



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss. JE Robinson

**Respondent:** Secretary of State for Justice

**Heard at:** Leicester

**On:** 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup> and 19<sup>th</sup> March 2018

**Before:** Employment Judge Heap (Sitting Alone)

**Representation**

**Claimant:** Ms. R Snocken - Counsel

**Respondent:** Ms. E Hodgetts - Counsel

**JUDGMENT** having been sent to the parties on 20<sup>th</sup> March 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, the following reasons are provided:

## REASONS

### BACKGROUND AND THE ISSUES

1. This is a claim of automatically unfair dismissal contrary to Section 103A Employment Rights Act 1996 presented by way of a Claim Form received by the Employment Tribunal on 4<sup>th</sup> May 2017.
2. There was also complaint of wrongful dismissal relating to unpaid notice pay, but that was withdrawn during the hearing and dismissed accordingly under Rule 52 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013. I therefore say no more about it.
3. In addition to the unfair dismissal complaint which remains before me for determination, there are also some monetary claims that the parties are agreed should not be dealt with at this liability only hearing on the basis that neither is in a position to have those complaints determined at this juncture.
4. The parties have helpfully agreed a list of issues in these proceedings and in view of that I do not rehearse the issues in any detail here.

**THE HEARING**

5. The claim was originally listed for a period of seven days of hearing time but thanks to the efforts and significant preparation, agreement and discussion between the experienced and skilful Counsel on both sides, we have been able to conclude the hearing in a shorter time. I am grateful to both Counsel for all of their efforts to assist throughout the hearing and for the sensible and pragmatic way in which they have dealt with matters.

6. During the hearing I have heard evidence from the following in behalf of the Respondent:

- (i) Andrew Canning – the Head of Security at HMP Leicester;
- (ii) Mark Hillman – investigating officer in respect of allegations which led to the Claimant's dismissal;
- (iii) Hayley Folland – the then Deputy Governor at the time of the Claimant's employment at HMP Leicester;
- (iv) Philip Novis – the Governing Governor at HMP Leicester at the time of the Claimant's dismissal and the dismissing officer; and
- (v) Teresa Clarke – Director of Midlands Prisons and the individual who heard the Claimant's appeal against dismissal.

7. On behalf of the Claimant I heard from the Claimant herself and also from Prison Officer Sally Preston on her behalf. Ms. Preston was at the time of the Claimant's dismissal, and remains at this time, a serving Prison Officer at HMP Leicester.

8. By agreement with the parties, initials have been used in this Judgment to identify serving officers against whom various allegations have been made but from whom I have not heard evidence or made any findings of fact.

9. One of the matters that has invariably informed my findings of fact in relation to the claim is the issue of credibility and I therefore touch upon that issue briefly here. I deal only with those witnesses whom it is specifically necessary to address in this regard and I begin with the Claimant.

10. I did have some concerns regarding the Claimant's evidence and that specifically arose in relation to two particular issues. The first of those concerned the fact that despite specific instructions given to her own Counsel for the purposes of discussion with the Tribunal, the Claimant accepted in later cross examination that she had in fact spoken with a former colleague, RS, the night before she gave her own evidence. I found her account that she had done so simply to make enquiries as to how she was, rather than to discuss these proceedings, overwhelmingly unlikely given that they had been said to have only spoken once last year and not at all this year in the instructions that the Claimant had given to Ms. Snocken prior to cross examination. That is all the more concerning when it is considered that on the very day of that conversation with RS, evidence had been given during cross examination by Governor Novis that RS had re-applied to join the Prison Service at HMP Leicester, a fact of which the Claimant had hitherto been unaware. The Claimant was therefore it would appear not at all candid in respect of that matter, even to her own Counsel.

11. I have also considered in assessing the reliability of the Claimant's evidence, her rather strident contention that a complaint of bullying by Officer DP had been a matter which had been before Governor Novis when he made the

decision to dismiss her. However, looking at the content of the document setting out DP's complaint and the dates and timeline referred to therein, it cannot possibly in fact have been written until some months later.

12. I am satisfied that that latter issue was likely to have simply been a mistake or misunderstanding on the Claimant's part and ultimately neither of the two matters referred to above led me to consider the Claimant's account or credibility to be significantly undermined. I was, however, as a result of those matters more cautious about accepting her evidence, particularly when it was not corroborated by contemporaneous documentation or other witnesses, given that it was clear that the Claimant's evidence was not wholly reliable and she had also been less than candid in regards to the RS issue.

13. I also heard on the Claimant's behalf of course from Sally Preston. Ms. Hodgett's on behalf of the Respondent invited me to view Ms. Preston's evidence with scepticism given the striking similarity in her witness statement to that of the Claimant and the fact that it was said by Ms. Hodgett's that she had a perhaps somewhat suggestible nature. I have dealt with my conclusions in respect of those matters below and where relevant to the evidence given by Officer Preston.

14. Turning then to the witnesses for the Respondent, I had no reason to doubt the evidence of Andrew. Canning, Mark Hillman or Teresa Clarke who I considered to all be candid, straightforward and credible witnesses. I should also say that I did find Governor Novis to be an entirely credible witness and I accepted the truth of the account that he gave to me. I found him to be strident and somewhat forthright in his evidence but there was nothing that led me to conclude that he was not a witness of truth.

15. I found Hayley Folland to be an essentially honest witness but one who, with the passage of time, finds it difficult to accurately recall the events in question and therefore in view of the fact that she was a rather poor historian I treated her evidence with some degree of caution given that lack of specific recall.

## **THE LAW**

16. Before turning to my findings of fact, I remind myself of the law which I am required to apply to those facts as I have found them to be.

### **Protected Disclosures**

17. In any claim based upon "whistleblowing" a Claimant is required to show that firstly they have made a "protected disclosure".

18. That in turn brings me to the definition of a protected disclosure, which is contained in Section 43A Employment Rights Act 1996 ("ERA 1996") and which provides as follows:

***"In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H (with which I am not concerned in the context of this claim)."***

19. Section 43B provides as follows:

***“In this part, a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following:***

- a) that a criminal offence has been committed, is being committed or is likely to be committed;***
- b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;***
- c) that a miscarriage of justice has occurred, is occurring or is likely to occur;***
- d) that the health and safety of any individual has been, is being or is likely to be endangered;***
- e) that the environment has been, is being or is likely to be damaged; or***
- f) that information tending to show any matter falling within one of the preceding paragraphs has been, or is likely to be deliberately concealed.***

20. An essential requirement of a disclosure which qualifies for protection under Sections 43B is that there is a disclosure of information. A disclosure is more than merely a communication, and information is more than simply making an allegation or a statement of position. The worker making the disclosure must actually convey facts, even if those facts are already known to the recipient (See **Cavendish Munro Professional Risks Management Ltd v Geluid [2010] IRLR 38 (EAT)**) rather than merely an allegation or, indeed, an expression of their own opinion or state of mind (See **Goode v Marks & Spencer Plc UKEAT/0442/09**).

21. It is not necessary for a worker to prove that the facts or allegations disclosed are true. Provided that the worker subjectively believes that the relevant failure has occurred or is likely to occur and their belief is objectively reasonable, it matters not if that belief subsequently turns out to be incorrect (See **Babula v Waltham Forest College [2007] IRLR 346 (CA)**).

22. A worker must establish that in making their disclosure they had a reasonable belief that the disclosure showed or tended to show that one or more of the relevant failures had occurred, was occurring or was likely to occur. That reasonable belief relates to the belief of the individual making the disclosure in the accuracy of the information about which he is making it. The question is not one of the reasonable employee/worker and what they would have believed, but of the reasonableness of what the worker himself believed.

23. However, there needs to be more than mere suspicion or unsubstantiated rumours and there needs to be something tangible to which a worker/employee can point to show that their belief was reasonable.

24. The questions for a Tribunal in considering the question of whether a Protected Disclosure has been made are therefore firstly, whether the Claimant disclosed “information”; secondly, if so, did she believe that that information tended to show one of the relevant failings contained in Section 43B Employment Rights Act 1996 and thirdly, if so was that belief reasonable.

### **Automatically unfair dismissal – Section 103A Employment Rights Act 1996**

25. Section 103A ERA 1996 provides that one category of “automatically unfair” dismissal is where the reason or principle reason for the dismissal is that the employee has made a protected disclosure. Section 103A provides as follows:

***“An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.”***

26. A Tribunal therefore needs to be satisfied that a Claimant bringing a successful claim under Section 103A ERA 1996 has firstly been dismissed and, secondly, that the reason or principle reason for that dismissal is the fact that he or she has made a protected disclosure.

27. The burden of proving the ‘whistleblowing’ reason for dismissal under Section 103A ERA 1996 lies on the employee who has insufficient continuous service to bring a claim of ordinary unfair dismissal (see **Ross v Eddie Stobart UKEAT/0068/13/RN**).

### **FINDINGS OF FACT**

28. I turn then to my findings of fact which I have made based on the evidence that I have seen and heard during the course of these proceedings.

29. The Claimant was employed as a Prison Officer by the Respondent at HMP Leicester. The Claimant was, as I understand it, effectively fresh out of training at the time of her appointment to the Prison, which commenced on 5<sup>th</sup> January 2015. Before the matters which led to her dismissal, the Claimant had an unblemished record and had, in fact, been the recipient of commendations (see for example pages 49 and 50 of the hearing bundle).

30. At the material time of the Claimant’s appointment, the Deputy Governor of HMP Leicester was Hayley Folland and the Governing Governor was GB. The Claimant’s evidence was that GB had been “sidelined” into a desk job following what she describes in her witness statement as a “scathing report” from Teresa Clarke, the Director of Midlands Prisons.

31. On 20<sup>th</sup> February 2016 there was therefore a new incumbent to the post of Governing Governor – i.e. the Governor responsible for HMP Leicester Prison as a whole – in order to replace the post apparently left vacant by GB, for whatever reason that may have been. The new incumbent to the post was Governor Phillip Novis to whom Deputy Governor Folland thereafter reported. This was as I understand it the first permanent Governing Governor post that Governor Novis

had held but he had previously acted up into a Governing Governor role at another Prison, HMP Gartree, before joining HMP Leicester.

### CPIR's

32. I accept that at the time that Governor Novis joined HMP Leicester he was briefed by Hayley Folland and Andrew Canning – the then Head of Security – about allegations of staff corruption and that those were being monitored by Mr. Canning's security team following the receipt of Corruption Prevention Intelligence Reports ("CPIR's"). As I understand it, CPIR's were submitted by staff following either something that they themselves had observed or something that they had been told by a prisoner or prisoners. As I shall come to further below, I accept that the ongoing covert monitoring issue which Governor Novis was briefed about was of concern to him and that he issued an instruction that there should not continue to be lengthy monitoring of unnamed staff in the future. Governor Novis was not made aware at this time that the individual being monitored by Mr. Canning's team at this time was the Claimant.

33. In this regard, I accept the evidence of Andrew Canning that a number of the CPIR's at that time related to the Claimant and had dated back from October/November the previous year (i.e. to October/November 2015). I similarly accept his evidence, as I shall deal with again later, that the Claimant was at that time being monitored by his security team as a result of the CPIR's and with the purpose of gathering further intelligence to determine if they were likely to be valid concerns and whether further action was therefore necessary.

34. Needless to say, that was covert monitoring and the Claimant was not aware of it nor was she made aware of the allegations made in the CPIR's at that time for fairly obvious reasons.

### Meeting with Deputy Governor Folland

35. On 21<sup>st</sup> March 2016 there was a meeting which took place between another Prison Officer, Sally Preston, and Deputy Governor Folland at which the Claimant was also present. Deputy Governor Folland's position is that she has no recollection of that meeting and that she had checked her electronic diary and that did not reveal that a meeting had taken place. She believed that she had met at some stage with Officer Preston but had no recollection of the Claimant having been present. However, that evidence did not persuade me that there was no meeting on 21<sup>st</sup> March 2016. Particularly, as confirmed by the evidence of Sally Preston, Deputy Governor Folland had an open-door policy and it may therefore simply be that the meeting was not formally recorded in her diary and that she does now not recall it some considerable time later. As I have indicated above, I did not consider Hayley Folland to be a particularly accurate historian and the fact that she does not recall a meeting with the Claimant does not therefore mean that there was no such meeting.

36. I am satisfied on the balance of probabilities that a meeting did take place with Deputy Governor Folland on 21<sup>st</sup> March 2016 at which the Claimant was present. In addition to the account of the Claimant and of Officer Sally Preston to that effect, there is support for the fact that it occurred in passages which appear at pages 159 and 278 of the hearing bundle and which were relatively contemporaneous in time to the date of the meeting which the Claimant contends had taken place. I therefore accept that there was a meeting at which the

Claimant, Officer Preston and Deputy Governor Folland were all present on 21<sup>st</sup> March 2016.

37. The purpose of the meeting was to discuss Officer Preston's dissatisfaction with the fact that her probationary period had been extended. I accept that she took the Claimant with her for support at the meeting and having observed her at the hearing before me it appeared likely to me that she would have wanted a close colleague to have been with her for support during a discussion of this nature with a senior officer. As a result of the concerns raised by Officer Preston, Deputy Governor Folland offered to assist and support her to successfully complete her probationary period. There is a dispute as to the extent to which that support and assistance manifested itself, but I do not need to make findings on that for the purposes of this claim. I note, however, that Officer Preston remains employed in the Prison service at HMP Leicester some two years on.

38. Once Officer Preston had dealt with the issues of concern regarding her probationary period, I accept that the Claimant raised some concerns that she herself had and which were unconnected to Officer Preston's probationary period. It would make sense for her to do so given that the meeting with Deputy Governor Folland would present a good opportunity to raise matters of concern, even if these were ultimately unconnected with the primary purpose of the meeting.

39. The Claimants' account, as supported by Officer Sally Preston in her evidence at this hearing, was that the following matters were raised:

- (a) That there was a divide between the "new" officers like the Claimant and Officer Preston and the older established prison officers such as Officers RF and SF;
- (b) That those officers were also bullying and harassing prisoners;
- (c) That those officers had been involved in an unlawful restraint when it was said that Officer SF had bragged about having a prisoner wrongfully restrained by saying that he had thrown a chair at her when he had not; and
- (d) That there was the exchange of contraband with prisoners and that officers were over familiar with prisoners and, particularly, that Officer RF had brought in tobacco for prisoners, had been seen smoking with them and acting unprofessionally around them.

40. As I shall come to further below, ultimately given the evidence of the Claimant and Officer Preston in support, I accept that the above matters were referred to by the Claimant during the meeting albeit that the emphasis, as I shall come to, was on the divide between established officers and the newer recruits such as the Claimant and Officer Preston.

41. Notwithstanding the fact that I have found that a meeting on 21<sup>st</sup> March 2016 did take place, I nevertheless accept the evidence of Hayley Folland that she does not recall the meeting in question and, indeed, does not recall a meeting where the Claimant was present with Officer Preston at all. As I have already touched upon above, she recalls meeting with Officer Preston to discuss the extension to her probation at some stage, and possibly more than once, but nothing further than that. Given that the meeting clearly took place (as again supported by passages at pages 159 and 278 of the hearing bundle) and the Claimant was present I have treated with caution whether I can accept what Ms.

Folland says about that matter. That is particularly in light of the fact that she was clear in her evidence that had the Claimant raised concerns about abuse of prisoners or contraband (and I have found as a fact that she did) then that would have been something that she would have definitely recalled and that she would have acted upon it.

42. However, given that the meeting was not recorded in her diary and, as confirmed by Officer Preston's evidence, she has an open door policy it is not in my view so unusual that Ms. Folland would not now recall the meeting specifically so as to cast doubt on her account about that matter. She did not, and has not at any stage, denied that the meeting took place but simply that she does not recall it. The first reference to the meeting that had any significance to Ms. Folland was at the point of presentation of the claim on 4<sup>th</sup> May 2017, some 14 months after the date of the meeting in question and given that the purpose of the meeting was to discuss Officer Preston's probationary extension (a matter which Ms. Folland accepted had at some stage been discussed) it is not perhaps surprising that she does not have a great deal of recollection now when, where and how that matter was discussed.

43. Of course, there is the fact that the Claimant, as supported by Officer Preston, raised the above matters of concern to her, including the alleged abuse of prisoners. The evidence of Ms. Folland was that she would have recalled such matters if that had been said and that she would have acted upon it accordingly. Given that I have found that the meeting did take place, it is at first blush difficult to square the lack of recollection of those events if the concerns were raised.

44. However, I am ultimately satisfied that the Claimant did make the references to abuse of prisoners and the unlawful restraint and also to the matters of contraband for the following reasons:

- (a) Whilst there were some concerns in relation to some aspects of the Claimant's evidence as identified above, I did not form a view that she would have manufactured her account of what occurred on 21<sup>st</sup> March 2016 so as to provide untrue evidence that she had said something that she knew that she had not. That would be the only other way of looking at the matter and I did not consider that she would have been untruthful in her account before me;
- (b) The Claimant was supported in her account as to the events of the meeting by Officer Preston. Ms. Hodgetts, not unreasonably, points to the fact that the relevant parts of Officer Preston's witness statement are identical to that of the Claimant, including some unusual grammatical terms. Ms. Hodgett's contends that, at best, Officer Preston was a person prone to being suggestible as she had in fact agreed with her also in many areas of her cross examination. My understanding from Officer Preston's evidence in regards to the identical content of the relevant parts of her witness statement was that she had received the statement already drafted from the Claimant's solicitor. It would appear to make sense therefore that the content of the paragraphs was identical because of somewhat sloppy witness interviewing and drafting on their part rather than the Claimant and Officer Preston having conspired to draft their own statements themselves with a remarkably similar content surrounding the 21<sup>st</sup> March meeting. Officer Preston struck me as a person who would not be likely to amend the wording and



grammar of a document drafted by a solicitor if the substance of what was in there was generally accurate, even if not in her own words. I consider that that is what is likely to have occurred here and I accept that Officer Preston's recollection is that the issues raised by the Claimant as set out above were said at the meeting on 21<sup>st</sup> March 2016. I also take into account in making that finding that Officer Preston is still employed at HMP Leicester and would doubtless be aware that she would potentially be risking her career by telling untruths under oath. I doubt very much that she would do so, even if she is suggestible as Ms. Hodgett's contends; and

- (c) Finally, there was clearly a meeting and given that Ms. Folland cannot recall the content, she therefore cannot satisfactorily gainsay what the Claimant and Officer Preston have said occurred thereat.

44. In view of the fact that I have found that the Claimant did make the references that she contends that she had made at the meeting in respect of a divide between officers, prisoner abuse and contraband, I have considered if this squares with Ms. Folland's evidence that she would have recalled those matters being said if they were said.

45. I note the evidence of both the Claimant and Officer Preston was that Deputy Governor Folland appeared unconcerned by what the Claimant was telling her and that she was distracted. In the words of Officer Preston, she considered Deputy Governor Folland to be distracted and that it seemed that she had somewhere else that she wanted to be. That is in my experience whilst undesirable, nevertheless not particularly unusual when managers are busy. No doubt Deputy Governor Folland also considered that she had dealt with what the purpose of the meeting had been all about – i.e Officer Preston's probation extension. Even on the Claimant's own account, the meeting was never about her wider concerns, or at least Deputy Governor Folland had not known at the time that that was to be the case.

46. I am satisfied that the emphasis on the Claimant's concerns as set out at the very end of the meeting were focused primarily on her concerns about a divide between older and newer officers. Ultimately, whilst I accept that the matters regarding abuse of prisoners and contraband were raised by the Claimant at the meeting, I consider it likely that that was very much a secondary reference to the allegations that the Claimant makes relating to a divide between older and newer officers and it was said more in passing than with considerable emphasis. That divide has been a central theme in these proceedings and was referenced during the course of a later disciplinary case against the Claimant to which I shall come in due course. Those divides were the focus of much of the case and evidence, including complaints made by the Claimant during the disciplinary proceedings, and I consider it likely that that also was the emphasis on what the Claimant was saying on 21<sup>st</sup> March.

47. I therefore find it likely that the Claimant focused on the "divide" issue and I also find it more likely than not that Deputy Governor Folland did, in that context, make comment during the meeting that she knew that there were problems with staff relationships. However, I do not accept that she went so far as the Claimant alleges as to say that bullying was rife at Leicester. I find it unlikely that she would make such a comment as that was not, I accept, her opinion either now or at the material time and investigations that were later

carried out by the Respondent did not uncover a problem in that regard either. I shall come to those matters later.

48. Deputy Governor Folland's evidence before me was that she knew about those divides or factions and that there were poor working relationships. I consider that it is more likely that it was those difficulties which she referred to in reply to the Claimant's concerns about a divide between the officers being raised.

49. Whilst I accept that the Claimant had then gone on to mention the incidents with Officers SF and RF which I have set out above, I consider that those were much less of a central theme and given the evidence of both the Claimant and Officer Preston that Deputy Governor Folland appeared distracted, it appears likely to me that she had perhaps "switched off" by that point and did not take those matters in. Again, and whilst undesirable, that would not be unusual for a busy manager who had dealt with what the central issue for the meeting in fact was and was on that basis expecting it to be drawn to a close.

50. I am satisfied that such a situation would account for her lack of recall of the contraband, bullying of prisoners and unlawful restraint issues and that squares with the Claimant's evidence was that Deputy Governor Folland's reaction to what she was being told was "one of acceptance". She did not appear, according to the Claimant, angry or upset about what she was being told which does not particularly fit with the fact that the Claimant contends that a sham disciplinary process was then commenced in order to exit her from the establishment for having raised her concerns. The Claimant's evidence on this point was that Deputy Governor Folland would have wanted to begin the process to bring about her dismissal so as to "gag" her from repeating the disclosures. If those had been matters of concern to Deputy Governor Folland and had had the result of subsequently motivating her to escalate matters, it is difficult to see how she would have appeared apparently entirely unconcerned about what the Claimant says that she had told her.

51. Her reaction as described by both the Claimant and Officer Preston fits more with the fact that she was most likely not paying proper attention to all of the matters that the Claimant was raising as does the fact that the divide or faction issue was the central theme and Deputy Governor Folland already had an awareness about those matters.

52. However, even if I am wrong about that and Deputy Governor Folland did note all of the comments made by the Claimant and effectively act in a dismissive way in respect of them notwithstanding their severity, then I am satisfied as I shall come to further below that she did not repeat those matters to Governor Novis. If, of course, Deputy Governor Folland was concerned for her own position (having seen what the Claimant says had happened to Governing Governor GB) and wanted to "cover those matters up" as the Claimant suggests, it would perhaps make sense for her not to have reported them to the very Governor – Governor Novis – who had been brought in following what the Claimant describes as a scathing report by Teresa Clarke to turn HMP Leicester around.

#### The escalation of the investigation into the CPIR's

53. After the meeting, Deputy Governor Folland determined that there needed to be an investigation into the CPIR's that had been raised against the Claimant. The escalation of that matter commenced on 22<sup>nd</sup> March 2016, the day after the

meeting with Deputy Governor Folland where the Claimant had raised her concerns.

54. The Claimant contends, given the timing of that decision, that this was the result of the matters that she had raised with Deputy Governor Folland and that this was an attempt to “gag” her from making any further references to what she had told her during the meeting.

55. Even had I accepted that Deputy Governor Folland had taken in all that the Claimant had said at the meeting, it seems to me that there are two problems with her contention that this process was commenced by Deputy Governor Folland to “gag” her. Firstly, Deputy Governor Folland was not going to be responsible for the later investigation and disciplinary hearing. It is not suggested that the investigating officer was influenced in his findings by Deputy Governor Folland nor that she influenced Governor Novis who dealt with the later disciplinary hearing. She would therefore, it seems to me, be unlikely to know that escalating the CPIR issue at that stage would lead to the dismissal of the Claimant.

56. Secondly, as I shall come to again later, removing the Claimant from the establishment would not have had the effect of “gagging her” as the Respondent’s Reporting Wrongdoing Policy, of which the Claimant was aware and of which specific mention was made in her Contract of Employment, allowed reports to be made to external sources outside the establishment. One might perhaps assume in this context that dismissing the Claimant might in fact have the opposite effect of gagging her and might make her more likely to escalate her concerns outside the establishment.

57. However, the timing of the decision to investigate the CPIR’s at this stage given the proximity to the meeting of 21<sup>st</sup> March of course begs the question as to why the escalation took place when it did. To get to that point, it is necessary to deal with how the disciplinary proceedings that later led to the Claimant’s dismissal came about.

58. I have to say in this regard that I initially found it surprising that action was not taken by the Respondent to suspend the Claimant at a much earlier point in light of the CPIR’s which had been in their possession since October or November 2015 and which included some very serious allegations such as the Claimant allegedly bringing drugs into the prison.

59. Moreover, by 24<sup>th</sup> February 2016 when a monthly security review took place between Deputy Governor Folland and Andrew Canning, all the allegations, including ones of prisoner assaults and the drugs issue, were already before the Respondent. I agree with Ms. Snocken therefore that at first blush that would appear to be somewhat coincidental and the proximity of the escalation to the meeting of 21<sup>st</sup> March 2016 is of concern.

60. However, I accept the evidence of Andrew Canning that he and his team dealt with the allegations in the CPIR’s in the first instance by way of covert monitoring. Whilst no documentation dealing with that monitoring has been provided, I accept Ms. Hodgett’s point that it has never been requested by the Claimant’s solicitors in an application for specific disclosure and that the Respondent had made its position clear that it considered such material to be confidential on the grounds of prison security. I do not therefore infer anything from that or from the relatively brief details that Andrew Canning gave in his

evidence about the monitoring of the Claimant on the basis that he considered that it might compromise security to provide further details at this hearing. He was not pushed on that in cross examination. I considered Mr. Canning a credible witness and I accept that there was therefore monitoring of the Claimant after the CPIR's were raised in October/November 2015 and that that would be the normal process until further intelligence was gathered rather than escalating to suspension straightaway, and even despite in some cases there being some very serious allegations. I accept in this regard that complaints against officers are something of an occupational hazard and that covert investigation by Mr. Canning's team therefore takes place to determine if there is anything of substance within them.

61. However, as set out above Deputy Governor Folland escalated the matter on 22<sup>nd</sup> March 2016 at which time there was a telephone call between Governor Novis and herself about the number of CPIR's that had been raised about the Claimant relating to reports from inmates as made to staff and from staff members themselves. As I have already observed, that came the day after the meeting of 21<sup>st</sup> March and the timing of that conversation and the escalation of the CPIR issue is therefore of concern.

62. However, the evidence of both Deputy Governor Folland and Andrew Canning was that on 22<sup>nd</sup> March there had been a "spike" in the number of CPIR's against the Claimant. It should be noted in the context of Andrew Canning's evidence that the Claimant alleges no impropriety against him nor does she suggest that he had knowledge of the discussions on 21<sup>st</sup> March or the protected disclosures relied upon. There had been 19 CPIR's prior to this point but on 22<sup>nd</sup> March a further three were raised on that date alone. At some point afterwards, that number again increased, with eventually 39 CPIR's being made concerning allegations from approximately 20 different prisoners having been made against the Claimant.

63. I accept the evidence of Mr. Canning that it was most unusual for a prison officer to have so many CPIR's against them but that three in one day was very unusual indeed. This also came against a backdrop of Governor Novis as the incoming Governing Governor having made it clear to Andrew Canning and to Deputy Governor Folland that he would not tolerate the continued monitoring of unnamed officers with CPIR's against them for lengthy periods of time. I find it likely that that instruction was given at some time after the 24<sup>th</sup> February 2016 monthly corruption briefing, which would have taken place four days after Governor Novis joined as Governing Governor of the establishment. Governor Novis's unchallenged evidence was that he had told Andrew Canning and Deputy Governor Folland that he did not "still want to be monitoring" unnamed people over a period of months later. That instruction was made before the spike in CPIR's to which I have already referred.

64. I accept that unchallenged evidence as to the instruction being given by Governor Novis as being credible, particularly in view of the fact that he placed that in context with regard to a grievance that he had dealt with shortly before joining the establishment relating to officer corruption and that he had noted that there had been monitoring for a period of many months of the officer in question. I am satisfied that when he was briefed by Andrew Canning and Deputy Governor Folland about the monitoring of unnamed officers that that was of concern to him because of the issues raised in that grievance and that he gave the instruction that he did not want that monitoring to continue for a lengthy period.

65. I accept that it was against that backdrop and the spike in CPIR's on 22<sup>nd</sup> March that was the prompt for Deputy Governor Folland to decide to escalate the matter at that stage. She therefore telephoned Andrew Canning at a time when he was out of the establishment and similarly spoke to Governor Novis to set up a meeting for the following day to discuss the CPIR's against the Claimant.

66. That meeting took place on 23<sup>rd</sup> March 2016. The CPIR's were discussed and I accept the evidence of Governor Novis that he determined that there appeared to be substance to some of the allegations contained therein and that further action was required. Whilst there is some confusion in the evidence as between Ms. Folland and Governor Novis about whether a decision was taken to suspend the Claimant at that meeting, I accept the evidence of Governor Novis that he determined that a "challenge meeting" was to be held with the Claimant to discuss the allegations and to see if an explanation was given by her which might have rendered suspension unnecessary. I prefer the evidence of Governor Novis to that of Ms. Follen as to the fact that suspension was discussed at the meeting of 23<sup>rd</sup> March as an option rather than the decided upon action given the problems that I have already set out with Ms. Follen's recall of events around this time. As the decision was one for Governor Novis, I consider that it is more likely than not that his evidence on that point is the more accurate of the two.

#### The Challenge Meeting and suspension

67. The challenge meeting also took place on 23<sup>rd</sup> March 2016 with the Claimant being brought by another officer to Governor Novis's office. There is a dispute over what was said at that meeting but it is not necessary in my view for me to resolve precisely what was said for the purposes of dealing with the issues in the claim. However, I do accept the evidence of Governor Novis that he did tell the Claimant that allegations had been made against her and that he also asked her if there was anything that she wanted to say about that. I consider that this was likely a somewhat vague reference and that no specifics were discussed. Against that backdrop, the Claimant was understandably not able to say much at all and Governor Novis therefore decided that she should be suspended.

#### The investigation

68. The Claimant's suspension took place on full pay from 23<sup>rd</sup> March 2016 onwards and thereafter Governor Mark Hillman was appointed to investigate the allegations against the Claimant. The Commissioning Manager for the investigation was Deputy Governor Folland but I accept the evidence of Governor Novis that as the Deputy Governor she was the Commissioning Manager for all investigations within the establishment and her further limited involvement in this regard was not therefore unusual.

69. The terms of reference for the investigation appear at page 62 of the hearing bundle and the relevant part of the same said this:

*"As Commissioning Manager I am appointing you to investigate the allegations made by staff and prisoners that Officer Jodie Robinson has acted in a way as to amount to serious unprofessional conduct, performance of duties or relations with others in the workplace in any of the ways listed here:*

*Trafficking*

*Being involved in the arrangement of abuse, assaults or threats to prisoners by other prisoners,*

*Sharing NOMIS or other data protected information with prisoners,*

*Deliberate provocation of a prisoner through goading and threatening behaviour*

*Other behaviour which contravenes the NOMS professional standards statement”.*

70. The Claimant does not allege that Governor Hillman knew about her conversation with Deputy Governor Folland on 21<sup>st</sup> March 2016, and it is put at its highest by Ms. Snocken that the Claimant simply does not know, nor is it said by the Claimant that he was therefore influenced in his dealings with the investigation report by the disclosures even if he was aware of them. Governor Hillman’s position is that he had no knowledge of any of the Claimant’s disclosures and I accept that evidence. I do not therefore focus in detail as to the investigation undertaken by Governor Hillman save as to say that following him conducting a number of interviews with the Claimant and others, he produced an investigation report (see pages 65 to 214 of the hearing bundle).

71. The report set out four allegations from the CPIR’s against the Claimant which were as follows:

- (i) Allegation 1 -This was an allegation that the Claimant had instigated the assault of Prisoner A by Prisoner B.
- (ii) Allegation 2 – that the Claimant had allowed a prisoner to view a mobile telephone and had looked at pictures on it with him in his cell;
- (iii) Allegation 3 – that the Claimant had moved or facilitated the moving of a mobile telephone for a prisoner to another cell; and
- (iv) Allegation 4 – that there had been unauthorised disclosure of official information to a prisoner.

72. Governor Hillman recommended in his report that allegations one, two and three be tested at a disciplinary hearing under the Respondent’s Code of Conduct. He recommended no further action in respect of allegation four given that the Claimant had demonstrated during the investigation that she had swapped shifts with another officer, Officer MB, when this incident had taken place and could not therefore possibly be responsible.

The disciplinary hearing and the decision to dismiss

73. Against that backdrop, the Claimant was therefore invited to a disciplinary hearing with Governor Novis. I have read the extensive transcripts from the first of those hearings on 27<sup>th</sup> July 2016 and the reconvened hearing on 31<sup>st</sup> August 2016. The reason that the hearing was reconvened was to allow further investigation to take place of matters that the Claimant and her Prison Officers Association (“POA”) representative had raised in her defence at the first disciplinary hearing.

74. It should be noted that at neither hearing did the Claimant raise any suggestion that the disciplinary case against her had only resulted from what she

had told Deputy Governor Folland on 21<sup>st</sup> March 2016. However, I accept that at that stage she was concentrating on her defence against the allegations which she faced.

75. I am satisfied from the transcripts that I have seen that Governor Novis conducted the disciplinary hearings appropriately and that he gave the Claimant and her POA representative ample opportunity to have their say in respect of the allegations. He also agreed, as referred to previously, to adjourn the hearing to look further into some of the issues raised.

76. However, the ultimate decision of Governor Novis was to dismiss the Claimant from the Prison Service on the grounds of gross misconduct. He did so with immediate effect on 31<sup>st</sup> August 2016 and followed that up with a letter on 8<sup>th</sup> September 2016. His findings in relation to each of allegations one to three as set out in that letter were as follows (see page 246 of the hearing bundle):

*“Allegation 1. I am satisfied that on the balance of probabilities incident one did occur. There is evidence of a minor altercation between yourself and prisoner Prisoner A. Subsequently, Mr. Prisoner A was assaulted by an unknown prisoner but believed by Prisoner A to be prisoner Prisoner B Prisoner B<sup>1</sup>. Following this Prisoner B alleged that you had asked him to carry out an assault. I find it difficult to believe that a prisoner would confess to an assault which had potentially serious consequences for him in the hope of getting you into trouble and therefore given your inability to provide a reasonable response I find this allegation proved.*

*Allegation 2. You rightly identified that we had not interviewed Prisoner R as I wrongly believed that he had been discharged. This was incorrect and so we subsequently asked for him to be interviewed by the Head of Security at Nottingham. Mr. Prisoner R had no recollection of the incident so as a result I am dismissing this allegation.*

*Allegation 3. On balance of probabilities I am satisfied that incident two did occur as two prisoners indicate this. I accept that there are some discrepancies in terms of the timings but believe the incident did occur. You rightly indicated in the first hearing that Prisoner Q had only suggested it was a blond officer in his initial interview, which the investigating officer had wrongly interpreted as female. On second interview Mr. Prisoner Q confirmed it was a blond female who he thought was called Jodie. This was therefore tested. There is some confusion over the timing of the search and we acknowledge that, but can find no reason why Mr. Prisoner Q would indicate the movement of a phone when he on interview he indicated he clearly dislikes Prisoner B. Given the nature of the two prisoners I find it hard to reconcile that they would collude to provide the information and therefore I find this allegation proved”.*

77. Governor Novis made no finding in relation to allegation four given the conclusion reached by Governor Hillman in his investigation report.

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<sup>1</sup> There is some repetition in this regard not from the letter itself but as a result of how it has been amended by the parties to protect the identity of the prisoners concerned. I have simply recorded how the letter appears in the bundle even though this was not precisely the content that the Claimant received.

78. I accept the evidence of Governor Novis, who as I have said above I found to be a credible witness, that he had not been informed by Deputy Governor Folland – or indeed anyone else – about the issues that the Claimant had raised in the meeting of 21<sup>st</sup> March 2016. There is nothing at all to gainsay that evidence and, as I have already observed, Governor Novis had been brought in to turn matters around at the establishment following what the Claimant described as the sidelining of Governor GB. If Deputy Governor Folland was, as the Claimant contends, seeking to “gag” her with regard to her disclosures it might appear an unusual decision for her to have informed Governor Novis against that background and it would appear equally unlikely that he himself would have sought to dismiss the Claimant on account of her reports. I consider it more likely had he been aware of those matters that, akin to matters raised by the Claimant in relation to bullying and harassment during the disciplinary process, that he would have taken steps to have them looked into as, indeed, he also did with issues raised at a later stage by Officer Preston. I am therefore entirely satisfied from the evidence of Governor Novis that he knew nothing of the Claimant’s disclosures to Deputy Governor Folland at the time that he made the decision to dismiss and that those matters therefore could not and did not form any part of that decision. I deal with that issue further below.

79. The day after the Claimant’s dismissal, a memorandum was sent out to all staff by Deputy Governor Folland which arose from comments that the Claimant had raised during the course of the disciplinary hearing that she had been bullied by other staff members. She did not mention during that time any abuse of prisoners or contraband issues and again that reinforces my view that any such mention to Deputy Governor Folland on 21<sup>st</sup> March was very much a secondary issue to the allegations of a staff divide and occupied little of what the Claimant had to say.

80. I accept the evidence of Governor Novis that as a result of the memorandum only one person in fact came forward and made any allegations about bullying and harassment within the establishment. However, that individual had been one named by the Claimant as having bullied and harassed her and in turn she made her own counter allegations against the Claimant. That thereby reinforced the view of Governor Novis about the alleged culture of bullying that this was a “tit for tat” dispute.

### The Appeal

81. The Claimant was offered a right of appeal by Governor Novis against his decision to dismiss her and she was told how to exercise that right of appeal. The Claimant was specifically told by Governor Novis in his dismissal letter that Teresa Clarke, the Director of Midlands Prisons, would be the Appeal Authority in this case. I remind myself here of the submissions of Ms. Hodgetts that Ms. Clarke was the very person that the Claimant contends had written the “scathing report” which led to Governor GB being “sidelined”. I accept that if Governor Novis was seeking to cover up the Claimant’s disclosures to Deputy Governor Folland or to “gag” her from repeating them, then to place her in direct contact with Ms. Clarke would appear a rather odd decision to say the very least and this further reinforces my finding that Governor Novis was not aware of any disclosure that the Claimant had made and was accordingly certainly not influenced by it in his decision to dismiss her.

82. Ms. Clarke conducted a review of the decision to dismiss and concluded that the dismissal should be upheld. I do not deal in detail with that decision



given that it is not suggested by the Claimant that Ms. Clarke knew or was influenced in her decision by the disclosures made during the meeting with Deputy Governor Folland on 21<sup>st</sup> March 2016. The decision taken by Ms. Clarke was to dismiss the Claimant's appeal and she upheld the conclusion reached by Governor Novis. That decision outcome on the appeal was communicated to the Claimant by letter on 23<sup>rd</sup> November 2016 and confirmed that that date was her last day of service given that the effect of her appeal had been to extend her effective date of termination until the appeal outcome.

The reasons for the decision to dismiss

83. Having dealt briefly with the question of the appeal, I turn back to the decision to dismiss which had originally been made by Governor Novis given that I need to make findings upon what the operative cause of his decision to dismiss the Claimant in fact was. The Claimant of course says that it is the disclosures that she made and the Respondent says that it is conduct.

84. In support of the contention that I should find that the reason or principle reason for dismissal was the disclosures on 21<sup>st</sup> March 2016, Ms. Snocken invites me to consider the Claimant's case that the allegations against her were so weak that this must show that Governor Novis was influenced by something other than her alleged conduct. I have indeed considered that matter extremely carefully.

85. Again, that is a matter at first blush that stands as something of not inconsiderable concern. Governor Novis's evidence before me was that he considered himself to be experienced in disciplinary matters but, in fact, it transpired that this was only the third that he had conducted in his career, the previous two being whilst acting up as Governing Governor at HMP Gartree. I have no doubt from his strident evidence to that effect before me that he is confident in the decision that he made to dismiss the Claimant and that he considered that he had "interrogated the evidence" and made the right decision that she had committed the acts of misconduct alleged.

86. Ultimately, whilst I accept his genuine belief in that position, it simply does not stand scrutiny and I accept the submissions of Ms. Snocken that the case against the Claimant was somewhat weak once they were properly interrogated.

87. In this regard, the allegations upheld by Governor Novis as identified previously were allegations one and three and I deal with each in turn as to the evidence before him at the material time:

88. **Allegation 1** - This was the assertion that the Claimant had instigated the assault of Prisoner A by Prisoner B. This came from the word of Prisoner B who had a propensity for violence and was a prisoner at the establishment with something of a colourful record as a result.

89. There was no other independent evidence that the Claimant had arranged this assault other than the word of Prisoner B.

90. Governor Novis accepted, as had Governor Hillman before him, that it was likely that Prisoner B was telling the truth about this incident. His reasoning for having done so was that he did not consider it likely that Prisoner B would implicate himself in an assault and that it was a matter of fact that an assault had

taken place on Prisoner A in which Prisoner A had implicated Prisoner B as the perpetrator.

91. However, there was a distinct problem with simply accepting the uncorroborated word of Prisoner B over that of the Claimant which included the following:

- (i) The Claimant was an officer with an unblemished record (save as for the fact that CPIR's had been made and I shall return to that further in due course) who had had a complaint raised against her by a prisoner – a matter which is doubtless something of an occupational hazard;
- (ii) There was no investigation as to when the instruction was supposedly given to Prisoner B by the Claimant to drill down into whether that was even possible – for example whether the Claimant had been on leave or on a rest day at the time when Prisoner B alleged she had told him to assault Prisoner A. That becomes all the more important in the context of one of the other allegations made against the Claimant by Prisoner B (namely allegation 3) in respect of which, as I shall come to, she had demonstrated that she could not possibly have been responsible;
- (iii) Simply because Prisoner A had been assaulted by Prisoner B, it did not follow that the Claimant had instigated or arranged that assault simply because Prisoner B had said so. The only possible motive identified was that the Claimant and Prisoner A had had a “minor” altercation some time previously but that was of a sort which Governor Novis accepted in his evidence before me was a common run of the mill occurrence for Prison Officers. It would not appear much of a motive for the Claimant to have compromised her otherwise unblemished career and commit a criminal offence by instigating an assault on Prisoner A;
- (iv) The reliance on Prisoner B not implicating himself had to be viewed against the backdrop of the fact that he had already been identified as the perpetrator by Prisoner A. Whilst Governor Novis's evidence was that many prisoners will not accept their wrongdoing, even when faced with conclusive CCTV footage, there was no consideration of a possible adverse motive for Prisoner B, particularly in view of the other number of complaints that were made against the Claimant by this particular prisoner;
- (v) The Claimant's assertions that Prisoner B had made it known that he was going to “stitch up” officers was not investigated at the time of the disciplinary case against the Claimant and, indeed, not until a week or so before this hearing before me and as part of preparation for it;
- (vi) Officer A was alleged by Prisoner B to have witnessed the incident in question where the instruction was allegedly given by the Claimant to Prisoner B to assault Prisoner A. Officer A attended the disciplinary hearing and gave evidence that she had witnessed no such incident taking place. Despite the fact that that clearly cast doubt on the evidence of Prisoner B, Governor Novis did not

accept the word of that Prison Officer over that of Prisoner B on the basis that Prison Officer A and the Claimant were friends. Simply because they were friends does not appear to me to be sufficient to cast doubt on the account of Prison Officer A and accept an otherwise uncorroborated word of the dubiously characterized Prisoner B; and

- (vii) Other complaints against the Claimant which had been made by Prisoner B were found to have contradictory evidence and therefore were not supported. That must logically cast doubt on the remainder of his other allegations, particularly where they were unsupported by any other evidence and, in fact in respect of this first allegation, positively contradicted by the evidence of Officer A.

92. **Allegation 3** - allegation 3 was that the Claimant had “tipped off” Prisoner B that there was to be a search of his cell, asked him if he had anything that he should not have had and then taken him to the cell of Prisoner Q to deposit a mobile phone there for safekeeping while the search took place.

93. Governor Novis upheld this allegation against the Claimant. It is somewhat surprising that he did so given that the Claimant had demonstrated that she could not possibly have known about the search to tip Prisoner B off beforehand and had not been on shift at the time that the search was carried out.

94. The CPIR in this regard was clear that the complaint was that the Claimant had tipped off Prisoner B about a search which was to be conducted by the “nationals”. That is in fact a regional or area team outside HMP Leicester who come in to assist in spot or targeted searches. It is not disputed that the only “national” during the Claimant’s employment took place on 1<sup>st</sup> March 2016. It also does not appear to be disputed that whilst there were other searches at the prison, the only targeted search on Prisoner B’s cell was the one on 1<sup>st</sup> March 2016.

95. The Claimant was not part of the team carrying out that search. Only members of staff who were to be involved would be told about the nationals coming in and undertaking the search. Therefore, for the Claimant to be aware of the search, she would have had to have been told about that by another member of staff involved in it who was “in the know”. Governor Novis accepted that would be a breach of confidence and a serious matter. There was also no evidence at all that such a breach had taken place.

96. The search took place as something of a dawn raid – in order no doubt to surprise the prisoners – at 6.00 a.m. The Respondent’s own traka records as shown to Governor Novis by the Claimant and her POA representative at the disciplinary hearing showed that the Claimant had not entered the gates into the prison until 7.29 a.m. She could not have known about the search to tip off Prisoner B on an earlier date (or at least there was no evidence that she could have) and she could not possibly have tipped him off and taken him to see Prisoner Q before the search commenced on 1<sup>st</sup> March 2016 because she was not in the prison until after it had been done.

97. Whilst seemingly accepting that, Governor Novis found the charge proven on the basis that Prisoner B’s account of a mobile telephone having been taken to Prisoner Q’s cell for him to hide was corroborated by Prisoner Q. He found that as Prisoner Q and Prisoner B despised each other, it was unlikely that they

would have conspired with each other. What that fails to take into account, however, Prisoner Q was being bullied by Prisoner B and therefore may have been pressured into giving the account that he did and in fear of reprisals.

98. In making his determination, Governor Novis also departed from the substance of the CPIR (despite that being what he was supposed to be looking at to consider the allegations) and concluded that the “tip off” and mobile telephone transfer must have occurred on some other occasion and not on 1<sup>st</sup> March 2016. That was despite the fact that there was no evidence of any other search of Prisoner B’s cell during the period of the Claimant’s employment and the CPIR had been quite specific in its reference to the “nationals” coming in and the only time that they had done so was on 1<sup>st</sup> March 2016.

99. In view of those holes in the disciplinary case against the Claimant, I have considered carefully whether an inference should be drawn that the allegations against the Claimant were used as a means to exit her from the Prison because she had made protected disclosures. After careful consideration, I have determined that it should not for the following reasons:

- (i) It is clear – both from references made during the disciplinary hearing and from his evidence before me - that Governor Novis became blindsided by the sheer number of CPIR’s against the Claimant. By that time there were 39 CPIR’s and I accept that that was an extraordinary number for any officer. However, those CPIR’s included ones which clearly had no substance and others that the Claimant had never seen. Whilst that latter position was against the requirements of the Respondent’s Conduct Policy as Ms. Snocken points out, other than having that policy on the desk before him there is nothing to show that Governor Novis referred to it or that he was referred to it by the Human Resources adviser who accompanied him to the disciplinary hearing. Instead, Governor Novis who, contrary to his assertion in evidence was in my view relatively inexperienced in dealing with disciplinary matters, developed something of a no smoke without fire mindset and he allowed that to cloud and colour his judgment on the specific allegations that he was looking at and for the number of CPIR’s to inform his view on the likelihood that the allegations that he was considering were substantiated;
- (ii) I found him to be a credible witness and I accepted that he has a considerable strength of feeling, however misplaced that might be on the evidence, that the Claimant was guilty of what was alleged against her – and if not in specifics then in substance. I accepted his strident view on that matter belied that the reason that he had chosen to dismiss the Claimant was on account of the allegations against her and therefore it was conduct which was operative in his mind at the time; and
- (iii) I am satisfied and accept the evidence of Governor Novis, as I have already dealt with to some extent above, that he was not made aware at any stage before the Claimant’s dismissal of the allegations that she had made in the meeting with Deputy Governor Folland on 21<sup>st</sup> March 2016. There is, quite simply, no evidence to support the position that Governor Novis was

told about that. Whilst he had a conversation with Deputy Governor Folland on 22<sup>nd</sup> March and also on 23<sup>rd</sup> March at their meeting with Andrew Canning, there is nothing to support the conclusion that he had been made aware of the meeting with the Claimant or what had been discussed. In all events, as highlighted above, it appears more likely than not on the evidence before me that Deputy Governor Folland had not taken in all that the Claimant had said and therefore was unlikely to be in a position to repeat that to Governor Novis. It follows that if he did not know about what the Claimant had told Deputy Governor Folland, that cannot have influenced him and therefore it was not the reason or principle reason for dismissal. The reason operating on Governor Novis's mind, I am satisfied, was conduct.

100. Moreover, there is no basis on the evidence before me to suggest that Governor Novis would have held the raising of the disclosures matters against the Claimant even if he had known about them. In this regard, I have in mind the following:

- (i) Governor Novis would have no motivation for seeking, as the Claimant contends, to dismiss her so as to seek to gag her from repeating the disclosures in question. Firstly, as Ms. Hodgett's points out dismissal would not achieve that end given that the Respondent's Reporting Wrongdoing Policy provides for a number of external avenues where reports can be made and does not rely on an individual still being within the establishment. As the evidence of the Claimant and Officer Sally Preston was that the Claimant was a strong person who would not hesitate to speak out where she saw wrongdoing, terminating her employment would not appear to me to gag her at all and potentially it would do exactly the opposite; and
- (ii) Secondly, Governor Novis was not inert in investigating complaints. He was instrumental in the 9<sup>th</sup> September 2016 memo regarding bullying being sent out. He was also responsible for setting in train a later investigation by Deputy Governor Mand Currie concerning the allegations of bullying raised by the Claimant during the disciplinary process and also by Officer Sally Preston and the latter gave evidence before me that whenever she had raised any concerns, Governor Novis had been the only person who had dealt with it. That had included Governor Novis referring further concerns raised by Officer Preston at a time that she requested a transfer from HMP Leicester to the most senior Human Resources Manager he could find so that she could investigate further if she had remained dissatisfied with the earlier investigation. I therefore find it unlikely that he would have sought to brush under the carpet serious allegations about prisoner mistreatment and the bringing of contraband into HMP Leicester.

101. I also take into account that the Claimant does not suggest that either Mark Hillman who dealt with the initial investigation on which Governor Novis relied, nor Teresa Clarke who considered the matter on appeal, were influenced by the fact that she had made protected disclosures. Governor Hillman on his examination of the matter recommended escalation for a disciplinary case to

answer on more grounds, in fact, than Governor Novis decided to ultimately uphold. Similarly, the decision to dismiss was upheld by Teresa Clarke, albeit as a review rather than a re-hearing and with therefore far little scrutiny than the involvement of either Governor Hillman or Governor Novis.

### Bullying and harassment

102. It is necessary finally before coming to my conclusions to say a brief word about the allegations of bullying and harassment that have featured in the case and the Claimant's contention that this was rife within HMP Leicester. I need to say a word on that to the extent that it is relevant to my findings regarding the likelihood of Deputy Governor Folland having made a comment to that effect on 21<sup>st</sup> March 2016 and also to the evidence of Governor Novis that there was no problem in his view in respect of bullying at the prison.

103. I am not satisfied that there was widespread – or rife - bullying but I accept that the Claimant from her own perspective may well have viewed it that way as can often occur when viewing matters subjectively. I prefer the evidence of the Respondent that the way in which the situation in fact developed was as a result of two factions with the Claimant, Prison Officer A, Officer Preston and some other junior officers such as DP on one side and the more experienced staff, such as Officers RF and SF on the other. Tolerances for how things should be done played a part in that as did the fact that Officer A – who was a close friend of the Claimant – had been having an affair with another officer who was already in a relationship with a different officer at HMP Leicester. That caused factions to arise with different camps taking certain sides. Whilst that is invariably problematic and unpleasant for all concerned, it did not amount to bullying.

104. Whilst Officer Preston had of course complained of bullying, she accepted in cross examination that Governor Novis had commissioned an investigation into those matters and the outcome suggested that the matters that she had complained of had occurred when she was challenged about something that she had done wrong. She did not dispute that assessment nor did she dispute the outcome of the investigation when she received it.

105. Moreover, the 9<sup>th</sup> September 2016 memorandum inviting concerns about bullying to be raised generated only one complaint – from a member of the opposing faction making counter allegations about bullying from the Claimant. That was one complaint out of an audience of approximately 120 other members of staff. Again, that response rate is not suggestive of bullying being rife within HMP Leicester but is indicative of there being two separate camps as I have already referred to above.

106. I should note that there had been an issue raised in correspondence to Governor Novis before the Claimant's dismissal by then Prison Officer RS raising concerns about bullying. RS left the service a short time later. I accept, however, the documentation adduced by the Respondent during the course of the hearing before me was to the effect that RS said that she had made a mistake leaving the service and she actively sought to return, not only to the Prison Service but specifically to HMP Leicester. That would seem unlikely if RS was the victim of bullying as her earlier communication suggested and again this seems to fit more with the tit for tat picture painted by Governor Novis and the two divided camps that I have referred to above.

107. However, as I say I accept that the Claimant may well have personally felt that she was being bullied as, it seems, so did the officer from the rival camp who complained about the Claimant and so, at the time, did Officer Preston. However, I reject the notion that bullying at HMP Leicester was rife as the evidence simply does not support that contention.

## **CONCLUSIONS**

108. Insofar as I have not already done so, I turn now to my conclusions on the remaining claim before me.

109. I deal firstly with the question of whether the Claimant made a protected disclosure or disclosures. I am not satisfied that the Claimant raising that there was a divide between the newer and established officers was such as to amount to a protected disclosure. This was simply a statement of fact but there was nothing to suggest that any such divide amounted to a breach of a legal obligation or to a criminal offence. It was simply indicative of the fact that, as I have found that Deputy Governor Folland commented, there were problems with staff relationships.

110. However, I am satisfied that in disclosing, even in brief terms, that there had been bullying and harassment of prisoners by way of the allegation that Officer SF had set up a prisoner for a wrongful restraint and that Officer RF had brought in contraband tobacco for a prisoner the Claimant made a disclosure of information which showed or tended to show that a criminal offence was being committed (i.e. an assault of a prisoner) and that the legal obligations expected of Prison Officers under the Respondent's Code of Conduct were being breached as to the both that assault and the bringing of contraband into the establishment. Whilst I should note that I would not have found that the allegation of bullying and harassment itself was a protected disclosure (it being merely it seems to me an allegation), the extension of that allegation to set it in the context of the unlawful restraint was sufficient to render it an a disclosure of information tending to show the commission of a criminal offence and breach of a legal obligation under the Code of Conduct.

111. I accept the Claimant had a reasonable belief in those matters as she had overheard "bragging" about them, a matter independently corroborated in oral evidence by Officer Preston. I make no finding or suggestion as to whether those incidents actually took place as they were being "bragged about" and it is not necessary for me to do so for the purpose of this claim. I accept therefore that the Claimant made a protected disclosure on 21<sup>st</sup> March 2016, albeit I remain unconvinced that Deputy Governor Folland actually took it in for the reasons that I have already given.

112. Equally, for the reasons that I have set out above I accept that Governor Novis did not know about the disclosures, either from Deputy Governor Folland or otherwise from anywhere or anyone else and therefore it cannot have played any part in his decision to dismiss the Claimant.

113. I am entirely satisfied that it was the conduct alleged against the Claimant and that conduct alone which formed the rationale for Governor Novis to dismiss her. Whilst the decision based on the evidence available appeared to me for the reasons that I have given to be wholly flawed, I am satisfied that the blindsiding of Governor Novis by the number of CPIR's and the "no smoke without fire" mindset that he adopted was to blame for that.

114. I should therefore perhaps say that had this been a claim of ordinary unfair dismissal, I would have had no hesitation in finding such a complaint well founded for the reasons already given and on the basis that I am told that one reason for bringing these proceedings was to seek to clear her name, I hope that that gives the Claimant some comfort.

115. However, I am not satisfied that the disclosures made were the reason or principle reason for the Claimant's dismissal and I am satisfied that that reason was conduct. The claim of automatically unfair dismissal contrary to Section 103A Employment Rights Act 1996 must therefore fail and it is accordingly dismissed.

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Employment Judge Heap

Date 11<sup>th</sup> June 2018

REASONS SENT TO THE PARTIES ON

19<sup>th</sup> June 2018

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FOR THE TRIBUNAL OFFICE