages between him and AB/IJ had been shortened to suit the narrative and had been manipulated. He maintained that the allegations were vexatious and malicious.

68. Mr Logan summarised his investigation and his summary and conclusions are at **pages 298 to page 304**. He referred the allegations to a disciplinary hearing, concluding that there was a case to answer on the allegations. His report was completed on **22 July 2021**. The final report was sent to C on **11 August 2021** along with all appendices bar one. That is the email from Mr Gabriel to Mr Logan of **11 June 2021** [**page 352**] regarding LA. C was invited to attend a disciplinary hearing on **19 August 2021**, which was then rescheduled to **25 August 2021**.

Disciplinary allegations

69. Although Mr Gabriel had initially been appointed as the Decision Manager, HR advised to change to DS because he was based in Liverpool and independent of the Durham office. C was advised of the change in an email dated 22 July 2021 [**page 408**].

Grievance

70. On **13 August 2021**, C wrote to DS saying that he wished to raise a formal complaint about the investigation process [**page 422-423**]. He complained of unconscious bias on the part of Mr Logan and implored DS to listen to the recording of the interview. He attached the document at pages **434 – 437**.

71. C then wrote to Valerie Ward, Deputy Head of Casework on **16 August 2021** raising a formal grievance [**pages 450 – 452**]. Among the things he referred to was that he had made the IM and DM aware of a precedent set as there was a case of sexual harassment between DW and AW, adding that '*they had only been segregated as an outcome. No formal action was undertaken*.' This he regarded as a disparity in treatment and evidence of unconscious bias.

72. Ms Ward replied on **17 August 2021** that C would need to present his concerns and reply to the outcome of the investigation as part of that process, as it was considered to be part of that process [**page 449**]. That is consistent with the Respondent's disciplinary policy, where under the title '*Special Circumstances'* it states:

"*Grievances raised during the discipline procedure must first pass the grievance consideration to be dealt with as a formal grievance. The way in which such grievances are handled will depend on the facts of the case:*

- *Where the grievance is directly related to the discipline case, it would normally be appropriate to deal with both issues within the discipline procedure, for example if the grievance concerns the discipline procedure being followed"*

73. Before the Tribunal, C accepted that his grievance related to the allegations he was facing and the investigatory process undertaken by R. Having read the grievance, that is also the view of the Tribunal.

Disciplinary Hearing

74. DS conducted the hearing on **25 August 2021**. The notes of the hearing are at **pages 485 – 491**. In evidence, C said he presumed them to be accurate and did not identify any inaccuracy. In advance of the disciplinary hearing, C asked.

75. DS approached the allegations in three sections:

75.1.1. Inappropriate messages and harassing behaviour of a sexual nature towards AB;

75.1.2. Inappropriate messages and harassing behaviour of a sexual nature towards IJ;

75.1.3. Inappropriate text messaging between C and his colleague, LA, about LE's daughter (CE).

76. DS wished to understand whether, on reflection C viewed any of his behaviour as inappropriate or if he could see why the complainants may consider his behaviour to be inappropriate or intimidating.

77. C raised a number of issues during the disciplinary hearing, what he saw as failings in the management team and breach of confidentiality. He raised his concern about Mr Logan being biased. He also said that he believed that he was being treated differently, raising again '*another scenario in the office that was much worse than this one between two males and all that was happened is they were segregated*'. He added '*my only conclusion is mine was treated differently because of my race*' [**page 491**].

78. As regards the incident on **08 March 2021**, C said that he was in close proximity of IJ's car and that his wheels could not get traction on the road due to adverse weather and made a wheel spin, so he exaggerated about speeding away [**page 488**].

79. As regards IJ's statement that she saw C pull up next to her at traffic lights, C said that there was a good probability that he was there, that it was near to where he lived, that he could have picking up his ex-partner around that time and that it would be no more than coincidence. C said he did not recall seeing IJ but there was a 70%-80% chance that it was him.

80. As regards the message about CE, he said that he and LE often show each other pictures of their children and that she showed him a picture of CE. He explained that he had sent a message to LA, as he thought he was his friend and understood his humour. He said that the message was 'I would dust her' but in fact this was a typo, and he meant to say 'I would date her'. C explained that if he was going to use the word 'dust' it would relate to going fast in a car, that "I would dust you". In seeking to explain why LA might have shown the message to other people, C said that he must have colluded.

81. There was a discussion about the meaning of the word 'dust' as featured in the online 'urban dictionary (Newcastle area) where it records 'dust' as urban slang for having sexual intercourse. The words 'peng' is recorded in the same dictionary as physically attractive or good looking. C said that the reference to CE having a boyfriend but not for long was just his jokey sense of humour and he meant nothing by it. C then said that LA came to work stoned and he had messages to prove this. We find that the Claimant deliberately used the word 'dust' and that in doing so he understood what it meant, as in the urban dictionary sense.

Breach of confidentiality

82. DS considered but did not accept that there had been a breach of confidentiality by management in relation to the investigation. He concluded that what C regarded to be a breach of confidentiality was no more than the natural growing awareness between colleagues, through discussion between them, that C had been messaging IJ and AB.

83. Given that IJ did not know C and had never met him, it is natural that she would talk to colleagues asking about him and asking them about the messages. It is also natural for AB to speak to colleagues about the messages to her, and for other colleagues, such as LA, to tell her, in that context, that C had messaged him about AB and CE. We agree with DS that these were discussions which assisted the complainants make the decision to raise their concerns. There is no evidence that management breached any confidentiality, at least not that we have seen.

Mr Logan's alleged bias

84. C said that he believed Mr Logan's report to be biased. In advance of the disciplinary hearing, he asked DS to listen to the recording. DS did not do so [**page 422**].

DS's decision

85. DS sent his decision on **07 September 2021** [**pages 495 - 497**]. In evidence to the Tribunal, DS was asked whether he could rank the incidents in terms of seriousness. He believed the matter regarding IJ to be the most serious, followed by AB and then the text regarding CE. As regards CE, DS's conclusion was that this was a factor in his overall assessment of the seriousness of and lending weight to the complaints regarding IJ and AB. He concluded that C had initiated the contact with both AB and IJ, that his messages were inappropriate, in some cases of a sexual nature and that the conduct in the car park regarding IJ was such that it reasonably caused her to feel intimidated and concerned for her safety. The conduct, he concluded, was unwanted by AB and IJ. He rejected the suggestion of collusion between AB and IJ, concluding that they had simply come to a realisation that they had both been receiving inappropriate messages from C.

86. DS did not investigate the incident regarding AW and DW. He did not regard it as similar to the case against C.

Appeal against dismissal

87. C appealed DS's decision. His grounds are at **pages 584 – 587**. This was later revised [**pages 751 – 756**]. He argued that the whole investigation had been biased and prejudiced from the outset, that management had not followed its own processes and that any comments he made had just been dismissed. Amongst the points raised in the appeal, C referred to the failure to review suspension, that he had not breached any policies. He emphasised that he had been a civil servant for over 5 years with no issues regarding his conduct.

88. On **page 753**, C said that he had "*made Mr Logan and DS aware of a precedent in where AW was sexually harassed by DW – this was a clear case in where gifts were being bought for AW, he was being stalked, he had pictures of DW genitalia sent to him, yet this was never referred up to PSU irregardless of whether or not if anyone wanted to pursue the matter, this should have been a process followed. Instead the matter was dealt with informally and DW had just been segregated from AW and continues to work for HMPO Durham. Yet, the DM refused to investigate further and his response was that he does not hold the full details, well unfortunately when my job is on the line and my character then this is not acceptable*."

89. The appeal was conducted by SM on **24 September 2021**.

90. Following the hearing, Ms SM considered that it was necessary to make further enquiries into the case which C relied on as a precedent, regarding AW. She wished to understand whether that case was truly comparable to that of C. She wrote to C on **28 September 2021** [**page 568**] to explain that she was undertaking some further investigation work and would provide C with the outcome decision week commencing **04 October 2021**. On **28 September 2021**, at Ms SM's request, DM emailed JT as follows: *"Sometime ago I believe you dealt with an issue that allegedly occurred between two members of staff (AW & DW). Please if possible could you provide detail and how it was dealt with?"* [**page 567**].

91. JT replied on **29 September 2021** [**page 566**]. He said:

"AW approached me as he was receiving 'befriending' contact from DW, sometimes late at night. From what I can recall, this was via text/WhatsApp.

AW was uncomfortable with this and simply wanted the contact to stop.

DW was spoken to by a manager and was asked to stop contacting AW.

DW complied with the rend stopped the contact.

The matter was dealt with informally."

92. SM received this information and she then wrote to AW on **04 October 2021**. She introduced herself and explained that she needed to ask some additional questions [**page 570**]. She met with AW on **06 October 2022**. She updated the HR caseworker assisting her, Karen Clayford, on **11 October 2022,** [**page 573-574**].

93. SM gave evidence to the Tribunal about her discussion with AW and was questioned by C. We accept her evidence as a truthful account of her discussion with AW. It is for that reason that we were able to set out our findings of fact in paragraphs 24 to 28 above. AW explained to SM that he was uncomfortable with the contact from AW but did not feel threatened. He said there was no sexual content in any of the messages. The only thing he considered inappropriate was that DW had made a comment about a photo of a stag night AW had been on and which AW had posted on his social media account. SM asked what the comment was but he could not remember, only that he considered it inappropriate.

94. AW told her that, after receiving a message from DW very early on Saturday morning when he was in bed, he felt that was enough and he spoke to his manager, asking to be moved to a different floor. This was agreed to and he asked for no further action to be taken. When cross examining SM, C put to her that perhaps the reference in AW's email [**page 572**] to feeling distressed was

to the distress he had experienced from the sexual harassment he had experienced and that he was still traumatised from it. This was pure speculation on C's part. In any event, SM did not accept this. In his email, AW was referring to his earlier interview with Mr Logan on **02 June 2021**, as part of the investigation into C. Although she was not able to see the messages that passed between DW and AW, she had been told by AW that they were not inappropriate. Having explained to AW that it was not an investigation into the incident and that she just wanted to understand what had happened regarding AW, she had no reason to believe that he had been lying to her about things. AW said to her that he did not consider he had been sexually harassed, but that DW wanted to befriend him and that AW did not want this.

95. As AW's line manager who dealt with the matter at the time had passed away, SM could find no more information in addition to what she had been told by JT and AW. She considered all of this in the context of the Claimant's complaint, which was that he had been treated differently and less favourably on grounds of race than DW because a matter which was at least as serious (in fact C contended more serious) than the allegations against him was dealt with informally and not subject to any investigation.

96. SM concluded that the situation regarding DW and AW was not comparable to C's case. She regarded it as appropriate for that matter to be treated as minor misconduct. She believed the essential differences to be:

96.1.1. AW did not feel threatened or intimidated by DW, whereas AB and IJ complained of feeling harassed, intimidated and threatened, especially IJ.

96.1.2. There was no evidence that the content of DW's messages was sexual in nature, unlike the content of C's messages, such as the comment regarding pierced nipples, 'dust' and 'proper peng'.

96.1.3. AW did not wish to proceed with the matter formally, unlike the complainants in C's case.

96.1.4. The incident involving DW lasted a span of one week, unlike C's case, which contained evidence supporting a pattern of inappropriate behaviour towards female colleagues and sending inappropriate messages.

96.1.5. She considered it reasonable to distinguish the situations and that the matters against C could reasonably be characterised as gross misconduct whereas the conduct of DW could reasonably be characterised as minor misconduct, relying on extracts from the Disciplinary Policy on **page 621** (4th bullet point) and **page 620** (5th bullet point) respectively.

97. She sent her decision on the appeal and on C's grievance on **18 October 2021**. She upheld DS's decision and, save for some aspects regarding policy and procedure, rejected the grievance. Her outcome is at **pages 590 – 592**. She set out her conclusions under the following headings:

    97.1.1. Process not applied correctly

    97.1.2. Unreasonable decision

    97.1.3. Other

98. As to the issue of bias on the part of Mr Logan, SM dealt with this under the heading 'process not applied correctly' [**page 590**]. She was of the view that the questions asked of C in his interview were in accordance with the investigation guidance; that the emails and additional statement provided by C was given to the Decision Manager and reviewed by him and considered as part of the decision-making process. She did not listen to the recorded interview.

99. The section headed '*other'* consisted of:

    99.1.1. SM's analysis of whether the complaints fell under the Sexual Harassment guidance,

    99.1.2. SM's consideration of C's concern about collusion,

    99.1.3. SM's consideration of C's grievance

100. C accepted in evidence that all the points he had raised were discussed at the appeal stage, albeit he did not agree with the outcome.

Relevant law

Direct discrimination: section 13 Equality Act 2010

101. **Section 13** provides that:

(1) *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*.

102. Person 'B' in section 13 is often referred to as 'the statutory comparator'. It follows from the wording of the section that the statutory comparator must not share the claimant's protected characteristic. In these proceedings, therefore, the comparator must be an individual who is not of Asian or of Bangladeshi origin.

103. In addition to this, **section 23(1) Equality Act 2010** provides that:

(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.

104. This means that the comparator must be someone in the same position in all material respects as the claimant, save only that he is not a member of the protected class: **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] I.C.R. 337 HL. This does not mean that the circumstances of the claimant and the comparator must be identical in all respects. Only those circumstances that are 'relevant' to the treatment of the claimant must be the same or nearly the same for the claimant and the comparator (see also paragraph 3.23 of the EHRC Code of Practice on Employment 2011).

105. In **Shamoon**, Lord Rodger said:

> ***"….the 'circumstances' relevant for a comparison include those that the alleged discriminator takes into account when deciding to treat the claimant as it did".***

106. A circumstance may be relevant if an employer attached some weight to it, when treating the person as it did. In **Macdonald v Ministry of Defence v Governing Body of Mayfield Secondar School** [2003] I.C.R. 937, HL, Lord Hope held that:

> ***"All characteristics of the complainant which are relevant to the way his case was dealt with must be found also in the comparator".***

107. This principle applies whether the comparator is an actual or hypothetical comparator: **Shomer v B and R Residential Lettings Ltd** [1992] IRLR 317, CA. Where there is no actual comparator, it is incumbent upon the Tribunal to consider how a hypothetical comparator would have been treated: **Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting** [2002] I.C.R. 646, CA.

108. Where a complainant relies on a hypothetical comparator, the 'circumstances' of the comparator must be constructed. When considering whether the employer would have treated the comparator any differently from the claimant, it may draw inferences from (among other things) the treatment of a person whose circumstances are not sufficiently similar to warrant them being treated as an actual comparator. Although not actual comparators, their circumstances may be sufficiently similar, and their treatment such, as to justify an inference that the Respondent would have treated a hypothetical comparator in similar circumstances to the claimant, more favourably.

109. In **Stockton on Tees Borough Council v Aylott** [2010] I.C.R. 1278, CA, Mummery LJ stated:

> ***"I think that the decision whether the claimant was treated less favourably than a hypothetical employee of the council is intertwined with identifying the ground on which the claimant was dismissed. If it was on the ground of disability, then it is likely that he was treated less favourably than the hypothetical comparator not having the particular disability would have been treated in the same relevant circumstances. The finding of the reason for his dismissal supplies the answer to the question whether he received less favourable treatment."***

110. Therefore, in cases where the identify of the comparator is in issue, a tribunal may find it helpful to consider postponing the question of less favourable treatment until after it has decided why the treatment was afforded to the claimant. If it is shown that the protected characteristic had a causative effect on the treatment of the claimant, it is almost certain that the treatment will have been less favourable than that which an appropriate comparator would have received. Similarly, if it is shown that the characteristic played no part in the decision making, then the complainant cannot succeed and there is no need to construct a comparator: see **Law Society and others v Bahl** [2003] IRLR 640, EAT (Elias J, as he then was).

111. An employer can be liable for discriminatory treatment in circumstances where the decision maker in relation to the claimant is different to that in the comparator's case. The mere difference in identity of decision makers is unlikely to constitute a material difference for the purpose of section 23 EqA: **Olalekan v Serco Ltd** [2019] IRLR 314, EAT.

112. Proving discrimination can be very difficult. As Lord Rodger of Earlsferry said in **Shamoon** (@para 143):

> ***"Discrimination is rarely open and may not even be conscious. It will usually be proved only as a matter of inference: Nagarajan v London Regional Transport [1999] I.C.R. 877 e – h, per Lord Nicholls. The important point is that there are no restrictions on the types of evidence on which a tribunal can be asked to find the facts from which to draw the necessary inference. In Chief Constable of West Yorkshire Police v Vento [2001] IRLR 124 the Employment Appeal Tribunal discussed some of the kinds of evidence that are used and how they should be approached. In particular, Lindsay J pointed out, at p.125, para 7, that one permissible way of judging how an employer would have treated a male employee in cases which, while not identical, were also now wholly dissimilar. Despite the differences, the tribunal may be able to use that evidence as a sound basis for inferring how the employer would have treated a male employee in the same circumstances as the applicant. Of course, a tribunal cannot draw inferences from thin air, but it can draw them by using its good sense to evaluate the evidence, including the comparisons offered: p.126, para 12."***

113. To assist complainants in establishing discrimination, the Equality Act 2010 provides for a reversal of the burden of proof in certain circumstances.

Burden of proof

114. **Section 136** Equality Act 2010 provides that:

> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred;*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision*

115. This section, otherwise known as the burden of proof provision, lays down a two-stage process for determining whether the burden shifts to the employer. However, it is not obligatory for Employment Tribunals to apply that process. Whether there is a need to resort to the burden of proof provision will vary in every given case. Where there is room for doubt as to the facts necessary to establish discrimination, the burden of proof provision will have a role to play. However, where the tribunal is in a position to make positive findings on the evidence one way or the other, there is little to be gained by otherwise reverting to the provision: **Hewage v Grampian Health Board** [2012] I.C.R. 1054.

116. In cases where the tribunal is not in a position to make positive findings, s136(2) means that if there are facts from which the tribunal could properly conclude, in the absence of any other explanation, that A had failed to make reasonable adjustments or harassed B, it must so conclude unless A satisfies it otherwise. In considering whether it could properly so conclude, the tribunal must consider all the evidence, not just that adduced by the Claimant but also that of the Respondent. That is the first stage, which is often referred to as the 'prima facie' case. The second stage is only reached if there is a prima facie case. At this stage, it is for A to show that he did not breach the statutory provision in question. Therefore, the Tribunal must carefully consider A's explanation for the conduct or treatment in question: **Madarassy v Nomura International pl**c [2007] I.C.R. 867, CA; **Igen Ltd v Wong** [2005] I.C.R. 931, CA.

117. For there to be direct discrimination, the treatment needs to be because of a protected characteristic. In considering this, motive is irrelevant. Where the reason for the treatment is not immediately apparent – or inherently discriminatory - it is necessary to explore the mental processes, conscious or unconscious of the alleged discriminator to discover the facts that operated on his or her mind: **Amnesty International v Ahmed** [2009] I.C.R. 1450, EAT. However, the protected characteristic need not be the only reason or even the

main reason for the treatment for it to be said to be 'on grounds of' or 'because of'. It is enough that the protected characteristic is an effective cause

Unfair Dismissal – requirement for continuity of employment

118. Subject to certain exceptions, section 108 of the Employment Rights Act 1996 provides that the right under section 94 not to be unfairly dismissed, does not apply to the dismissal of an employee unless he has been continuously employed for a period off not less than two years ending with the effective date of termination.

119. **Section 210 ERA 1996** provides:

(1) References in any provision of this Act to a period of continuous employment are (unless provision is expressly made to the contrary) to a period computed in accordance with this Chapter.

(2) …..

(3) In computing an employee's period of continuous employment for the purposes of any provision of this Act, any question –

(a) Whether the employee's employment is of a kind counting towards a period of continuous employment, or

(b) Whether periods (consecutive or otherwise) are to be treated as forming a single period of continuous employment,

Shall be determined week by week; but where it is necessary to compute the length of an employee's period of employment it shall be computed in months and years of twelve months in accordance with section 211.

(4) …..

(5) *A person's employment during any period shall, unless the contrary is shown, be presumed to have been continuous*.

120. **Section 211 ERA 1996** provides:

(1) An employee's period of continuous employment for the purposes of any provision of this Act –

(c) Subject to subsection (3) begins with the day on which the employee starts work, and

(d) *Ends with the day by reference to which the length of the employee's period of continuous employment is to be ascertained for the purposes of the provision*.

121. **Section 212 ERA** provides:

(1) Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.

122. **Section 218(6) ERA** provides:

(6) If an employee of an employer is taken into the employment of another employer who at the time when the employee enters the second employer's employment, is an associated employer of the first employer –

(a) the employee's period of employment at that time counts as a period of employment with the second employer, and
(b) The change of employer does not break the continuity of the period of employment.

123. **Section 231 ERA** provides:

For the purposes of this Act any two employers shall be treated as associated if –

(a) One is a company of which the other (directly or indirectly) has control, or
(b) Both are companies of which a third person (directly or indirectly) has control,

And 'associated employer' shall be construed accordingly.

Crown employment

124. **Section 191 ERA 1996** provides:

(1) Subject to sections 192 and 193, the provisions of this Act to which this section applies have effect in relation to Crown employment and persons in Crown employment as they have effect in relation to other employment and other employees or workers.

(2) …..

(3) *In this Act "Crown employment" means employed under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision*.

125. In **Department for Environment Food and Rural Affairs v Robertson and others** [2004] I.C.R. 1289, the EAT had to consider whether employees employed in DEFRA were 'in the same employment' for the purposes of the

Equal Pay Act 1970, as other employees employed in the Department of Transport and the Regions (DETR). The issue was whether it was permissible for civil servants in an equal pay case to use as comparators civil servants of the opposite sex who worked in a different government department under different pay and conditions set by that different government department. The EAT, and the Court of Appeal set out the legislative history for the employment of and management of civil servants. It was common ground that civil servants employed in DEFRA and those employed in other government departments had the Crown as their common employer. Government is carried on through civil servants employed by the Crown.

126. In **Surrey County Council v Lewis** [1987] 3 ALL E.R. 641, the House of Lords had to consider the position of a part-time teacher employed by the same employer (Surrey CC), in three separate departments under separate, short, fixed-term contracts with varying intervals in between. The issue was whether she qualified for unfair dismissal and redundancy rights.

127. Their Lordships held that where an employee was employed by the same employer under concurrent but separate contracts of employment for part-time work the total hours worked could not be aggregated for the purpose of qualifying under paras 4 and 6 of Sch 13 of the Employment Protection (Consolidation) Act 1978 for a redundancy payment or compensation for unfair dismissal.

128. At the time of the Lewis case, in order to qualify for the right to unfair dismissal, an employee had to be able to show a period of 'continuous employment' of one year. However, only those weeks 'during the whole or part of which the employee's relations with the employer are governed by a contract of employment which normally involves employment for 16 hours or more' counted for the purpose of computing the period of continuous employment (see Lord Hailsham @ **page 643, paras d – g**).

129. Mrs Lewis was a teacher of photography, employed under separate and distinct, concurrent contracts of employment. Each contract was independent of the other and did not form part of a composite whole. In respect of each contract she worked for less than 16 hours a week. She sought to aggregate the contracts (and the hours thereunder) to demonstrate that her relations with her employer were governed by a contract of employment which normally involved employment for 16 hours or more. In addition, she argued that different 'periods' of employment were to be treated as forming a single period of continuous employment. She needed to do this because of the requirement that to show a continuous period of employment of one year. Each of her contracts was with a different college: Guildford, Farnham and Epson. Each contract was a fixed-term and part-time hours contract. Each was for the length of a term, therefore less than a year.

130. She sought to join together, not only the periods within one college, but also the periods of each contract with Guildford college to those with Farnham and Epson. Therefore, although the primary issue in the case was the aggregation of hours, that was not the only issue. There was also the question of which weeks counted for the purposes of determining the 'period of continuous employment' and whether she had completed one year's continuous service (see Lord Ackner, page 646, para H – J). As Lord Ackner described it: "*If such aggregation is permissible the further question arises, namely whether an interval between these separate contracts, as opposed to the interval between the successor and predecessor contracts in the same series, breaks the continuity of employment*" (**page 647 @ para b**).

131. Lord Hailsham (with whom the remainder of the House agreed) said at **page 644, paras F – J**) said:

"***The employee's difficulty resides in the fact that she can only establish the requisite periods of continuous employment whether for deciding that 'the whole or part of the employee's relations with the employer is governed by a contract of employment which normally involves employment for sixteen hours or more weekly' (see Sch 13, para 4) or for the purpose of considering whether 'the periods' (consecutive or otherwise) are to be treated as forming a single period of continuous employment if she is permitted to add both the hours and periods of work actually done under one engagement respectively to the hours and periods of work actually performed under one or more of the others. In my opinion neither computation will avail the employee if it is once established that the engagements are quite separate and distinct from one another, and do not, in one way or another, form a part of a single composite whole, entitling the employee to add one to the other for both purposes….The whole structure of the Employment Protection (Consolidation) Act 1978 read with Sch 13 is built on the supposition that to create the qualifying period there must be a single relationship contained in a single contractual complex, whether oral, in writing or implied, and whether or not contained in a single document or a number of documents, and there is no room therefore for importing into para 4 of Sch 13 any such phrase as would give the meaning 'a contract or contracts of employment which normally, whether singly or collectively involve employment for sixteen hours.' In my view the whole structure of the Act precludes this interpretation and accordingly neither the Interpretation Act 1978 nor the ambivalence, in English, of the indefinite article, to which I referred in the argument before your Lordships, is available to the employee."***

132. Lord Ackner (at page 650, paras F -G) said:

"***I agree with the judgment of the Employment Appeal Tribunal that at the theart of the right to claim that a dismissal has been unfair…. Lies the loss of employment under the particular contract of employment in relation to thwich the complaint of termination is made. The relevant provisions all focus on that particular contract. In the case of unfair dismissal, dismissal occurs whe the contract in respect of which complaint is made is terminated…That complaint must be presented within three months of the termination of that contract…Moreover, if the complaint succeeds, the applicant receives a basic award which reflects the hours worked under the contract in respect of which the complaint is made.."***

133. As regards the 'intervals' point, the intervals would not break continuity if the employee had been absent from work on account of a 'temporary cessation' of work (see now, section 212(3) ERA). On this point, Lord Ackner said at page 648 (para f) (with my emphasis added):

"The Question whether **an interval between these separate contracts**, as **opposed to an interval between the successor and predecessor contract in the same series**, breaks the continuity of employment depends on the proper interpretation of the words 'a temporary cessation of work' in para 9(1)(b) of Sch 13"

134. Although it was strictly unnecessary to answer the question about 'temporary cessation', their Lordships did so out of deference to the arguments. Lord Ackner stated that:

"Thus, para 9 is dealing only with periods which are not to be treated as interrupting a continuous period of employment under a contract of employment, notwithstanding that during the period of interruption there is in law no subsisting contract of employment.…Moreover, to assess 'temporary cessation' by reference to contracts other than the successor and predecessor contracts in the same series would give rise to comparable anomalies."

135. The point in **Lewis** in relation to the second question was that Mrs Lewis had argued that she was continuously employed for more than one year by treating the periods of employment under each contract as forming a single period of continuous employment. However, the House of Lords rejected this, declaring that she could not treat the periods under separate and distinct contracts as forming a single period of continuous employment. She could only do this in respect of successor and predecessor contracts in the same series where the interval between such contracts was due to a 'temporary cessation of work'.

136. In **Bradford Metropolitan Borough Council v Dawson** [1999] I.C.R. 312, the EAT had to consider the position of an employee who was employed by the same employer under two different contracts. Mrs Dawson commenced employment in the council's community and environmental services directorate in **December 1991** (**'contract 1'**) and then commenced another contract in the social services directorate on **04 March 1996 ('contract 2')**.

137. She resigned from **contract 1** with effect **02 June 1996** but continued in employment under **contract 2** until it was terminated by dismissal on **27 April 1997**.

138. The EAT held that the use of the indefinite article in section 212(1) ERA, which provided that "*any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment*" meant that, for the purpose

of establishing continuity of employment, the tribunal should examine the whole of the employment relationship during which there was any contract of employment in existence. Where there were two contracts running concurrently, however, it was not permissible to aggregate the service or hours of one into the other. But where, as in Mrs Dawson's case, there was only one contract in existence as at the date of termination of that contract, the presumption in favour of continuity contained in section 210(5) together with section 212 operated so as to entitle her to the benefit of the entirety of her period of service with the employer, including the time when there were two contracts in existence (see Morison J, **page 318, paras A-C)**.

139. The EAT held that Mrs Dawson did have sufficient continuity because at the time of dismissal from the contract which was the subject of complaint there had been only one contract in existence. Therefore, the **Lewis** decision did not apply. The EAT expressed no view as to whether there would have been a 'dismissal' if one of the two concurrent contracts had been terminated at a time when Mrs Dawson was employed under both contracts leaving the other one in in place because that was not an issue which arose on that appeal (see **page 318, para E**). Although the court referred to 'dismissal', it seems to us that this must be a transcription error and that it was referring to an 'actionable' dismissal (i.e. one which the tribunal would have jurisdiction to adjudicate on).

Section 98(4) and Fairness

140. It is for the employer to show the principal reason for dismissal and that it is a reason falling within section 98(2) or that it is for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. The reference to the 'reason' or 'principal reason' in section 98(1)(a) and s98(4) is not a reference to the category of reasons in section 98(2)(a)-(d) or for that matter in section 98(1)(b). It is a reference to the actual reason for dismissal (**Robinson v Combat Stress** UKEAT/0310/14 unreported). The categorisation of that reason (i.e. within which of subsection 98(2)(a)-(d) it falls) is a matter of legal analysis: **Wilson v Post Office** [2000] IRLR 834, CA.

141. A reason for dismissal 'is the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee: **Abernethy v Mott, Hay and Anderson** [1974] ICR 323, CA. In a more recent analysis in **Croydon Health Services NHS Trust v Beatt** [2017] ICR 1240, CA, Underhill LJ said that the 'reason' for dismissal connotes the factor or factors operating on the mind of the decision maker which causes them to take the decision. It is a case of considering the decision-maker's motivation.

142. An employer may have multiple reasons for dismissing an employee. In **Robinson v Combat Stress** Langstaff P said at paragraphs 20 and 21:

"where an employer has a number of reasons which together form a composite reason for dismissal, the tribunal's task is to have regard to the whole of those reasons in assessing fairness. Where dismissal is for a number of events which have taken place separately, each of which is to the discredit of the employee in the eyes of the employer, then to ask if that dismissal would have occurred if only some of those incidents had been established to the employer's satisfaction, rather than all involves close evaluation of the employer's reasoning. Was it actually that once satisfied of one event, the second merely leant emphasis to what had already been decided? There may be many situations in which, having regard to the whole of the reason the employer actually had for dismissal, it is nonetheless fair to dismiss.

All must depend on the employer's evidence and the Tribunal's approach to it. But that approach must be to ask first what the reason was for the dismissal, and to deal with whether the employer acted reasonably or unreasonably by having regard to that reason: that is, the totality of the reason which the employer gives."

143. Where the reason is a composite of a number of conclusions about a number of different events the tribunal must examine all of the employer's reasoning as that was the actual reason for its dismissal.

144. In a 'misconduct' dismissal, the employer must also show that the principal reason for dismissal relates to the conduct of the employee. If it is established that the reason for dismissal relates to conduct the next question is whether the employer has acted reasonably in treating that reason as a sufficient reason for dismissal – s98(4) ERA 1996. The burden here is, of course, neutral. It is not for the employer to prove that it acted reasonably in this regard. The Tribunal must not put itself in the position of the employer. The Tribunal must confine its consideration of the facts to those found by the employer at the time of dismissal and not its own findings of fact regarding the employee's conduct.

145. Section 98(4) poses a single question namely whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the Claimant. It requires the Tribunal to apply an objective standard to the reasonableness of the investigation, the procedure adopted and the decision itself. However, they are not separate questions – they all feed into the single question under section 98(4). Whilst an unfair dismissal case will often require a tribunal to consider what are referred to as 'substantive' and 'procedural' fairness it is important to recognise that the tribunal is not answering whether there has been 'substantive' or 'procedural' fairness as separate questions.

146. The approach to be taken when considering s98(4) is the well-known band of reasonable responses, summarised by the EAT in **Iceland v Frozen Foods Ltd v Jones** [1983] I.C.R. 17. The Tribunal must take as the starting point the words of s98(4). It must determine whether in the particular circumstances the decision to dismiss was within the band of reasonable responses which a reasonable employer might have adopted. In assessing the reasonableness of the response it must do so by reference to the objective

standard of the hypothetical reasonable employer (**Tayeh v Barchester Healthcare Ltd** [2013] IRLR 387, CA @ para 49). The Tribunal must not substitute its own view as to what was the right course of action.

147. In misconduct cases, the approach which a Tribunal takes is guided by the well known decision of **British Home Stores v Burchell** [1978] IRLR 379, EAT. Once the employer has shown a valid reason for dismissal the Tribunal there are three questions:

(i) Did the employer carry out a reasonable investigation?

(ii) Did the employer believe that the employee was guilty of the conduct complained of?

(iii) Did the employer have reasonable grounds for that belief?

148. In gross misconduct unfair dismissal cases, in determining the question of fairness, it is unnecessary for the Tribunal to embark on any analysis of whether the conduct for which the employee was dismissed amounts to gross misconduct. However, where an employer dismisses an employee for gross misconduct, it is relevant to ask whether the employer acted reasonably in characterising the conduct as gross misconduct – and this means inevitably asking whether the conduct for which the employee was dismissed was capable of amounting to gross misconduct – see **Sandwell & West Birmingham Hospitals NHS Trust v Westwood** (UKEAT/0032/09/LA) [2009] and **Eastland Homes Partnership Ltd v Cunningham** (EAT/0272/13). This means asking two questions:

(1) is the conduct for which the employee was dismissed conduct which, looked at objectively, capable of amounting to gross misconduct, and

(2) Did the employer act reasonably in characterising the conduct as gross misconduct?

Fair procedures

149. A dismissal may be unfair because the employer has failed to follow a fair procedure: **Polkey v AE Dayton Services Ltd** [1988] I.C.R. 142, HL. In considering whether an employer adopted a fair procedure, the range of reasonable responses test applies: **Sainsbury plc v Hitt** [2003] I.C.R. 111, CA. The fairness of a procedure which results in dismissal must be assessed overall. That includes the appeal process. Defects in a disciplinary hearing and pre-dismissal procedures can be remedied on appeal: **Taylor v OCS Group Ltd** [2006] I.C.R. 1602, CA.

150. Sometimes, in the course of a disciplinary investigation, an employee raises a grievance. Employees may subsequently argue that a failure to address the grievance or the way in which it was dealt with renders a dismissal

unfair. The ACAS Code of Practice on Discipline and Grievances at Work (2019) states that where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended but where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently (para 46 of the Code). Further guidance is given in the ACAS Guide under 'what problems may arise and how should they be handled?'.

Reasonable sanction

151. Dismissal must be within a band of reasonable responses open to the employer. An employer who, without warning, treats a case of misconduct more seriously than a comparable case may be found to have acted unreasonably. If cases are truly comparable the issue will be whether any distinction in treatment by the employer was within the band of reasonable responses. However, like must be compared with like and the Tribunal must not lose focus of the statutory test under section 98(4) ERA 1996

Discussion and conclusions

Race Discrimination: section 13 EqA

152. We start with the complaint of direct race discrimination. As set out in the relevant law section above, discrimination requires a comparative analysis of how a person has been treated. The comparison may be with how an identified person has been treated or with how a hypothetical person would be treated by the respondent. In either case, however, when comparing the treatment, there must be no material difference between the circumstances relating to each case.

153. We first considered the question of the actual comparator identified by the Claimant, namely DW. It is C's case that he was treated less favourably than DW, who is white British.

153.1. In our judgement, the Claimant's case is materially different from that of DW, such that he is not an appropriate statutory comparator. The material differences which preclude a direct comparison are:

153.2. There were two complainants in C's case, whereas there was one on DW's case,

153.3. One complainant in C's case was concerned for her safety sufficient to contact the police, whereas in DW's case there were no such concerns expressed.

153.4. The conduct complained of in DW's case was over the period of a week, whereas in C's case it was much longer,

153.5. The complainant was a male employee complaining about unwanted attention from a male colleague and not inappropriate sexual comments towards him, whereas in C's case the complainants were much younger female employees one of whom had never met the Claimant, and where some of the comments made by the Claimant were related to sex,

153.6. The one complainant in DW's case (namely AW) did not wish any formal action to be taken and simply asked to move to a different floor, whereas the complainants in C's case did wish matters to be taken formally.

154. We considered the circumstances of a hypothetical comparator to be:

154.1.1. A white male employee who was the subject of harassment complaints from two younger female colleagues who wished matters to be considered formally by the employer.

155. Although there was, in our judgement, no appropriate actual comparator, that does not mean that we need not take account of the circumstances of DW or of his treatment. As is clear from the legal authorities referred to above, we can and should consider the events relating to DW and AW as evidence in comparing how the hypothetical comparator would be treated and in considering whether it is appropriate to draw any inference of less favourable treatment being on grounds of race

156. There are some similarities between C's case and DW's case. We believe we can infer that AW must have been sufficiently uncomfortable with the contact from DW in order to raise it with his line manager at the time, as was the case with IJ and AB. However, this does not mean it is legitimate to draw an inference that a hypothetical comparator, as described in paragraph 154, would have been treated differently from the Claimant. That would not be a legitimate inference to draw. We are satisfied that the decision to investigate, suspend and discipline the Claimant was not motivated consciously or unconsciously by race. It was motivated entirely by the fact that the complainants wished formal action to be considered, and upon considering the facts, the decision to dismiss was made because of the dismissing manager's assessment of the seriousness of the conduct and the appropriate sanction.

157. We refer to our finding that, when the matters were first raised, the Respondent had intimated that there would be no formal action, as the complainants had not requested this. Contrary to the Claimant's arguments, we did not conclude that the Respondent was looking for ways to discipline him. It was only when the complainants reflected and asked for the matters to be taken forward formally, that the Respondent invoked a formal investigation against the Claimant. Had this not happened, just as in the case of DW, it is likely that no formal action would have been instigated against the Claimant – absent any repeat of the behaviours by the Claimant. There was no evidence of any animus

towards the Claimant either from the complainants or from the decision makers. We considered the Claimant's argument that Mr Logan had displayed bias towards him but this was put on the basis of his intonation and dismissive manner. Even if it were right to conclude that Mr Logan had displayed impatience or was dismissive of some of the Claimant's points (and the written report does not bear this out) nevertheless that would be equally consistent with him being dismissive of the points of interpretation the Claimant was placing on his actions or words used. We bear in mind that most of the facts were not in dispute and that broadly speaking, the case was about the interpretation to be placed on the conduct. Mr Logan did not go looking for complaints against the Claimant. He was brought in from outside to investigate.

158. There was no evidence of a quick or knee-jerk reaction to investigate the Claimant's conduct, such that might be said to be motivated by racial considerations. There is nothing in the words or language used that evinces any sign of conscious or unconscious bias that we have detected. There is nothing from our findings in relation to DW or from the circumstances in his case, from which we might justifiably infer that the Claimant had been treated less favourably than a white British employee had been or would have been. In the terms of section 136 Equality Act 2010, the Claimant has not proved facts from which we could conclude DS or SM had directly discriminated against him. We consider that a White British employee in materially similar circumstances would have been subject to investigation, would have been suspended and would have been dismissed by the Respondent.

159. We emphasise that we considered the motivation of DS and SM and asked the 'reason why' question, namely: '*why did the Respondent dismiss the Clamant?*' We are satisfied that the reason for dismissing him was that DS – and SM on appeal – genuinely considered his communications with and conduct towards IJ and AB and the reference to CE to be unacceptable and to amount to gross misconduct and that in so finding, he was not motivated consciously or unconsciously by race. The only factors that operated on their minds were those in paragraph 85 above and 181 below.

160. We conclude, therefore, that the Claimant's treatment was not motivated by race, but solely by the fact that the complainants had made these complaints against him, and by the assessment of their seriousness by DS and SM. He was not treated less favourably than a white British employee had been or would have been. Therefore, his complaint of direct race discrimination must be dismissed.

Unfair dismissal: continuity of employment

161. This case raised an interesting legal argument regarding jurisdiction. As set out above, the issue was whether the claimant had been employed for two continuous years in order to qualify for the right not to be unfairly dismissed.

162. This depended on whether the time during which he has been employed in HMRC could be counted in computing his period of continuous employment. Initially, the Claimant relied on the 'associated employer' provisions of the Employment Relations Act 1996. However, he accepted that he had been 'barking up the wrong tree' (in the words of the tribunal) as neither HMPO or HMRC satisfied the statutory definition of 'associated employer'.

163. It was the Tribunal that raised the question of 'the same employer' directing the parties to the Defra case.

164. We are satisfied that, in relation to his employment in HMRC and HMPO, the Claimant was at all times employed by the one employer, namely the Crown. Mr Ryan did not strenuously argue against this and it seems to us to be an uncontroversial conclusion and one which is recognised in the contractual documents as referred to in our findings.

165. Therefore, at the date of termination of the HMPO contract of employment, the Claimant had been employed by the Crown for over two years. However, his employment was under two separate and distinct contracts: one within HMRC and one within HMPO. Those two organisations sit within two different government departments. The Claimant accepted that they were separate and distinct. Indeed, he made this point himself during the course of the investigation into his conduct.

166. The work is entirely different; the contractual terms are different; the place of work is different; the hours of work are different. The Claimant had to undergo checks before starting with HMPO (even if they were scaled down because he was an existing civil servant). He had to undergo a probationary period. He was for all practical purposes a new employee in a new job with a new organisation. They are totally autonomous.

167. Section 210(3) ERA speaks of whether an employee's 'employment is of a kind' counting towards a period of continuous employment. Those words suggest that there may be 'employment' which is not 'of a kind' that counts towards a period of continuous employment. This must be considered week by week. When considering the position week by week, section 212(1) applies.

168. At first blush, section 212(1) ERA would tend to suggest that the Claimant had sufficient continuous employment to bring his complaint of unfair dismissal from his HMPO contract. He can say that all weeks from **May 2016** to the date of dismissal on **26 August 2021** were weeks during which his relations with the Crown (his employer) were governed by a contact of employment – in fact, two contracts from **16 December 2019**.

169. If the examination of the statutory provisions and legal principles started and stopped there, the Claimant would be able to show that he did have the right not to be unfairly dismissed. However, it does not stop there.

170. When the employer terminated the HMPO contract, there were two concurrent contracts in existence. This is the same situation that prevailed in the Lewis case. Section 2110(3)(b) raises the question whether periods (consecutive or otherwise) are to be treated as forming a "single period of continuous employment".

171. In our judgement there was no single period of continuous employment. Rather, immediately before and on the termination of the HMPO contract there were two periods of continuous employment: one in respect of the HMRC contract and one in respect of HMPO. We are bound by the Lewis case. We have considered whether it might be argued that, because the issues here are not on all fours with those in Lewis, the HL decision is not strictly binding and the statements of opinion are obiter. We consider them to be part of the ration of Lewis. One of the issues was whether the Claimant could show that she had been 'continuously employed' for one year (it is now two years). Although that involved her showing that she was employed for 16 hours or more under 'a' contract, it also required her to show that the period of employment was continuous – the same issue in this case. It is right that, because their Lordships answered the 'aggregation' point against the Claimant, they did not strictly need to consider the 'period' of employment issue. It is also right that no question of 'intervals' arose in these proceedings. Nevertheless, there was a thorough examination of the applicable statutory provisions (which largely remain the same – leaving aside the demise of the hours requirement). In respect of both the 'aggregation' and the 'periods of employment', their Lordships handed down strongly expressed opinions, which we have set out above and with which, at this level, we would respectfully not countenance any disagreement. It is essential that, when considering whether a person qualifies for the right to claim unfair dismissal where they are seeking to combine two periods employment to form one, that they form a single period of continuous employment.

172. We conclude that the period of employment in HMRC and the period of employment in HMPO are not to be treated as forming a single period of continuous employment.

173. Therefore, the Claimant's claim of unfair dismissal must fail for that reason alone.

174. Lest we be wrong about that, however, we went on to consider the fairness of the dismissal.

Reason for dismissal

175. The reason for the Claimant's dismissal was his conduct towards the complainants AB and IJ. DS considered the Claimant to be in breach of the civil service code, the social media policy and the personal conduct policy [**page 195**].

176. We are satisfied that DS was genuinely of the belief that the Claimant had engaged in the conduct complained of and that in doing so he had contravened those policies. In addition, whether or not it could be said that there was a contravention of any express policy, DS was of the belief that the Claimant's conduct towards IJ and AB amounted to harassment related to sex. He believed and concluded that it was unwanted conduct which had the effect of creating an intimidating environment for the complainants, in particular IJ. DS ranked the cases in terms of seriousness as IJ, AB and the reference to CE. That may be so, but in fact he dismissed the Claimant because of the totality of his conduct, as he had found it to be. We have examined his reasoning in respect of IJ and AB. It is clear to us that the Claimant's text regarding 'CE' lent emphasis to the concerns he had regarding IJ and AB. He considered but did not accept the interpretation that the Claimant asked him to place on not only the words regarding CE but also his contact with IJ and AB and his conduct in the car park regarding IJ.

177. The reason for dismissal is a reason which relates to conduct and therefore a potentially fair reason for dismissal within section 98 ERA.

178. The next question is whether the dismissal was fair or unfair which depends on whether the Respondent acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the Claimant. This introduces the 'band of reasonable responses' test and brings to play the principles in **Burchell**.

179. We are satisfied that the Respondent carried out a reasonable investigation into the complaints. Mr Logan interviewed the complainants, the Claimant and other relevant witnesses.

180. From there, he prepared a report which sets out the respective versions of events and recommended a case to answer. It is not for us to ask whether we would have investigated differently or whether the investigation could have been better in some respect. The question is whether it was reasonable, in the sense of whether a reasonable employer might carry out an investigation in the way that this employer did. We are satisfied that it was a reasonable investigation.

181. Most of the facts were largely undisputed. Where they were disputed, it was reasonable for DS to conclude as he did. The decision to dismiss was based on the following

181.1.1. That the initial communication with AB was jokey banter and cordial.
181.1.2. Some of the messages with and comments regarding AB were of a sexual nature
181.1.3. That the Claimant had zoomed in on AB's breasts.
181.1.4. That the message regarding AB's pierced nipples was unwanted and conduct of a sexual nature.
181.1.5. The contact with IJ was initiated by the Claimant and unsolicited by her.
181.1.6. That his behaviour in the car park (the facts of which were not in dispute, merely the interpretation to be placed on them) was such that it made IJ feel increasingly concerned for her safety, which impacted on her mental wellbeing, her work and private life.
181.1.7. That, in his message regarding CE, 'dust' meant sexual intercourse, that it was not a typographical error and it was said in a sexual context.

182. DS had reasonable grounds on which to arrive at those conclusions.

183. With regards IJ in particular, as a Tribunal, we can readily see and understand why a young woman walking some 10 minutes from her work to her car in the dark, late at night, would have cause for concern when a man that she did not know, who had been sending her unsolicited messages commenting on her appearance and boyfriend, did a wheel spin near her car, then followed this up with a text saying that he did not mean to 'scare her' and using the word 'stalker' in that context. The Claimant has, to us, demonstrated a lack of insight into the effects of his own conduct – whatever his intentions. It is easy to see how an employer would be concerned by such conduct and by such a lack of insight.

184. Much the same can be said of the message to AB regarding her pierced nipples. Rather than recognising that his conduct was both unwanted and of a sexual nature (in respect of both of which the Respondent was reasonably entitled to conclude). We can understand the Claimant's point that until someone tells him that his conduct is unwanted, he is not to know that it is unwanted. But that has to be measured against what is coming in the other direction. From the evidence which was before the Respondent (and also before us) we could see no evidence that AB was engaging with the Claimant in a way that might be said to invite sexualised comments. The Claimant's case was that they had a banter type relationship and that by putting her images on social media, AB could not say that his contact was unwanted. This, we conclude, is misguided on the Claimant's part. When AB put her image on

Instagram, she did not invite comments about her breasts or nipples. We cannot conceive of how the Claimant can think that the mere posting of her image would warrant such a reply. Rather than recognise this, the Claimant says that the complaints were malicious and vexatious – something for which he has no basis. What he refers to as collusion was considered by DS and rejected. He (rightly in our judgement) merely saw a gradual realisation on the part of the two complainants that the same individual was contacting them both about their appearances, their boyfriends and so on. They were not colluding but doing what happens naturally at work, talking to each other. They did not invent anything. The messages speak for themselves.

185. As regards the message about CE, DS rejected the Claimant's argument that he had made a typo and that he did not use the word 'dust' as alleged. That was reasonably open to him. Indeed, we have concluded that the Claimant was being disingenuous in saying that this was a typo. By using the word 'dust' in the context of describing CE as 'proper peng' he was using it in the way alleged.

186. It is clear to us that at work the Claimant adopted what might be called a 'laddish' demeanour in his communications. That is very different to how he presented to this tribunal, which was most impressive. But when considering the fairness of a dismissal, our function is not to substitute our opinion for that of the Respondent. It is to assess whether they acted within a range of reasonable responses. We have no doubt whatsoever, that DS (and SM on appeal) had reasonable grounds to sustain the genuine belief that the Claimant had harassed IJ and AB and had acted in contravention of the Respondent's policies.

187. We did have some concerns regarding the procedure, which we considered when assessing the reasonableness of the decision to dismiss. In particular,

187.1.1. Neither DS nor SM listened to the recording of the Claimant's interview as he had asked them to,

187.1.2. Appendix J was not provided to the Claimant,

187.1.3. Mr DS did not address the Claimant's grievance at the disciplinary hearing

188. We feel that the Respondent should have listened to the recording of the interview by Mr Logan, not least because the Claimant was imploring DS to do so. It is not just actual fairness, but the perception of fairness that are important considerations for employees who are undergoing disciplinary investigation. After all, one of the benefits of recording an interview (other than to provide an accurate transcript) would be to detect any irregularity or aggression, for example. We accept the Claimant's point that sometimes bias cannot be

detected from the written report alone and that there may well be something in the manner of speech, whether it be a dismissive tone or an angry one, that could call into question a person's independence. Although we recognise the Claimant's point and are of the view that 'we' would have listened if we had been in Mr DS's position, we must also recognise that it is not our opinion that determines such things. Not only must it have been objectively unreasonable but it must (either alone or alongside other things) be such as to render the decision to dismiss unreasonable. We have read the report and the appendices. The matters which formed the basis of the allegations were largely undisputed – and where there were disputes, any conclusion to be reached depended on what inferences could be drawn from the undisputed facts and from hearing the Claimant's explanation at the disciplinary hearing. There were questions of interpretation to be placed on the words used and the events, which were matters for DS to decide upon.

189. We were unable to detect anything of substance in the report that could was explicable by any conscious or unconscious bias on the part of the investigator. It often happens that a person feels a questioner is biased because they do not like the way in which they have been asked questions, or the tone of voice of the questioner, but in our judgement, there has to be something more than that to render DS's (and SM's) decision not to listen to the recording to be outside a band of reasonable responses. All that the Claimant said was '*I implore you to listen to the interview recording…. And you can see from the questioning that there lies an underlying bias*." [**page 424**]. He does not say in what respect a listener might detect bias. At the disciplinary interview [**page 486**] in describing the report as very biased, the Claimant says that it refers to him as aged 33 whereas he was 31 at the time and that there loads of inaccurate data within it. He also seeks to draw out an inconsistency regarding something AB is said to have said about messages.

190. These do not, in our judgement, demonstrate bias in the report or in the decision to recommend a case to answer (which there clearly was, on any objective analysis). While we think DS should have listened to the recording because the Claimant had expressly asked him to do so, we conclude that – in the absence of more – a reasonable employer might have taken the same decision not to do so. Mr DS's approach was that he would make his decision based on the written report, the appendices and the Claimant's representations and not be influenced by any manner or tone of voice. That, we conclude, was a reasonable approach and one open to a reasonable employer.

191. We do not believe that the other concerns which we had were such as to render either the investigation or the decision making to fall outside a band of reasonable responses. The decision not to take a statement from LA was not unreasonable given the material available from others who were interviewed. We did not agree that the reference to 'credible' [**page 196**] must have been taken to mean that the Respondent considered LA not be a believable witness.

Rather, it was simply a statement that Mr Gabriel was content for him not to be called as a credible witness. He could just as easily have omitted the word 'credible', without changing the point he was making. Further, LA was the recipient of the text message from the Claimant about CE, the content of which was not in dispute. The Claimant's point was that the Respondent treated his evidence as 'credible', whilst describing him as not credible. However, Mr DS did not regard LA's involvement as significant. He was simply the conduit of the message regarding CE. Again, although we consider that the Claimant could and should have been given Appendix J, or a suitably redacted version of it, the failure to so was not such as to render the decision making or the overall process unfair.

192. The matters referred to above we would consider to be procedural imperfections. Our most significant concern was the failure by DS to address the Claimant's grievance. We are satisfied that his grievance did relate to the matters under investigation and that it was reasonable for the employer to have told the Claimant that he should raise the matters at the disciplinary hearing which was the proper forum to address them. The Claimant did just that. However, Mr DS did not consider the points he raised.

193. Had it not been for the fact that SM addressed the grievance on appeal, we would have found that the procedure in this respect was unfair to the Claimant and that in failing to address the grievance, the Respondent could be said to have acted unreasonably in terminating the Claimant's employment without first considering that grievance. We emphasise that we are not, thereby, concluding that there was merit in the grievance, but that as a matter of due process and fairness, when an employer tells an employee that his grievance will be addressed at the disciplinary hearing it will ordinarily act unreasonably if it does not then address it. It matters not that the failure to adopt a fair procedure would have made no difference to the outcome – that is something that can be assessed at the compensatory stage.

194. Thus, if there is a failure to adopt a fair procedure, the dismissal will be unfair even if that unfairness would not affect the end result. However, we must consider the dismissal process as a whole and that includes the appeal. SM did consider the grievance raised by the Claimant and, aside from accepting that some aspects of the procedure were not followed (review of suspension) did not uphold the grievance or conclude that it affected his ability to present his case or the decisions which had been reached by DS. The Claimant accepted that she considered his grievance albeit he did not agree with her outcome. That may be so, but in our judgement, she was reasonably entitled to arrive at the conclusions she did and to the extent that there had been a procedural failure, this was cured on appeal.

195. As to sanction, this again, is something on which we are not entitled to substitute our opinion for that of the employer. The question is whether

dismissal was, in the circumstances, within a range of reasonable responses open to a reasonable employer. Whereas one employer might have issued a written warning or a final written warning, another might reasonably have dismissed the Claimant.

196. DS and SM were struck by the lack of insight on the part of the Claimant. Although he had stopped contacting IJ and apologised, he maintained in the disciplinary hearing that the complaints were malicious and vexatious and that there had been collusion between IJ, AB and others. That appeared to sit uncomfortably with an apology and any recognition that the complainants might reasonably be concerned by his conduct. The incident in the carpark regarding IJ and the sending of the whatsApp message to her immediately after that, is conduct which any young woman in that situation would regard as unnerving at that time of night. That is especially so, given IJ's growing concerns about the C's unsolicited comments regarding her appearance and her boyfriend. Despite the Claimant's previous good record, we are satisfied that, given the impact of C's conduct, in particular, on IJ and given the lack of insight demonstrated by the Claimant, dismissal was within a range of reasonable responses open to the Respondent. We also considered whether there was any disparity of treatment between C and DW. However, we conclude that those cases were not comparable and certainly were not so that it could be said a reasonable employer would have taken the incident regarding DW into account in considering whether it was reasonable to dismiss C in respect of the complaints against him.

197. Therefore, even if we had concluded that the Claimant had sufficient continuous employment by aggregating the periods under the HMRC and HMPO contracts, we would have concluded that C's dismissal was not unfair within section 98(4) ERA 1996.

198. The result is that these claims are not well founded. Therefore, the proceedings are dismissed. We would finish on this note, however. Although we have found against the Claimant, this judgement must not be read as any criticism of him beyond that which is necessary for the purposes of disposing of these proceedings. We are not suggesting that the Claimant has a propensity, more widely, to engage in such unwanted conduct as he was found to have done in the case of AB and IJ. We have made our findings on his lack of insight as regards his contact with IJ and AB and have expressed our observations on the 'wisdom' of some of the points he has raised in the disciplinary investigation and in these proceedings. But overall, we must commend the Claimant for the way in which he represented himself in these proceedings. As a tribunal we were very impressed by his attention to detail, his courtesy and approach not only towards the tribunal but towards the respondent. It is regrettable that he allowed what might be regarded as a 'jokey laddishness' to develop into unwanted and conduct towards IJ and AB which his employer reasonably (and this tribunal also) regarded as inappropriate and

unacceptable. We hope that he will be able to reflect on that behaviour and learn from this.

Employment Judge Sweeney

29 November 2022

Sent to the parties on:

12 December 2022

For the Tribunal:

Miss K Featherstone

APPENDIX

LIST OF ISSUES

Preliminary issue – LENGTH OF SERVICE (s.108(1) ERA)

1. Does the Claimant have sufficient qualifying service under s.108(1) to claim unfair dismissal? (2 years). In particular, the ET may wish to consider the following questions/issues:

    a. Was the Claimant's contract with the Respondent as a PO3 Examiner a separate/distinct contract of employment from his contract with the HMRC or were the two contracts part of one single overarching or umbrella contract between the Claimant and respondent?

    b. In any event, did the Claimant's previous employment with the HMRC entitled him to add such service to his employment with the Respondent? (or otherwise can the Claimant amalgamate the service under the HMRC contract to meet the 2 years' service requirement under s.108 for the purposes of the dismissal by the R?)

    c. The Claimant relies upon sections 218(6) and s.231 ERA; are such sections relevant, on these facts, and if so, do they operate to allow the Claimant to achieve sufficient continuity/length of service under s.108?

Dismissal – UNFAIR DISMISSAL (s.98 ERA)

2. Was the Claimant dismissed for a fair reason pursuant to s98(20 of the Employment Rights Act 1996, namely conduct?

3. If so, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant, having regard to the equity and substantial merits of the case under s.98(4) ERA 1996? In particular:

    a. Did the Respondent have reasonable grounds upon which to sustain its belief in the Claimant's misconduct?

    b. Was the belief based on a reasonable investigation?

    c. Was the Claimant's dismissal within the band of reasonable responses?

    d. Was there inconsistent treatment (re AW v DW comparison)? Are the two cases truly similar/parallel, or sufficiently similar, to afford an adequate basis for comparison in light of the issues raised by s.98(4) of the ERA and overall fairness?

Dismissal – DIRECT RACE DISCRIMINATION (s.13 EqA 2010)

4. Was the Respondent's decision to dismiss an act of direct race discrimination? In particular:
    a. Did the Respondent treat the Claimant less favourably than it treated or would have treated an actual or hypothetical comparator? The Claimant relies upon an actual comparator – a White English/British individual; (see 3(d) above); is that individual an appropriate comparator under s.23 EqA 2010?
    b. Was the less favourable treatment because of the protected characteristic of race?
    c. Can the Claimant prove primary facts from which the Tribunal *could* properly and fairly conclude that the Claimant's dismissal was because of race?
    d. If the Tribunal concludes that there is a potential prima facie case of race discrimination, has the Respondent shown that the treatment was not because of the protected characteristic of race?