Case No: 2302214/2022
& 2302471/2022

EMPLOYMENT TRIBUNALS

Claimants: Mr J Lehan (1) and Mr D Maynard (2)

Respondent: Mitie Care and Custody Limited

Heard at: **London South Employment Tribunal (by CVP)**
On: 11, 12, 13, 14, 15 March 2024

Before: Employment Judge T Perry

Representation
Claimants: In person
Respondent: Ms Mensah (Counsel)

RESERVED JUDGMENT

It is the Judgement of the Tribunal that:

1. Mr Lehan's claim of unfair dismissal fails and is dismissed;
2. Mr Maynard's claim for unfair dismissal is well founded and succeeds; and
3. Mr Lehan's claims of wrongful dismissal and in respect of unpaid holiday pay are dismissed on withdrawal.

REASONS

Evidence

1. The Tribunal was provided with:
    a. a final hearing bundle running to 627 pages;
    b. a supplementary bundle running to 37 pages;
    c. a chronology and cast list prepared by the Respondent; and

d. an opening note on behalf of the Respondent.

2. The Tribunal pre-read those documents referred to in witness statements.
3. During the course of the hearing, the Respondent disclosed a further five documents relevant to the question of individuals Mr Lehan said were treated inconsistently to him. These documents were also put before the Tribunal.
4. The Claimants both gave evidence from written witness statements. The Tribunal heard from a further four witnesses in support of the Claimants. These were Gemma Marchant, Linda Basiony, Ashley Perham-Sims, and Amanda Elliot. All gave evidence from written statements. There was some discussion about whether by giving evidence, Linda Basiony was breaching the terms of an agreement between her and the Respondent. Ultimately, she gave evidence without the need for any witness order.
5. For the Respondent Shehraz Khan (Senior Operations Manager and an investigating officer in relation to some alleged misconduct), Katherine Woods (Deputy General Counsel involved in formulating the disciplinary allegations), Caroline Morrissey (Senior People Transformation and Change Partner and disciplining officer) and Kealie Ahmad (Head of Employee Relations and HR support to the appeal officer) gave evidence from witness statements.
6. There was only time during the hearing to conclude the evidence. After the hearing, the parties provided written submissions. The parties were invited to say if they wanted to make oral submissions after seeing each other's written submissinons but none took up this offer.

The issues

7. On the first day of the hearing there was a discussion regarding the issues. No list of issued had been agreed or prepared.
8. The hearing was to consider liability only.
9. The issues before the Tribunal were as follows.
    a. What was the reason or principal reason for dismissal?
    b. Was it a potentially fair reason? The Respondent relies upon the potentially fair reason of related to conduct.
    c. Was there a genuine belief in misconduct?
    d. Were there reasonable grounds to hold that belief?

e. At the time the belief was formed, had the Respondent carried out a reasonable investigation?

f. Had the Respondent otherwise acted in a procedurally fair manner?

g. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant? Specifically, was dismissal within the band of reasonable responses?

10. I confirmed at the start of the hearing that considerations of whether convention rights under articles 8, 9 and 10 had been breached was essentially to be wrapped up within the scope of the questions above but that the Tribunal was alive to this particular aspect of the Claimants' cases.
11. Mr Lehan withdraw his claim for notice pay and I indicated this would be dismissed on withdrawal.
12. There was no evidence before me in respect of Mr Lehan's claim for holiday pay. After the hearing, Mr Lehan confirmed to the Tribunal that this matter had been resolved and could be dismissed on withdrawal.

Findings of fact

13. Mr Maynard started employment as a detainee custody officer with a predecessor of the Respondent on 6 July 2015.
14. Mr Lehan started employment as a detainee custody officer with a predecessor of the Respondent on 16 July 2016.
15. Both Claimants transferred to the Respondent under TUPE on 1 May 2018.
16. The Claimants worked as escorts accompanying unsuccessful asylum applicants back to their country of origin or a safe third country.
17. The Claimants both appear to have joined a WhatsApp messaging group called "Escorts Meet and Greet". This group appears to have been established by individuals associated with the Community Trade Union. The number of people on the "Escorts Meet and Greet" chat varied but it was a sizeable group of around 80 people. The "Escorts Meet and Greet" group appears to have been used at times by the Community Trade Union to circulate messages and policies to staff.
18. Mr Lehan was a member of another WhatsApp group relating to a fantasy football league. Exactly who was on this group is unclear. This appears to have included colleagues from work but also wider friends and family.

19. Around 18 March 2020 Mr Lehan forwarded on the fantasy football league WhatsApp group a picture of the door of a restaurant displaying a sign reading “closed due to slanty eyed cunts.”
20. On 18 March 2020 this message was reported to the Respondent’s anonymous whistleblowing email account. The individual reporting did not provide their name and stated to have been told about (rather than directly having received) the WhatsApp message. The individual attached a picture of the WhatsApp message in question.
21. There is evidence of the message being discussed by the Respondent’s managers with uncertainty as to whether if this was on a union WhatsApp group whether it should be dealt with by the union or by the Respondent.
22. Ultimately, the matter was addressed around March 2020 by the Respondent’s Head of Overseas Escorting Services, Care and Custody, Derek Ross and Service Delivery Manager, Alex Jackson. They called Mr Lehan into a meeting also attended by Gemma Marchant and told Mr Lehan to delete the message. Mr Lehan was informally warned not to do something similar again. The fact that the message was not sent on a work phone and was on a group apparently unrelated to work appear to have been part of the reason this matter was dealt with informally.
23. On 4 November 2020 a notice to staff was sent on behalf of the Respondent attaching copies of a recently reviewed Communications Policy and a Professional Standards document.
24. In or shortly before March 2021 it appears that an individual contacted the Respondent’s whistleblowing email account to complain about Mr Lehan posting on the “Escorts Meet and Greet” group a.GIF file of the actor Eddie Murphy in some way indicating that his lips were sealed. Apparently there was a suggestion that this could be racist although this correspondence was again not in the bundle.
25. An investigation hearing was held with Mr Lehan by Mr Mohammad Hassan, Account Manager, Technical Services (Dedicated Accounts) on 26 March 2021. In early April 2021 Mr Lehan was informed that there would be no further action in respect of the image of Mr Murphy as it was neither discriminatory nor race related.
26. On 3 October 2021 Mr Lehan, Mr Maynard and a third member of staff had an exchange on the “Escorts Meet and Greet” group. It consisted of Mr

Maynard commenting on a previous message about a charter flight where an individual had apparently self harmed. Mr Maynard said "Yes I remember it well" and "I got accused of breaking a wrist on that job too." Mr Lehan replied with two laughing face emojis and the text "that's right." Mr Maynard replied "Again vicious rumour totally unsubstantiated." The third member of staff then commented "They can only stay if they swim all the way." Mr Maynard replied one minute later "What you mean from Syria?"

27. It appears that an individual contacted the Respondent's whistleblowing email account to complain about the comments made on the "Escorts Meet and Greet" group on 3 October 2021 although this correspondence was not in the bundle.
28. Shehraz Khan was appointed to investigate the 3 October 2021 comments in mid November 2021.
29. Mr Khan met with Mr Lehan and Mr Maynard on 24 January 2022 for investigation hearings in relation to the 3 October 2021 comments.
30. On 31 January 2022 an individual contacted the Respondent's whistleblowing email account threatening to go to the media. The individual attached what they described as "samples of the Racist, disturbing comments that some of us are subjected to on a daily basis from our own colleagues and relates to the vulnerable people that we are dealing with every day." The individual referred to there being "way more evidences that were posted on the staff WhatsApp group" and to the fact that the group had been closed as they "knew some of us were on to them." The individual went on to raise separate concerns regarding members of the Respondent's management team.
31. It appears from the print out in the bundle that this email contained 3 attachments: the image Mr Lehan circulated on 18 March 2020, the exchange from 3 October 2021, and a photograph of a comment referring to a former employee who had brought a claim against the Respondent as a "muslim snitch."
32. On 1 February 2022, the Respondent's CEO, Phil Bentley, replied to the individual stating that Deputy Company Secretary, Katherine Woods and Head of Risk, Ian Carter would look into the concerns raised.
33. On 14 February 2022 Mr Lehan was suspended by a letter from Alex Jackson, Service Delivery Manager, Overseas Escorting "pending an

investigation into the allegations of distributing racist material." Mr Maynard was not suspended but a number of other colleagues were.

34. On 16 February 2022 Mr Khan circulated drafts of the investigation reports for the Claimants and a third individual in relation to the 3 October 2021 comments. The email stated "Please find attached my investigation report for the whistle blower complaint, personally the remarks are very close to the line and I feel have a racist undertone however this is difficult to evidence. The positive news is that following my conversation with the union the group has been shut down, hopefully avoiding any further incidents. I have attached each report, minutes, NTS on professional standards and the original WhatsApp message. Please let me know if you agree with my report and specifically my wording in the conclusion section also issuing LOC as an outcome." LOC means letter of concerns, which would effectively be an informal warning.

35. I have not been provided with the attachments to this email, which was a matter I raised with counsel for the Respondent as being unsatisfactory. However, I infer from the contents of the covering email that Mr Khan initially produced outcome letters stating that the only outcome would be a letter of concern. I also find as a fact that the reference in this letter to a "conversation with the union" describes a conversation between Mr Khan and Linda Basiony when he informed her that the outcome for the Claimants would be only a letter of concern.

36. On 18 February 2022 Mr Khan circulated an email attaching amended versions of the investigation reports for the Claimants. The email stated "I have updated the three reports taking out my mention of LOC and changed to a Case to Answer, following my discussion with Duncan." This was a reference to Duncan Partridge, the Respondent's Head of Operations and Custody Overseas. In response to questioning, Mr Khan said that Mr Partridge questioned why the conclusion of the investigation was not to proceed to an investigation. I accept that this did happen and also accept Mr Khan's explanation that he personally had felt the matter could justify a disciplinary but had been given previous cautious advice from HR.

37. I have no evidence before me that outcome letters were ever sent to the Claimants. Both Claimants later in their disciplinary hearings denied ever

having had the outcome of this investigation. It seems likely that outcome letters were never formally sent.

38. On 19 February 2022 the Mirror newspaper published a story headed "Racist WhatsApp texts sent by immigration staff at firm paid by Home Office probed." This included reference to both the 3 October 2021 comments and the image Mr Lehan circulated on 18 March 2020 (amongst other allegations). Neither Claimant was named in the article.
39. On 21 February 2022 Mr Bentley produced a public document addressed to "Mitie colleagues" addressing the press reporting. This referred to the "offensive and racist messages they had shared on a private WhatsApp group." Mr Bentley referred to an investigation stating "there is no place in our business for racist, bullying, or discriminatory behaviour. We take appropriate actions against any colleagues who go against this approach. Due to the seriousness of these issues, we suspended those colleagues about whom complaints were made, pending the outcome of the investigation." Mr Bentley went on to say that he had assured the Home Secretary that "no stone will be left unturned during this investigation to exit such people from Mitie." In concluding, Mr Bentley said "It is with a heavy heart that I write this and I trust that all of you will join with me in condemning this behaviour of a few that harm so many. They have let me and you down, and when they are dismissed, they will have let their families down." Mr Bentley's comments were reported in the Guardian newspaper on 25 February 2022.
40. Katherine Woods produced a terms of reference for an investigation to be conducted by the Respondent's Group Information Security, Information Services, Internal Audit and Employment Law teams. This referred to the conduct of investigation meetings with a view to preparation of a report for presentation to the Respondent's Board of Directors on or before 25 March 2022. The investigation was based on a review of transcripts of the "Escorts Meet and Greet" group provided after the 19 February 2022 press coverage.
41. The only reports included in the bundle in relation to the Claimants were undated but must have been produced before the disciplinary invites (ie before 17 March 2022). The Respondent confirmed when asked that there was no other discloseable (ie not legally privileged) report.

42. The report in relation to Mr Lehan set out the allegations that were later included in the disciplinary invite letter. These covered:
    a. messages on the "Escorts Meet and Greet" group that were critical of the Respondent (specifically encouraging insubordination by refusing management requests) and/or comments that could bring the Respondent into disrepute (specifically the 3 October 2021 comments);
    b. posting discriminatory or offensive images (the image Mr Lehan circulated on 18 March 2020); and
    c. using social media to bully (specifically victimising whistleblower(s) by calling them a rat) and using aggressive language.
43. Specific mention was made of the reporting of "racist and offensive language" in the Mirror and that this brought the company's name into disrepute and put contracts at risk.
44. The report in relation to Mr Lehan highlighted under a section headed "risks" that Mr Lehan claimed to have been investigated four times in relation to WhatsApp chat content but that the investigator could only see evidence of two investigations, namely into the image Mr Lehan circulated on 18 March 2020 and Mr Khan's investigation into the 3 October 2021 comments. The report mentions Mr Khan upholding the allegations. The report detailed 15 items of current evidence.
45. The report in relation to Mr Maynard also set out the allegations that were later included in the disciplinary invite letter. These covered:
    a. messages on the "Escorts Meet and Greet" group that were critical of the Respondent (specifically encouraging insubordination by refusing management requests) and/or comments that could bring the Respondent into disrepute (specifically the 3 October 2021 comments);
    b. using social media to bully (specifically victimising whistleblower(s) by calling them a pencil dicked rat) and using abusive or offensvie language (specifically "I will send my line manager along the lines of if I'm put 1-2-1 and my resident kicks off I WILL DEFEND MYSELF. If the this is deemed an issue please speak to me now rather than after the event.");

c. posting discriminatory or offensive images (specifically a photo of a pub sign referring to politicians as “bellends” and a reference to “where’s the rat”; and

d. allegedly bringing the Respondent into disrepute by comments referring to a TUPE transfer “on a shit contract” and questioning the need to acquire personal insurance.

46. The risks section for Mr Maynard contained a somewhat nonsensical sentence that reads “Appears that there are WhatsApp messages that could be a witness so potentially not as serious but warrants further investigation in to comments that have been made.” The report stated there were no previous disciplinary or investigation processes but then went on to detail Mr Khan’s investigation with a finding of case to answer. The report detailed nine items of current evidence.

47. On 17 March 2022 Caroline Morrissey wrote to invite Mr Lehan to attend a disciplinary hearing. This duplicated the allegations as set out in the undated investigation report. The letter set out that the allegations “could constitute gross misconduct, which if confirmed will result in your summary dismissal from the Company.” The letter referred to attaching screenshots of the comments and photos posted on the “Escorts Meet and Greet” WhatsApp group. It appears these were the attachments of current evidence listed in the undated investigation report.

48. There was no copy of the original disciplinary invite for Mr Maynard in the bundle. I accept that this was sent around 17 March 2022. There was what appears to be a draft of an updated invite letter rescheduling the disciplinary hearing. This is dated (undoubtedly in error) 10 November 2022. This letter again duplicated the allegations as set out in the undated investigation report and appears to have attached the current evidence listed in the undated investigation report. The letter set out that the allegations “could constitute gross misconduct, which if confirmed will result in your summary dismissal from the Company.”

49. On 29 March 2022 Mr Lehan attended a disciplinary hearing with Ms Morrissey. Mr Ashley Penham-Sims attended as a union representative. Ms Morrissey went through the various appendices to the investigation report. Her approach was to get Mr Lehan to explain why comments were appropriate. Mr Lehan raised that the allegations had been dealt with at

previous hearings with a conclusion that there was no further action. Mr Lehan sought to argue that some of his comments were simply statements of fact and not derogatory. He defended his use of the word "ratted" as a term in common parlance for an informer. Mr Lehan defended some of his criticism of the Respondent as simply being honest about what he saw as poor working conditions and some of the alleged insubordination as in effect justifiable refusal of orders that went beyond the requirements of the role. There was discussion of the image Mr Lehan circulated on 18 March 2020 having been sent in a different WhatsApp chat containing work colleagues. Mr Lehan admitted the post was offensive but stressed that this allegation only appeared to have become a problem after it was reported in the press. In relation to the 3 October 2021 messages Mr Lehan said he had included laughing emojis solely because Mr Maynard had been accused of something he had not done. Towards the end of the meeting Mr Penham-Sims raised Mr Bentley's comments that were reported in the press and said that this meant dismissal was a foregone conclusion. Ms Morrissey disputed that saying "the decision is mine and I would stand up and defend it on the evidence of what I have. Its my decision and because it's me if it goes that far it will be me that answers for that decision." She went on to say "You may not like but you have the right to appeal."

50. In a number of areas Ms Morrissey's style of questioning became closed (eg starting a question "I put it to you that") and she expressed her opinions (sometimes dismissively) of the answers given (eg "it looks like insubordination" "you have brought the company into disrepute by posting it").

51. On 31 March 2022 Mr Maynard attended a disciplinary hearing with Caroline Morrissey. Amanda Elliot attended as trade union representative. Mr Maynard apologised for referring to an individual using the "Escorts Meet and Greet" chat to "snake people out". Mr Maynard sought to justify the comment in which he said that he was considering messaging his manager to say that if required to work 1-2-1 "I WILL DEFEND MYSELF" by saying he did not in fact send the message to his manager, and that this was a reference to training about restraint being that three staff were needed to restrain someone and that it would not be possible in a one on one situation. Mr Maynard sought to justify some of his alleged acts of insubordination as

references to possible changes to terms and conditions or breaches of the Working Time Regulations by the Respondent and that he was not inciting people to sue the Respondent but rather commenting on existing litigation.

52. In relation to the comments on 3 October 2021 Mr Maynard denied that he was boasting or making light of an incident when he referred to having been accused on breaking a wrist on a job. Mr Maynard admitted to not feeling good at all when he heard these comments were in the press and that he could see why the company was concerned. Mr Maynard sought to explain the meaning of his comment "what you mean from Syria?" when replying to the comment that only those migrants who swam "all the way" to the UK should be allowed to stay. Mr Maynard said his answer was to show the previous comment was impossible and/or made no sense.
53. As with Mr Lehan in a number of areas Ms Morrissey's style of questioning became closed (eg starting in questions "the way it comes across is aggressive" "it comes across as you are taking the mickey and that you are boasting") and she expressed her opinions (sometimes dismissively) of the answers given (eg "that's not how it reads, and I would honestly doubt anyone would read it the way you say that you meant it"). When Mr Maynard sought to justify the comment "Are we even insured to go hands on? If we're not then we might have to introduce some policies of our own?" as being a reference to obtaining personal insurance for visits to certain "hostile" countries, Ms Morrissey's reply (somewhat surprising in the context) was "I don't believe what you are saying about taking out an insurance policy." Ms Morrissey's questioning in relation to the comments on 3 October 2021 was very closed and quite repetitive and her responses to the explanations offered were completely dismissive.
54. In relation to several allegations, Ms Morrissey did move on, appearing to abandon the allegations, stating "I'm not sure what that was about" and "I can't see much in that one to be fair."
55. Towards the end of Mr Maynard's hearing, Ms Morrissey took a break and, on her return, suspended Mr Maynard. After this Amanda Elliot raised that a number of allegations brought against Mr Maynard were about comments not actually made by him. The details of two of these were discussed and Ms Morrissey said "The only things I have gone through is the only things I will consider and those comments were all made by Dave, I think we can

agree." Mr Maynard agreed. The meeting ended with a general apology from Mr Maynard.

56. On 30 March 2022 Mr Lehan asked for the minutes of his disciplinary hearing. He asked again on 4 April 2022 and that these be provided before the disciplinary outcome. Ms Morrissey replied that the notes would be attached to the outcome letter.

57. By letter on 8 April 2022, Ms Morrissey provided the outcome of Mr Lehan's disciplinary hearing. The decision was to dismiss for gross misconduct. The letter started by stating the reason for dismissal by reference to all the allegations (which appear to have been copied and pasted from the invite letter and before that the investigation report). However, the letter went on to provide "specific reasons for my decision", which I consider to be the only actual reasons for dismissal. The letter stated that Mr Lehan had been made aware of his professional obligations in relation to social media by the notice to staff sent on 4 November 2020 and that he would have been aware that his comments on the "Escorts Meet and Greet" WhatsApp group could have caused offence to at least 70 members of staff on the group and that there was no reasonable expectation of privacy on that chat.

58. Ms Morrissey specifically referred to and rejected Mr Lehan's explanations for:

    a. use of laughing emojis in the exchange on 3 October 2021;
    b. referring to individuals as having been on bed watch and hunger strike; and
    c. the message sent on 18 March 2020.

59. In relation to this last point, Ms Morrissey referred to the fact that this message was not sent on the "Escorts Meet and Greet" WhatsApp group and that the matter had been looked at before without a disciplinary sanction being applied. Ms Morrissey stated "It is completely unacceptable and, if this was the only allegation against you, an appropriate sanction for this allegation alone would be summary dismissal."

60. Ms Morrissey found that the use of the terms "rat" and "coward" were comments aimed at the whistleblower to bully them. Ms Morrissey found the comments critical of the Respondent's management including that whoever had thought up a certain policy "need[ed] a good slap" were aggressive and threatening.

61. The letter referred to their being consideration of a final written warning in very brief terms.

62. By letter on 8 April 2022, Ms Morrissey provided the outcome of Mr Maynard's disciplinary hearing. Again, the decision was to dismiss for gross misconduct. Again, the letter started by stating the reason for dismissal by reference to all the allegations (which appear to have been copied and pasted from the invite letter and before that the investigation report). Notably for Mr Maynard this included a number of alleged comments that it was accepted had been made by others. However, again the letter went on to provide "specific reasons for my decision", which I consider to be the only actual reasons for dismissal. The letter stated that Mr Maynard had been made aware of his professional obligations in relation to social media by the notice to staff sent on 4 November 2020 and that he would have been aware that his comments on the "Escorts Meet and Greet" WhatsApp group could have caused offence to at least 70 members of staff on the group and that there was no reasonable expectation of privacy on that chat.

63. Ms Morrissey specifically referred to and rejected Mr Maynard's explanations for his comments in the exchange on 3 October 2021 recording that he accepted he should not have commented in relation to being accused of breaking someone's wrist. In relation to the comment "what you mean from Syria?" Ms Morrissey stated "Your explanation in the hearing did not make sense. You explained that you were questioning the previous post about that they could stay in they swam all the way and the distance they would have to swim. You confirmed to me that you do escort residents back to Syria and so I do not accept this explanation."

64. Ms Morrissey went on to say "I find your comments to be racist, offensive, derogatory and do not demonstrate respect and sensitivity." Ms Morrissey described Mr Maynard as mocking people in "severe and desperate circumstances" Ms Morrissey described "the first example" which I take to be a reference to commenting in relation to being accused of breaking someone's wrist as a "completely inexcusable" example of "making light" of a resident harming themselves.

65. Ms Morrissey described Mr Maynard's reference to "sadly though people seem to abuse this group and use it to snake people out" as a comment intending to victimise and bully the whistleblower.

66. Ms Morrissey accepted Mr Maynard's explanation for suggesting staff dig their heels in to avoid being TUPE transferred "on a shit contract" but stated that it was inappropriate to say that on a WhatsApp group chat and that this was inciting insubordination.
67. Ms Morrissey took into account Mr Maynard's remorse and length of service. The letter says alternatives including a Final Written Warning were considered.
68. Both Claimants appealed their dismissals. My Maynard on 13 April 2022 and Mr Lehan the following day.
69. By email on 13 April 2022, Mr Maynard complained about predetermination due to Mr Bentley's comments and the wording of the disciplinary invite letter, and his belief that Mr Khan's investigation had concluded no case to answer. Mr Maynard alleged the Respondent should not have been using messages from a private WhatsApp group against him.
70. By email on 14 April 2022, Mr Lehan complained about a greater number of alleged failings including Mr Bentley's comments and that Ms Morrissey's questioning had been aggressive and biased. He complained about not having seen the terms of reference of the investigation or having been interviewed as part of the investigation. Mr Lehan went into more detail about the Human Right Act violations allegedly involved in using his correspondence against him and the failure to provide training on use of social media. Mr Lehan complained about the failure to deal with his complaints of being bullied by the whistleblower.
71. Mandy Hughes, Head of HR – Business Services, heard both appeals.
72. Ms Hughes met with Mr Lehan to hear his appeal on 11 May 2022. Mr Ashley Penham-Sims attended as a union representative.
73. On 16 May 2022 Mr Lehan sent Ms Hughes evidence of him acting as an advocate for ensuring only appropriate comments were posted on the WhatsApp group and challenged others when appropriate.
74. Ms Hughes met with Mr Maynard to hear his appeal on 17 May 2022. Mr Ashley Penham-Sims attended as a union representative. In addition to disussing the existing grounds of appeal, Mr Maynard mentioned the fact that the dismissal letter referred to comments that were made by other people and not him.

75. On 30 May 2022 Ms Hughes sent both Claimants redacted copies of the Terms of Reference for the investigation.
76. On 1 June 2022 Mr Lehan replied to Ms Hughes with a mark up of the Terms of Reference. Most of the amendments were questions but Mr Lehan noted that certain points in the Terms of Reference had not been followed (notably the failure to hold separate investigation interviews before progressing to a disciplinary).
77. By letter dated 11 July 2022 Ms Hughes provided Mr Lehan with the outcome of his appeal. She confirmed the decision to dismiss. Ms Hughes identified and addressed 12 grounds of appeal. Ms Hughes rejected that the disciplinary was pre-determined and found that a separate investigation was not required in every case. Ms Hughes found that, in relation to the 18 March 2020 image, as the post was in the public domain, the Respondent had no alternative but to consider it whatever WhatsApp group it was on. Ms Hughes found that there was no breach of Mr Lehan's human rights, in part because it was on a chat with other colleagues. Ms Hughes referred to the evidence of Mr Lehan acting as an advocate for appropriate communication and commended him for this but said it was not enough to overturn the decision to dismiss.
78. By letter dated 14 July 2022 Ms Hughes provided Mr Maynard with the outcome of his appeal. She confirmed the decision to dismiss. Ms Hughes identified and addressed 4 grounds of appeal. Ms Hughes rejected that the disciplinary was pre-determined (either by Mr Bentley's comments or the terms of the disciplinary invite letter). Ms Hughes defended the decision to proceed to a disciplinary despite there having been a previous investigation hearing on the basis that Mr Maynard had been told in error that there would be no further action. Ms Hughes defended the decision to take action on the WhatsApp messages saying that they had been posted on a chat with colleagues. Ms Hughes also stated that in her view, the decision to dismiss was based solely on the comments that Mr Maynard himself had made. Ms Hughes (somewhat confusingly) provided comments on Mr Lehan's mark up of the Terms of Reference.

The Law

79. Determination of a claim of unfair dismissal is subject to section 98 Employment Rights Act 1996, which states (in so far as is relevant):

98 General.

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

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

…

(b)relates to the conduct of the employee,

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

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

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

80. The employer must show what the principal reason for dismissal was and that it is a potentially fair reason otherwise the dismissal will be unfair (**Timex Corporationn v Thomson** [1981] IRLR 522, EAT).

81. If an employer seeks to rely on several reasons, it must either establish them all, or show that the dismissal was justified solely on those that it can establish (**Smith v City of Glasgow District Council** [1987] IRLR 326). An unsubtantiated reason that was a significant part of the overall reason would render a dismissal unfair.

82. The classic statement of the reason for dismissal remains that set out by Cairns LJ in **Abernethy v Mott Hay and Anderson** [1974] IRLR 213

namely the 'set of facts known to the employer, … or of beliefs held by him, which [caused] him to dismiss the employee':

83. The reason of the employer in a corporate employer will usually mean the reason motivating the dismissing manager unless that manager (acting in good faith) is in fact manipulated by another manager who acts for another reason (which may well be unfair) (**Royal Mail Group Ltd v Jhuti** [2020] IRLR 129).
84. Where there are multiple independent reasons for the disciplining it is necessary for the tribunal to determine which was the principal reason in the subjective belief of the employer, not just to consider if any of them might have produced a fair dismissal: **Robinson v Combat Stress** UKEAT/0310/14 (5 December 2014, unreported).
85. In cases related to conduct, the test is whether the employer believed, and had reasonable grounds for believing (after adequate investigation) that the employee was guilty of the misconduct (**British Home Stores Ltd v Burchell** [1978] IRLR 379).
86. The word 'conduct' means actions 'of such a nature whether done in the course of employment or outwith it that reflect in some way upon the employer/employee relationship' (**Thomson v Alloa Motor Co Ltd** [1983] IRLR 403, EAT).
87. Disciplinary rules covering specific offences explicitly can make it easier for the employer to dismiss for failure to comply with requirements that it considers important, even though they may not be generally so considered: (**Singh v Lyons Maid Ltd** [1975] IRLR 328).
88. The burden of proving the fairness of a dismissal is a neutral one falling on both parties equally (**Post Office Counters Ltd v Heavey** [1989] IRLR 513, EAT).
89. The correct test is whether the employer acted reasonably, not whether the tribunal would have come to the same decision; in many cases there will be a 'range of reasonable responses' (**Iceland Frozen Foods Ltd v Jones** [1982] IRLR 439). While this test must be adhered to, it is not so stringent

as to mean that only a perverse decision to dismiss can be unfair (**Rentokil Ltd v Mackin** [1989] IRLR 286, EAT).

90. The range of reasonable responses test applies to the reasonableness of the employer's investigations as well as the final decision to dismiss (**Sainsbury's Supermarkets Ltd v Hitt** [2003] IRLR 23),
91. In **Turner v East Midlands Trains Ltd** [2013] IRLR 107 the Court of Appeal affirmed that the range test is not incompatible with art 8 of the European Convention on Human Rights.
92. Reasonableness cover procedure as well as substance, so that procedural defects may make an otherwise fair dismissal unfair (**W Devis & Sons Ltd v Atkins** [1977] IRLR 314).
93. There is no rule that if gross misconduct is established by the employer the dismissal must be fair, as coming within the range of reasonable responses: (**Brito-Babapulle v Ealing Hospital NHS Trust** [2013] IRLR 854, EAT).
94. Consistency of treatment of different employees charged with similar offences may be an important consideration in misconduct dismissals when considering the reasonableness of the employer's reaction. It must be clear that the cases in question are truly comparable (**Wilcox v Humphreys and Glasgow Ltd** [1975] IRLR 211). The bar here for the claimant is a high one.
95. Where the employer initially thought the misconduct less serious (using a lesser procedure which would not result in dismissal) it could be unfair to change to a more serious view, especially where the only new facts to come to light were relatively minor (**Sarkar v West London Mental Health NHS Trust** [2010] IRLR 508).
96. However, this remains a question of fact. **Sarkar** establishes no rule of law in favour of either fairness or unfairness in these circumstances. Res judicata does not apply to domestic disciplinary proceedings by an employer (**Christou v London Borough of Haringey** [2013] IRLR 379).
97. In **X v Y** [2004] IRLR 625, CA. Mummery LJ suggested the following framework of questions for a tribunal when dealing with arguments based on Human Rights:

    (1) Do the circumstances of the dismissal fall within the ambit of one or more of the articles of the Convention? If they do not, the Convention is not engaged and need not be considered.

    (2) If they do, does the state have a positive obligation to secure

enjoyment of the relevant Convention right between private persons? If it does not, the Convention right is unlikely to affect the outcome of an unfair dismissal claim against a private employer.

(3) If it does, is the interference with the employee's Convention right by dismissal justified? If it is, proceed to (5) below.

(4) If it is not, was there a permissible reason for the dismissal under the ERA which does not involve unjustified interference with a Convention right? If there was not, the dismissal will be unfair for the absence of a permissible reason to justify it.

(5) If there was, is the dismissal fair, tested by the provisions of the ERA, reading and giving effect to them under s 3 of the HRA so as to be compatible with the Convention right?

98. The same judge also commented that 'Human rights points rarely add anything much to the numerous detailed and valuable employment rights conferred on employees.'

99. In **Garamukanwa v United Kingdom** [2019] IRLR 853, ECtHR a reference to the European Court of Human Rights was unsuccessful, that court holding that for the employer to rely on material found by the police on the claimant's phone was not contrary to art 8 of the European Convention:.

Conclusions

100. I am satisfied that the sole decision maker in respect of the dismissal of both Claimants was Ms Morrissey. It is the set of facts known to her or beliefs held by her, which caused her to dismiss the Claimant which the Respondent had to establish.

101. As indicated above, I am satisfied that the facts and beliefs that led to the decision to dismiss were those set out in the second half of the dismissal letters dated 8 April 2022. That is to say the sections after the words “The specific reasons for my decision are set out below.”

102. No alternative reason for dismissal has been advanced other than that relied upon by the Respondent.

Mr Lehan

103. In relation to Mr Lehan the reasons for dismissal were:

a. The two laughing face emojis used on the 3 October 2021 messages on the “Escorts Meet and Greet” group;

b. The message on the "Escorts Meet and Greet" group "so we'll have 8 former bed watches and some hungry people to deal with"
c. the image Mr Lehan circulated on 18 March 2020;
d. the messages on the "Escorts Meet and Greet" group referring to the whistleblower as a "rat"; and
e. the message on the "Escorts Meet and Greet" group regarding whoever was responsible for a particular policy that "whoever it is, they need a good slap."

104. These were all matters that related to the potentially fair reason of conduct. Even those matters done outside of work reflected in some way upon the employer/employee relationship in that they were on WhatsApp groups containing colleagues or had been reported in the press in relation to Mr Lehan's employment with the Respondent.

105. Ms Morrissey genuinely believed Mr Lehan to be guilty of the misconduct.

106. There had been a reasonable investigation into the allegations. Indeed, in circumstances where Mr Lehan accepted having sent all the messages in question, there was limited need for extensive investigation.

107. As to whether there were reasonable grounds for belief in misconduct and whether dismissal was within the band of reasonable responses in all the circumstances including the size and administrative resources of the employer, there are a number of matters to consider.

Inconsistency with others

108. Mr Lehan sought to suggest that his treatment was inconsistent with the treatment of five other employees. The Respondent provided evidence of the treatment of some of these individuals. Person X was issued a first and final warning for a partially upheld allegation of sexual harassment of a colleague. Consideration was given to dismissing them. Two colleagues were alleged to have been vaping on aircraft. One allegation was not upheld. The other individual was given a first and final warning. Mr Lehan also referred to two other staff, one of whom was suspended for inappropriate comments but returned to work without charge and the other was suspended for manipulating tasking and workloads for officers. Overall, I am not satisfied that the allegations against any of these individuals are

sufficiently similar to Mr Lehan's case that I can say they are truly comparable. I found none of these examples assisted much when considering the fairness or otherwise of the decision to dismiss Mr Lehan.

Previous investigation

109. Mr Lehan placed significant weight on the fact that two of the matters relied on to dismiss him, namely the two laughing face emojis used on the 3 October 2021 messages and the image Mr Lehan circulated on 18 March 2020 had both been considered before. As set out above, I accept that this point is factually correct. In around March 2020 Mr Ross and Mr Jackson did not even progress the allegation regarding the image Mr Lehan circulated on 18 March 2020 to a formal disciplinary, rather Mr Lehan was told to remove the image and informally warned not to do something similar again. Mr Khan looked into the messages of 3 October 2021 and initially decided (and verbally communicated to Ms Basiony) that a letter of concern was going to be the only action taken. This later decision was changed before the formal outcome letters were sent out.

110. Following the decision of the Court of Appeal in **Christou**, the doctrine of res judicata (referred to by the parties as the principle of double jeopardy) does not apply. What I have to consider is effectively whether it was within the band of reasonable responses to institute disciplinary proceedings relating to matters that had already been looked at.

111. In relation to Mr Khan's investigation, I have no hesitation in finding that it was well within the band of reasonable responses to take this matter to a disciplinary. Effectively, Mr Khan changed his mind about the next steps required. He did so before he had issued the final outcome letters of his investigation. Whether Mr Partirdge encouraged him to do so is largely irrelevant. It is regrettable that he had already told Ms Basiony informally that the outcome would be different but I am satisfied that he was entitled to change his mind before the final letters were sent out. Accordingly, considerations of res judicata or double jeopardy do not truly arise in relation to that point.

112. In relation to Mr Ross and Mr Jackson's treatment of the image Mr Lehan circulated on 18 March 2020, including this as a disciplinary allegation several years after it had been dealt with informally was a

significant (and much delayed) change of approach. The matter was dealt with in the dismissal letter, where Ms Morrissey said "I do agree that a much more severe sanction could and should have been considered and imposed at the earlier disciplinary. The post is clearly racist and offensive. Mitie has zero tolerance for any acts of racist behaviour." Ms Morrissey also referred to the fact that the image had been referred to in the Sunday Mirror article. Essentially, Ms Morrissey's justification was that the allegation was of an extremely serious nature and was now in the public domain. Although highly unusual, I consider that Ms Morrissey was acting within the band of reasonable responses when deciding to rely on this allegation notwithstanding the fact that it had been treated differently by Mr Ross and Mr Jackson. The allegation was a serious one. It had not been fully aired in any form of formal disciplinary process at any stage. Although the press coverage of the image was not a particularly good reason for looking at it again, it did not take it outwith the band of reasonable responses for Ms Morrissey to have some regard to this factor.

Predetermination

113. Mr Lehan relied on Mr Bentley's statement dated 21 February 2022 to support his argument that the decision to dismiss him was predetermined. The ACAS Code of practice on disciplinary and grievance procedures requires that a decision on disciplinary action be taken only after the disciplinary hearing (paragraph 18). The ACAS guide to discipline and grievances at work states that it is important for a disciplining officer to keep an open mind and look for evidence which support's the employee's case. It also states that questions should be open-ended.

114. I can understand Mr Lehan's concerns in this regard. Mr Bentley's statement dated 21 February 2022 would clearly have an effect on those investigating and then taking decisions on disciplinary matters (whether conscious or otherwise). It is not realistic to expect otherwise. There was a clear and public statement from the most senior person in the business which was reported in the press that he was expecting staff to be dismissed. That is very unusual.

115. I am worried by the closed style of questioning that Ms Morrissey used at points and the times where she was instantly dismissive of the

answers and explanations given by both Claimants. It does suggest a degree of predetermination. I find that this was mostly a result of Ms Morrissey's own permissible interpretation of the messages she had read in advance of the hearing. I find that the press coverage of the allegations also coloured her view to an extent – she refers to this several times. Finally, although I think Mr Bentley's statement did have a subconscious influence on Ms Morrissey, I find that it was no more than minor and did not prevent her from reaching her own decision.

116. Overall, I do accept Ms Morrissey's evidence and previous statements that she was making her own decision on the matter. Overall, she conducted a fair disciplinary hearing at which the Claimant was able to have his say in response to the allegations. There is evidence that she was prepared to dismiss or not proceed with allegations that she thought had no merit although I would say that that reflected partly the fact that an excessive number of allegations were levelled at the Claimants, some of which either clearly had no merit or did not even relate to them. I do not accept Mr Lehan's suggestion that the outcome of the disciplinary process was pre-determined.

Respondent's policies

117. The exact nature of the Respondent's policies in relation to social media at various times is somewhat unclear. In the dismissal letter, Ms Morrissey refers to Mr Lehan being provided with a copy of the Respondent's Care and Custody Professional standards. She also refers to the staff notice sent on 4 November 2020. Ms Morrissey's conclusion is that Mr Lehan was "well aware of the professional standards expected of you … including in all your communications and the use of social media. Mrs Morrissey found that WhatsApp was defined as social media in both the social media procedure and the professional standards.

118. Starting with the professional standards statement. This does state that staff should "Ensure that your behaviour does not bring Care & Custody or Home Office into disrepute. This includes your time off work as much as in work, and includes the use of social or any other electronic media." The version in the bundle is undated. The 4 November 2020 notice to staff attached the professional standards statement (which was not described as

new or amended). In the absence of any evidence to the contrary, I find on the balance of probabilities that this professional standards statement was in place before the 4 November 2020 notice to staff and was likely in place from at least the start of 2020 (and likely earlier).

119. The 4 November 2020 notice to staff also attached the Communication policy. This was dated August 2020 and was described as "recently revised", from which I conclude there was a previous version in place from at least the start of 2020 (and likely earlier). This policy included a section on social media that stated social media should not be used to criticise "Mitie, your colleagues, our suppliers or customers." The policy reminded staff that "anything can be shared on social media by screenshotting, so please be mindful about other forms of digital communication that could be captured and shared online." The policy did not identify WhatsApp as social media.

120. There is in the bundle a Social Media policy dated November 2021. There is no evidence of this being circulated to staff at any point or of the existence of a previous version of this policy before November 2021.This policy names WhatsApp as a form of social media. The policy prohibits criticising Mitie on "blogs or on other internet sites" and reminds staff "not to allow comments on these websites to damage working relationships with employees and clients of Mitie." It states online bullying, harassment or discrimination "will be treated in the same way as it would if it were face to face or by text, WhatsApp or e-mail."

121. Mr Lehan's employment contract from 2016 (admittedly with a predecessor Capita) refers to non contractual disciplinary and anti-harassment procedures. The Respondent's policies from November 2021 are included in the bundle. I find it very likely that something similar was in place before this point and indeed throughout Mr Lehan's employment.

122. The bullying and harassment policy defines harassment as possibly occurring inside or outside the workplace and including making inappropriate jokes in relation to race. It defines victimisation as harassment of those who have made allegations of harassment or bullying. It sets out that such behaviour may result in dismissal.

123. The November 2021 disciplinary policy lists as potential instances of gross misconduct, breaching social media policies, aggressive behaviour

towards colleagues, bullying and harassment and conduct outside of work that may negatively affect the Respondent's name.

124. The conclusions to be drawn from these various policies are as follows. As at March 2020 when Mr Lehan forwarded the image by WhatsApp to a group including colleagues there was in force a professional standards policy requiring him to ensure that his behaviour including out of work and on any electronic media did not bring the Respondent or the Home Office into disrepute. As at 3 October 2021 an updated communications policy had been drafted and circulated to staff containing a warning about the risks of copying of other electronic media (which would include WhatsApp) and placing them on social media. Throughout there were disciplinary and harassment policies making clear that conduct outside of work that may negatively affect the Respondent's name, making inappropriate jokes in relation to race and victimising whistleblowers, might result in dismissal. I find these factors relevant to whether the Respondent was within the band of reasonable responses in dismissing Mr Lehan and supportive of the Respondent's actions falling within the band of reasonable responses.

Sensitive nature of roles

125. It is relevant to notice that both Claimants were in roles that were inherently in the public eye and likely to be closely scrutinised by the press and, by extension, the public. It is hard to think of a more politically sensitive or high profile area than the deportation of unsuccessful asylum seekers and migrants. The contract the Claimants worked on was apparently high value as well as high profile. This necessarily meant that the consequences of inappropriate communication that could be associated with the Respondent were undoubtedly potentially more serious for the Respondent than they would be for many employers. To an extent, this justified the Respondent taking a hard line over such matters.

Conclusion

126. Turning to the overall assessment of whether there were reasonable grounds to believe in misconduct and whether dismissal for sending these messages was within the band of reasonable responses, I am satisfied overall that it was. The process followed was overall within the band of

reasonable responses. The image Mr Lehan circulated on 18 March 2020 was sent by him to colleagues. It was an offensive image related to race. It was within the band of reasonable responses for Ms Morrissey to say that dismissal was an appropriate sanction for this allegation alone. Equally, it was within the band of reasonable responses to find that describing the whistleblower as a "rat" and "pathetic coward" in a WhatsApp chat that they were presumably on was bullying, aggressive and inappropriate. It was within the band of reasonable responses for Ms Morrissey to consider that the laughing emojis and references to people on hunger strike as "hungry people" were derogatory, offensive and insensitive. It is somewhat harder to understand how Mr Lehan saying that a manager who had come up with a policy Mr Lehan disagreed "need[s] a good slap" was "aggressive and threatening" or that this would have justified dismissal on its own. This was clearly simply an employee letting off steam rather than encouraging any kind of physical violence. However, with the decision in **Smith** and **Robinson** in mind, I am satisfied (based in particular on Ms Morrissey's reference in the dismissal letter to the allegation of 18 March 2020 alone justifying dismissal as an appropriate sanction) that the Respondent has shown that dismissal was justified due to the other messages. Dismissal was in accordance with the policies identified above, which should have acted as a warning to Mr Lehan of what the potential consequences of his actions could be.

127. Turning finally to Mr Lehan's suggestion that his convention rights were unjustifiably violated, I am not satisfied that his convention rights were ever engaged in this case. The messages relied upon were sent in WhatsApp groups involving colleagues (in one case a large number of colleagues). That they were sent on a private device is, in my view, irrelevant. There can have been no expectation of privacy to engage Article 8. Article 10 (and possibly 9) arguably are engaged in relation to certain of the messages in that Mr Lehan was expressing his views (in particular about the wisdom of the actions of his managers). However, even if convention rights were engaged I am satisfied that the interference with these rights by reason of dismissal was justified because of the inappropriate nature of some of the messages, the politically sensitive nature of the Respondent's work, and the need to protect its business and reputation in light of those

inappropriate comments. Sufficient protection is provided by the band of reasonable responses test that has been applied above.

128. Mr Lehan's unfair dismissal claim fails and is dismissed.

Mr Maynard

129. In relation to Mr Maynard the reasons for dismissal were:

a. Saying "yes, I remember it well", "I got accused of breaking a wrist on that job too" in the 3 October 2021 messages on the "Escorts Meet and Greet" group;

b. Saying "what you mean from Syria?" in the 3 October 2021 messages on the "Escorts Meet and Greet" group;

c. Victimising and bullying the whistleblower by saying they were using the "Escorts Meet and Greet" group" to "snake people out"; and

d. Making inappropriate comments and inciting insubordination by saying "We really need to dig our heels in an make sure they don't start implementing changes. We can't risk being tupeed on a shit contract."

130. These were all matters that related to the potentially fair reason of conduct. Even those matters done outside of work reflected in some way upon the employer/employee relationship in that they were on WhatsApp groups containing colleagues or had been reported in the press in relation to Mr Maynard's employment with the Respondent.

131. Ms Morrissey genuinely believed Mr Maynard to be guilty of the misconduct.

132. There had been a reasonable investigation into the allegations. Indeed, in circumstances where Mr Maynard accepted having sent all the messages in question, there was limited need for extensive investigation.

133. As to whether there were reasonable grounds for belief in misconduct and whether dismissal was within the band of reasonable responses in all the circumstances including the size and administrative resources of the employer, there are a number of matters to consider.

Inconsistency with others

134. Mr Maynard did not seek to suggest that his treatment was inconsistent with the treatment of five other employees. For the avoidance

of doubt, I found none of these examples assisted much when considering the fairness or otherwise of the decision to dismiss Mr Maynard.

Previous investigation

135. Mr Maynard relied on the fact that the messages sent on the 3 October 2021 had both considered before. Mr Khan looked into the messages of 3 October 2021 and initially decided (and verbally communicated to Ms Basiony) that a letter of concern was going to be the only action taken. This later decision was changed before the formal outcome letters were sent out

136. As set out above in relation to Mr Lehan and for the same reasons, I have no hesitation in finding that it was well within the band of reasonable responses to take this matter to a disciplinary.

Predetermination

137. Mr Maynard also relied on Mr Bentley's statement dated 21 February 2022 to support his argument that the decision to dismiss him was predetermined. My reasoning and conclusions above in relation to this point for Mr Lehan apply equally to Mr Maynard. That is to say that overall, I accept Ms Morrissey's evidence and previous statements that she was making her own decision on the matter. Overall, she conducted a fair disciplinary hearing at which the Claimant was able to have his say in response to the allegations. There is evidence that she was prepared to dismiss or not proceed with allegations that she thought had no merit. I do not accept Mr Maynard's suggestion that the outcome of the disciplinary process was pre-determined.

138. That said, there is one distinction in relation to Mr Maynard. There was no controversial or potentially misleading interpretation in the press reporting of Mr Lehan's actions (save to incorrectly identify the group to which Mr Lehan circulated the image on 18 March 2020). However, the press reporting of the messages of 3 October 2021 described ""Jokes" about Syrian refugees swimming to the UK." This draws a conclusion that Mr Maynard's comment "What you mean from Syria?" was a joke. For reasons I will come on to, I find that Ms Morrissey had accepted this interpretation of this comment as fact before she met with Mr Maynard.

Respondent's policies

139. The discussion above in relation to Mr Lehan of the applicable policies in place at various times applies equally to Mr Maynard. As at 3 October 2021 when Mr Maynard made his comments on a WhatsApp to a group including colleagues there was in force a professional standards policy requiring him to ensure that his behaviour including out of work and on any electronic media did not bring the Respondent or the Home Office into disrepute. There was also an updated communications policy had been drafted and circulated to staff containing a warning about the risks of copying of other electronic media (which would include WhatsApp) and placing them on social media. Throughout there were disciplinary and harassment policies making clear that conduct outside of work that may negatively affect the Respondent's name, making inappropriate jokes in relation to race and victimising whistleblowers, might result in dismissal. I will come on to consider the effect of those policies in relation to Mr Maynard in the context of the comments he made.

Sensitive nature of roles

140. My comments about the nature of the Claimants' roles being inherently in the public eye and likely to be closely scrutinised by the press and, by extension, the public apply equally to Mr Maynard. To an extent, this justified the Respondent taking a hard line over such matters.

Conclusion

141. Turning to the overall assessment of whether there were reasonable grounds of belief in misconduct and whether dismissal for sending these messages was within the band of reasonable responses, there are certain differences between the positions of Mr Lehan and Mr Maynard. One important difference is that Ms Morrissey did not say in the dismissal letter that in relation to any allegation against Mr Maynard that it was sufficient to justify dismissal alone. When I asked Ms Morrissey whether the decision to dismiss was based on one comment or an accumulation of comments, her answer was that dismissal was based on an accumulation of different comments.

142. The other difference between the Claimants was the nature of the comments.

143. Ms Morrissey's conclusion in relation to the messages sent on in the 3 October 2021 to the "Escorts Meet and Greet" group was that the messages were "racist, offensive, derogatory" that they "do not demonstrate respect and sensitivity." Ms Morrissey found these comments were "mocking people in severe and desperate circumstances".

144. Ms Morrissey goes on to say that the comments "yes, I remember it well", "I got accused of breaking a wrist on that job too" were "making light of" a resident "so desperate that he harms himself." Ms Morrissey explicitly refers to these comments being included in the Sunday Mirror article.

145. The conclusion Ms Morrissey reached about the comments "yes, I remember it well", "I got accused of breaking a wrist on that job too" was not one that a reasonable employer could have reached. There is simply nothing in those words that was making light of the resident, rather it was reporting a serious allegation raised against Mr Maynard. To conclude there was anything that was racist, offensive or derogatory in what Mr Maynard said was not a response open to a reasonable employer. Ms Morrissey appears to have (in all likelihood because both parts of the exchange were reported in the press) conflated Mr Lehan's response laughing at this comment (which as a reasonable employer she could – and indeed did - find was making light of the resident) with Mr Lehan's anodyne comment.

146. Ms Morrissey justified rejecting Mr Maynard's explanation for the comment "What do you mean from Syria" because it did not make sense. "You explained that you were questioning the previous post about that they could stay in they swam all the way back and the distance they would have to swim. You confirmed to me that you do escort residents back to Syria and so I do not accept this explanation." At the disciplinary hearing Ms Morrissey dismissed the same explanation on the basis that Mr Maynard had been too quick to respond to the comment before (he had replied one minute later). Although it was of course open to Ms Morrissey to reject this explanation, neither of those reasons for rejecting this explanation were open to a reasonable employer. It simply makes no logical sense to reject the explanation that Mr Maynard was querying the comment before because Mr Maynard did or did not escort people to Syria. Equally, it makes

no logical sense to exclude the explanation because the message was sent just one minute after the previous message. Relying on illogical or non-sensical reasons is inherently outside the band of reasonable responses.

147. Ms Morrissey was conflating Mr Maynard's comment with the statement of the person he was corresponding with because that was what the press had done when it reported that Mr Maynard's comment was a "Joke about Syrian refugees swimming to the UK." It is notable that Ms Morrissey referred again in this section of the outcome letter to the press coverage of Mr Maynard's comments. To that extent his hearing was predetermined. That was not an action open to a reasonable employer. Mr Maynard had the right to be judged on his own comments not the comments of others.

148. Although objectively less vitriolic than Mr Lehan's description of the whistleblower, it was within the band of reasonable responses to find that describing the whistleblower as a "snaking people out" in a WhatsApp chat that they were presumably on was bullying or victimising the whistleblower.

149. The finding that suggesting staff object to changes to working terms in order to avoid being TUPE transferred on "a shit contract" amounted to insubordination or was inappropriate was not one open to a reasonable employer. The "Escorts Meet and Greet" group had been established by a recognised Trade Union. Regardless of the various prohibitions on not saying anything critical of the Respondent in any forum, there was no basis to find that union members discussing objecting to changes to terms and conditions amounted to inciting insubordination. When I asked Ms Morrissey why she would be surprised to see a message like that in a chat between union members she was unable to provide a satisfactory response.

150. Overall, I find that the Respondent relied on three grounds for dismissal for which there was no reasonable grounds for believing in misconduct and/or that were unsustainable as justifying dismissal for the reasons given above. In circumstances (unlike for Mr Lehan) where Ms Morrissey stated dismissal was due to a combination of reasons and that the individual allegations did not in themselves justify dismissal, with **Smith** and **Robinson** in mind, the decision to dismiss was outside the band of reasonable responses.

151. Mr Maynard's claim for unfair dismissal is therefore well founded and succeeds.

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Employment Judge **T Perry**

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Date 12 April 2024