THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr T Martin	**v**	**Serious Fraud Office**

Heard at: London Central **On**: 28 September – 2 October 2020

Before: Employment Judge Glennie

Representation:
Claimant: Mr J Galbraith-Marten QC
Respondent: Mr C Glyn QC

JUDGMENT

1. **The complaints of unfair dismissal and breach of contract (wrongful dismissal) are well founded.**

2. **Remedies are to be determined at a further hearing on a date to be fixed.**

REASONS

1. By his claim to the Tribunal the Claimant, Mr Martin, makes complaints of unfair dismissal and wrongful dismissal (breach of contract). The Respondent, the Serious Fraud Office, resists those complaints.

The issues

2. Put broadly, the issues to be determined in relation to the complaint of unfair dismissal are as follows:

   2.1 What was the reason or, if more than one, the principal reason for the dismissal?

   2.2 Did the Respondent act reasonably or unreasonably in treating that as a reason for dismissing the Claimant?

2.3 If the dismissal was unfair because of a procedural failing, what chance is there that the Claimant would have been dismissed in any event had that failing been rectified?

2.4 Did the Claimant contribute to his dismissal by his own conduct?

3. The issue in the complaint of wrongful dismissal is, did the Claimant commit a breach of the contract of employment that was sufficiently serious as to entitle the Respondent to dismiss him without notice?

4. These issues will be the subject of further refinement when I set out the applicable law later in these reasons.

Procedural matters

5. At the commencement of the hearing, Mr Galbraith-Marten made applications for specific disclosure of documents and for witness orders. Mr Glyn opposed both applications.

6. The documents were said to be potentially relevant to the Claimant's case that senior individuals within the Respondent's organisation were complicit in, or aware of, an attempt by the US agencies to have him removed from the Unaoil investigation, which I shall say more about in the course of these reasons. I accepted that this was an important part of the Claimant's case, but in the event I agreed with Mr Glyn's submission that disclosure of the documents sought was not necessary for a fair determination of the case. The removal of the Claimant as Case Controller for the Unaoil investigation (as distinct from his dismissal), although relevant, was not directly in issue. The Claimant was able to set out in his witness statement his case as to why he was removed, and it was evident from the existing evidence who the various individuals were and what roles they played in the relevant events. I therefore refused the application for specific disclosure.

7. I was satisfied that the witnesses who were the subject of the application had evidence to give that was relevant to the complaint of wrongful dismissal and the issue of contributory conduct, as their evidence was potentially relevant to the context of the allegations that led to the dismissal. I informed the parties that I was prepared to make the orders sought: in the event, it was agreed that the Claimant could rely on the statements without the need for the witnesses to be called to give oral evidence.

Evidence and findings of fact

8. I heard evidence from the following witnesses:

8.1 Mr Tony Osbaldiston, formerly a non-executive board member of the Respondent.

8.2 Mr Paul Staff, formerly the Respondent's Chief Executive Officer.

8.3 Mr John Carroll, the Respondent's Chief operating Officer.

8.4 Mr Matthew Wagstaff, the Claimant's line manager at the time of the events with which the case was concerned.

8.5 The Claimant.

9. I also read the additional witness statements referred to above, from Mr George Barbary, Mr Dermot Rice and Ms Elizabeth Collery, all colleagues of the Claimant at the relevant time.

10. There was an agreed bundle of documents and page numbers that follow in these reasons refer to that bundle.

11. The Claimant is a solicitor who commenced employment with the Respondent in June 2014. His role was that of a Case Controller and Senior Lawyer. As a Case Controller, he led the investigation and prosecution of complex bribery cases. Some of these would have an international element.

12. In March 2016 the Respondent commenced an investigation into Unaoil, a Monaco-registered company owned by members of the Ahsani family, who are British citizens. In outline, Unaoil was suspected of paying bribes on behalf of oil engineering companies in order to secure high value contracts relating to oil infrastructure projects. The Claimant became Case Controller for this investigation. The cases were identified as the "PVT" cases or as "Operation Pivot".

13. Other law enforcement agencies were interested in Unaoil and the Ahsanis. These included the Australian Federal Police and, importantly for the present case, the United States' Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI). As the facts of this case demonstrate, in situations such as this there can be competition as well as co-operation between the various agencies.

14. On 25 May 2016 there took place at the US Embassy in London a meeting between officers of the FBI, the DOJ and the Respondent, with a view to fostering co-operation between the US and UK agencies. The Claimant was among those who attended. The meeting was followed by a brief drinks reception at the Embassy, after which some attendees, both British and American, went for informal drinks in a pub.

15. In due course it will be necessary for me to make findings of fact about what occurred that evening, in particular so far as the Claimant was concerned, for the purposes of the wrongful dismissal complaint and any issue as to contributory conduct. For the present, with a view to the main issues in the unfair dismissal complaint, I will concentrate on the information that became known to the Respondent.

16. On the day after the meeting and drinks, 26 May 2016, Mr McEachern of the FBI sent an email to his colleague Mr Luebke (at page 435) which read as follows:

> "You can't seem to win over these past few days. I'm sorry you had to put up with that shit last night from Tom [the Claimant]. I want to document what he accused you of last night. I don't want to make a big deal of it but the unprofessionalism is truly unacceptable. I do not plan to elevate it with anyone. Just want to put it in the file just in case. Let me know if you have a problem with this. Thanks again for organizing everything and taking the high road."

17. Mr Luebke's reply of the same date included the following:

> "I didn't take it personally, as I think there is a lot of bad blood between the NCA [a US agency] and SFO, and he sees me as a NCA rep. He's taking his anger on the NCA out on me."

18. I note at this stage that Mr McEachern referred to the Claimant having accused Mr Luebke of something; that he did not make reference to offensive language or swearing; and (for what it is worth), he did not flinch from using the word "shit" in his email.

19. The investigations into Unaoil continued, and at this stage the no one on the Respondent's side was aware of this exchange between Mr McGechan and Mr Luebke.

20. Mr Wagstaff's evidence, in paragraph 4 of his witness statement, was that "some months after" 25 May 2016, he and the Respondent's General Counsel Mr Milford spoke to Mr Kahn of the DOJ. He stated that Mr Kahn said that the DOJ had an issue with the Claimant because of his lack of respect. Mr Wagstaff continued that Mr Kahn said that there had been an incident in a pub when the Claimant had called someone a "cunt" (a word which I will not keep repeating but will render as "c***"). When interviewed in September 2018 Mr Kahn said that he spoke to Mr Wagstaff about the matter in August 2017, so about 15 months after the incident.

21. In any event, Mr Wagstaff's evidence, supported by Mr Kahn's account, was that (whenever precisely it was) they spoke about a number of matters regarding the Claimant, of which the pub incident was one. It was common ground that, at this point, Mr Wagstaff asked the Claimant about the incident, and he denied calling Mr Luebke a c***. Mr Wagstaff relayed that denial to Mr Kahn and asked him whether he wished to make a formal complaint. The reply was that he did not, and Mr Wagstaff took the matter no further.

22. On 12 April 2018 Mr Sam Ahsani was arrested in Rome under an arrest warrant obtained by the Respondent. There were then some discussions between officers of the DOJ and Mr Ahsani with a view to any proceedings against him taking place in the USA, evidently with a view to his receiving

some sort of credit for co-operating with future investigations. There was a suggestion that, to facilitate this, he might be extradited from Italy to the USA.

23. On 16 April 2018 Mr Milford sent to Ms Moser, Acting Chief of the Fraud Section of the DOJ, an email at pages 514-515, following a meeting a few days earlier. Mr Milford expressed concern about the issue of "primacy" over Mr Ahsani and other Unaoil suspects or defendants, meaning essentially the jurisdiction in which any future prosecution would take place. Essentially, the Respondent's team wanted any prosecution of Mr Ahsani to take place in the UK. Mr Milford wrote:

"Your willingness to enter into discussions of the kind that you did with [Mr Ahsani] has gone down very badly across our senior management team. People want to know when / if they can trust DOJ."

24. Mr Milford further explained the developments concerning Mr Ashani, and then continued as follows:

"What of the impact of these events on the SFO/DOJ relationship? As I hope you accept, we have set a great deal of store by getting the SFO/DOJ relationship back on track. In preparing for our meetings a fortnight ago some of my colleagues expressed scepticism that anything would be achieved beyond a one-way flow of information. We thought it worth taking that risk in order to try to build trust. But within two weeks, it became clear that you were prepared to put a short term advantage on a single case above a respectful and trusting relationship with us. It will not help any part of that rebuilding to have Tom Martin's name invoked as a justification for what you have done."

25. On 25 June 2018 there took place a meeting between Ms Moser and Mr Thompson, the Respondent's Interim Director. Mr Thompson's note of this meeting, which he apparently wrote on 12 July 2018, is at pages 134-136. This recorded a number of matters, including various complaints from the DOJ about the general level of co-operation from the UK, and about specific incidents of disrespectful conduct, in particular by the Claimant. (There were also complaints the other way, by the UK team about the US team). The note recorded that, during the course of the meeting, Ms Moser had shown Mr Thompson a document in which counsel for Mr Ahsani made complaints about the treatment of him by the Respondent's team, and the Claimant in particular.

26. This was followed by a document described as an "unofficial briefer" sent by Ms Moser to Mr Thompson on 6 July 2018. This included a number of allegations against the Claimant, including that on 25 May 2016 he had called Mr Luebke a c*** and a spy.

27. On 9 July 2018 Mr Carroll sent an email to Mr Thompson, Mr Milford and Mr Wagstaff describing a conversation which had taken place with a senior

officer in the Australian Federal Police, who had expressed concern about communication difficulties affecting the Unaoil investigation.

28. Meanwhile, in Italy, the American agencies were seeking to extradite Mr Ahsani to the USA. On 10 July 2018 the Court of Appeal in Rome refused that application.

29. On 17 July 2018 Ms Moser sent an email to Mr Thompson at page 807 to which she attached a memo from Mr Ahsani's defence team. This raised various complaints about the Claimant. There is then at page 147 a file note dated 18 July 2018, recording that a discussion had taken place involving Mr Thompson and two other attendees. Four allegations or sets of allegations against the Claimant were recorded: a complaint from the DOJ about the Claimant's conduct, including that he abused or swore at a member of staff during a meeting; a complaint from the Australian Federal Police; an unattributed complaint, further details of which were awaited; and complaints from two firms of defence lawyers. It is not necessary for me to set out details of the second, third or fourth complaints, as in the event, in one way or another, they were not proceeded with or were rejected. The first complaint is the subject matter of the present claim.

30. The file note recorded that the Claimant was to be suspended and that Mr Thompson agreed that he was the decision maker with regard to this. A further file note of the same date at page 827 recorded that Mr Thompson informed the Claimant that he was being suspended and that the allegations were of serious misconduct. The note also stated that the Claimant's response was that this was "serious rabble rousing from the DOJ and the defence", and that his conscience was clear.

31. At around this time a colleague carried out a peer review of the work of the Claimant's team, producing a document dated 25 July 2018 at pages 155-159. Only one out of 7 ongoing cases had been considered in depth, with a limited review of the others being carried out. The writer stated that a great deal of very positive work had been carried out, but that there was an almost complete reliance on the case controller (the Claimant) for the full picture of each investigation. The writer described the Claimant as "a charismatic strong leader with a record of successful prosecutions" but also said that he had a "somewhat maverick attitude to some elements of the work" and commented that a lack of documentation of case strategy gave rise to a risk in the event of disruption to the chain of command.

32. I found this to be of little significance to the issues about the Claimant's dismissal. The review was limited in extent. It contained both positive and negative observations. It did not feature in the subsequent disciplinary proceedings.

33. Two events of note occurred on 9 August 2018. One was that the Claimant sent to the Respondent a letter before action, drafted and signed by Mr Galbraith-Marten, challenging his suspension and indicating that it was written in anticipation of an application for an injunction staying the

suspension. (The Respondent replied to this on 13 September 2018 denying breach of contract and, ultimately, no such application was ultimately made). The other was that, following further legal proceedings in Italy, Mr Ahsani left that country for the United States, seemingly with some assistance or co-operation from the American law enforcement agencies.

34. On 10 August 2018 Mr Paul McManus interviewed the Claimant about all of the allegations against him. The interviews, which were recorded, lasted for most of the day: the transcripts run from page 305 to page 423. I only need to refer to the part of the interviews that concerns the events of 26 May 2016.

35. On page 316 the Claimant said that after the meeting and brief reception at the Embassy, he went to the pub with various SFA colleagues and members of the DOJ and FBI. In relation to the allegation that he called Mr Luebke a c*** and a spy, he replied:

"Out-outrageous, that's not correct. That's just I mean….and if I had said that, and I said it in front of them, why have they waited two and a half years to make that complaint? I – I look, it didn't happen……"

36. The Claimant continued that if he had said this, the American agencies would have been complaining immediately about his "outrageous scurrilous behaviour". On page 317 the transcript records that the Claimant again denied saying the words alleged, saying that he did not know why this was being raised now, and that he thought that it was raised informally at around the time Mr Ahsani made contact with the DOJ. On page 318 the Claimant said that he would not have had sufficient to drink to have caused him to lose control. On page 319 he said that he would never say these things to a third party agency. When asked why those concerned would make such an allegation, the Claimant named three people (not including Mr Luebke) who were "not particularly fond" of him.

37. It is evident from a short note at page 648.7 that Mr McManus met Mr Thompson and two others on 10 August 2018 to debrief them on the situation. On the same date (seemingly after the debrief) Mr Thompson wrote a file note at pages 206-207, circulated to the Respondent's new director Ms Osofsky, recommending the removal of the Claimant as Case Controller of the PVT cases, "irrespective of the findings of the investigation into [his] conduct". Mr Thompson expressed serious concerns arising from the peer review and said that there was a danger of a "toxic culture" taking hold of the team. He wrote considerably more about this aspect than about the conduct investigation.

38. Mr McManus and Mr Byrne carried out a series of interviews with various individuals between 13 and 30 August 2018. Again, I am ultimately concerned with what was said about the events of 26 May 2016 only. I will summarise below what each of them said about the allegation against the Claimant, indicating the agency by which they were employed, but without

detailing the particular dates or page numbers. (The interviews at this stage with two other individuals did not address 26 May 2016).

38.1 Mr Brown (SFO) could not remember the detail of any conversation and stated that nothing untoward was said. He did not remember the Claimant using the words c*** or spy in any context, or saying anything overtly offensive. He said that the atmosphere in the pub was friendly and there was no undercurrent of hostility.

38.2 Mr Wagstaff (SFO) said that he became aware of the incident some months later when Mr Kahn told him that the Claimant had called someone a c***. There was no mention of the word "spy". This was an informal conversation on the phone.

38.3 Mr Milford (SFO) was not present on the evening, but had previously been informed of the alleged use of the word "c***" but not of the word "spy". He had taken no action, but was trying to understand what needed to be done in order to recalibrate the relationship the relationship with the US.

38.4 Mr Luebke (FBI) said that the Claimant called him a "Quisling", that he asked what that was, and the Claimant replied that it meant a "mole". Mr Luebke replied that this was his job, he was the eyes and ears for the US. He thought that the Claimant was acting inappropriately, but was not intimidated, and put it down to the Claimant's comments "becoming unfiltered through alcohol". He had no recollection of the Claimant calling him a c***. Mr Luebke was asked whether he considered this to be banter or something more aggressive, the reply to which was recorded as: "KL said that it was not jovial, it was more aggressive but figured that [the Claimant] hated him. KL tried to get along with [the Claimant] but he knew where he stood. KL was not offended by [the Claimant's] remarks and did not feel threatened at all." Later, Mr Luebke repeated that he did not recall the Claimant using the word c***, remembered that he used the word spy, or similar, and definitely Quisling.

38.5 Mr Kihm (DOJ) said that before the incident the Claimant had told him several times that he thought Mr Luebke was a spy. He said that in the pub, "[the Claimant] turned to [Mr Luebke] and said to him "you're a spy and a c***. He definitely used both words and [Mr Kihm] described himself as completely blown away. "[The Claimant] said it several times, five or six, and was very offensive. He accused [Mr Luebke] of trying to sneak a look at SFO materials." Later Mr Kihm was asked whether he recalled the word Quisling being used, and he said that this triggered a memory of the Claimant using it several times.

39. On 5 September 2018 a meeting took place between five individuals, including Ms Osofsky, Mr Milford and Mr Wagstaff. The note of this at page

241 records that Ms Osofsky was clear that the Claimant should not return as Case Controller for the PVT team. Mr Wagstaff informed the Claimant of this by telephone on 6 September 2018. He and the Claimant differed in their accounts of what was said, the Claimant relying on a note at page 242, and Mr Wagstaff on an email of 6 September at page 245. They agreed that Mr Wagstaff said that the decision to remove the Claimant was made by Ms Osofsky. In general terms, the Claimant's account was that Mr Wagstaff said that he was being treated appallingly and that matters had been prejudged, while Mr Wagstaff said that he took a more neutral stance, while telling the Claimant that he was sorry about what was happening.

40. Perhaps the most material difference was that the Claimant recorded Mr Wagstaff as saying that Ms Moser had demanded his removal from the case; that the priority for Ms Osofsky was to get the DOJ onside, and that if that was to be at the Claimant's cost, so be it. In his witness statement Mr Wagstaff said that he did not believe that he said anything about Ms Moser demanding the Claimant's removal (he was firmer in his oral evidence, stating that he did not say this), and that he was quite certain that he did not make the "so be it" comment.

41. I found that both the Claimant and Mr Wagstaff were giving honest accounts of their recollection of this conversation. I do not believe that either would have concocted untrue records of the conversation: but I also find it likely that Mr Wagstaff's recollection of what he did or did not say would be influenced by his belief as to what he should or should not have said, and that the Claimant's recollection would be influenced by what he believed the situation to be.

42. I find as a matter of probability that Mr Wagstaff said something to the effect that the Claimant's removal had been at the instigation of Ms Moser. It was Ms Moser who had sent the "unofficial briefer" and the email with the memo from the Ahsani's defence team in July. It seems to me to be fair to say that Ms Moser in fact wanted the Claimant to be removed, and therefore probable that what Mr Wagstaff said reflected this.

43. Mr McManus and Mr Byrne carried out further interviews between 7 September and 2 October 2018. The content of these, so far as they concerned 26 May 2016, may be summarised as follows:

    43.1 Mr McEachern (FBI) said that Ms Davis approached him and said that there might be a problem between the Claimant and Mr Luebke. He went over and observed a "verbal disagreement" between them. The Claimant accused Mr Luebke of being a Qusling and a c*** and of accessing SFO databases without authorisation. Mr McGechan told them to break it up, and was shocked at the accusations and terminology being used by the Claimant. He put it down to "hotheads being hotheads". He did not think it was banter, he was in no doubt that it was accusatory. Mr McGechan also stated that the language used was less of a concern than the allegation of accessing databases without authority.

43.2 Mr Brown (SFO) said that the events in question were over two years previously, that he and others had been drinking, and that he had little recollection of specifics. He remembered that a friction point had emerged at the earlier meeting concerning the Ahsanis. He did not remember the Claimant using the words c*** or spy. The Claimant was the only person he had heard use the word Quisling: he could not remember whether this was in the pub or on some other occasion, but it was a reference to Mr Luebcke.

43.3 Mr Kahn (DOJ) said that he had dialled in for the Embassy meeting and only learned about events in the pub subsequently. He called Mr Milford and Mr Wagstaff in about August 2017 and raised this and other matters.

43.4 Mr Robell (FCPA, a US agency) saw the Claimant and Mr Luebke talking, and observed that the Claimant became angry. He remembered the Claimant using the words Quisling and spy, but not c***. Mr Robell did not think that the incident was a big deal, but later realised that the FBI were upset about it. His view was that "it went beyond banter and was a bit aggressive but it was said amongst grown-ups, [Mr Luebke] could handle himself and it was not the most offensive thing that [Mr Robell] had ever heard. [The Claimant] made no secret of his feelings for the FBI."

43.5 Mr McArthur (Australian Federal Police) could not remember any memorable incident other than someone dropping a glass at some point. He did not remember the Claimant using the words c***, spy or Quisling, but he became aware of the last of these some time later when Mr Luebke mentioned it to him.

43.6 Ms Davis (FBI) said that she was standing near Mr Luebke when the Claimant walked over and said that "co-operation with the FBI and the DOJ was a problem was a problem because of that c*** there", indicating Mr Luebke. He also called Mr Luebke a "fucking Quisling" and a spy, and said that he had accessed UK databases without authorisation. She stated that her view was that this was not case of a poor choice of words after a few drinks, it was a deliberate use of inappropriate language designed to offend.

44. Mr McManus produced an investigation report (pages 274 – 304) on 25 October 2018. In his summary of findings at page 274 Mr McManus referred to the tensions between the US agencies and the Respondent, and that "significantly a principal suspect in the case, [Mr Ahsani], appears to have entered into an arrangement of some sort with the DOJ / FBI." He also wrote: "It is quite clear that neither the DOJ / FBI nor Ahsani are on good terms with [the Claimant]. It is also noteworthy that the defence lawyers' complaints have been made via the DOJ rather than directly to the SFO".

45. Mr McManus continued that the vast majority of the complaints against the Claimant had fallen away as he had investigated them, leaving only 4 where he found that there was a case to answer. These were (as set out on page 304, in summary only with regard to numbers 2 to 4):

    45.1 In relation to the events of 26 May 2016, Mr McManus wrote:

    > "The decision maker should consider whether [the Claimant] did direct the offensive words 'c***', 'spy' and 'quisling' at [Mr Luebke] during an informal event at a London pub on May 25 2016 and in doing so brought the SFO into disrepute. Additionally the decision maker should consider whether [the Claimant] is making a wilful misrepresentation of facts to this internal investigation by denying that such an incident took place."

    45.2 Not making a record of a series of "off the record" conversations.

    45.3 Making the fact of Mr Ahsani's co-operation with the US authorities public.

    45.4 Making comments to a firm of solicitors that suggested that he was not performing his investigatory role with the expected integrity and impartiality.

46. The report was sent to the Claimant on 13 November 2018. On the same date an invitation to a formal meeting on 4 December 2018 was sent to the Claimant (pages 593-594). The meeting was to be conducted by Mr Osbaldiston. The letter contained the observation that "the allegations to be discussed at the meeting are of a serious nature and if upheld may result in disciplinary action against you up to and including your dismissal."

47. The meeting in fact took place on 14 December 2018. There are notes of it at pages 632 - 637. The Claimant challenged the accuracy of the notes in some respects, but ultimately I found that nothing significant turned on this. In addition to his oral statements at the meeting, the Claimant relied on a written response at pages 616 – 631. The latter made a number of points relevant to the allegation about 26 May 2016.

48. The Claimant stated that he had been refused access to evidence, in that he had not been given access to witnesses, and that he had only been allowed access to case documents on the morning of the meeting. On page 618 he stated that the complaints by the DOJ and Mr Ahsani were "motivated by a joint desire to see me removed as case controller and senior lawyer on the Unaoil case", and went on to give further details of why he maintained this. The Claimant said that the DOJ and Mr Ahsani had entered into "an unlikely pact" to try to engineer this, and that this was the prism through which those complaints should be seen.

49. The Claimant pointed out that Mr Luebke did not recall him using the relevant words. He said that he did not find Mr Kihm trustworthy, and that it

more than likely that he and Ms Davis would have exaggerated the incident. The Claimant added that the matter had been dealt with informally by Mr Wagstaff in August 2017.

50. On page 622 the Claimant addressed the matter of whether he was making a wilful misrepresentation of the facts by denying that an incident took place. He said that he had denied calling Mr Luebke a spy and a c***, but was not asked about a wider incident and had only now been presented with the evidence about this. The Claimant wrote that he had taken legal advice before being interviewed and that it was clear that it was unlikely that the pub incident could lead to his dismissal, but that the matters raised by Mr Ahsani might lead to dismissal, striking off and criminal prosecution. He maintained that he therefore had every reason to be as candid as possible and added:

"I do not believe there is any credible evidence that I have misled anyone, never mind wilfully. I now believe that I must have been far drunker than I had previously recalled and my memory has let me down."

51. The notes recorded that the Claimant accepted that the Quisling comment probably did happen, and that internally he referred to Mr Luebke in this way. He said that the passage of time had made him realise that he had been more intoxicated than he thought he was. He said that the language that he used was "the common lexicon for criminal lawyers and partner agencies". Mr Osbaldiston asked the Claimant if this meant that he called Mr Luebke a quisling, and the Claimant said that he was inclined to accept that he had said this. He said that he "didn't think he did" call Mr Luebke a c***, and said that there were varying levels of evidence about this. The Claimant said that he was not sure about using the word spy, but it was "in the same bracket" as quisling.

52. Mr Osbaldiston asked the Claimant what motive the witnesses would have for making untrue statements. The Claimant replied that he was an immoveable object in "bringing in" Mr Ahsani. He agreed that he was saying that there was a joint complaint by the DOJ, the FBI and Mr Ahsani with a view to undermining him.

53. In his witness statement, Mr Osbaldiston referred to the Clamant's comments in the disciplinary meeting about the relevant allegation, as outlined above. In paragraph 52 he stated that the Claimant's account had changed, in that he was now accepting some parts of the allegation and was saying that he had been more drunk on the evening than he had recalled. Mr Osbaldiston stated that he concluded that the Claimant had called Mr Luebke a c***, a spy and a quisling, and that this was unacceptable abuse on a personal level. In paragraph 63 he said that in his view, the term "quisling" was as offensive as "c***" when addressed to am member of a friendly foreign government.

54. In paragraph 68 of his statement, Mr Osbaldiston said that when asked the Claimant whether he regretted the language he had used to Mr Luebke, the

Claimant replied that it was "common lexicon" between criminal lawyers. In relation to the question why the incident had been raised when it was, rather than soon after it had happened, Mr Osbaldiston stated in paragraph 75 that he found it credible that "the Americans might have held fire on reporting this incident at the time if there were concerns about trying to improve their relationships with the SFO and had not referred to it until they found the relationship was not improving". In paragraph 77 he gave other reasons why the incident might not have been taken further at the time (i.e. the Americans wanting to appear resilient and tough; not wanting to affect the investigation; wanting to protect the relationship; hoping the Claimant would think better of his actions). In paragraph 78 Mr Osbaldiston stated that Mr Luebke might have said that he was not offended for those reasons.

55. Mr Osbaldiston then explained the conclusions that he reached, which were set out in a letter of 18 December 2018, sent to the Claimant by the Respondent's head of HR. In relation to allegation 2, the conclusion was that his behaviour did not fall below the expected standard and that no further action was required. In relation to allegations 3 and 4, the decision was that there was no case to answer.

56. On allegation 1, the letter stated that Mr Osbaldiston had concluded that the Claimant used the words c***, spy, and quisling to Mr Luebke, and that he considered that this brought the Respondent into serious disrepute and amounted to unacceptable abuse on a personal level. He had decided that these matters amounted to gross misconduct. Additionally, Mr Osbaldiston had found that the Claimant had denied using offensive language when asked about it by Mr Wagstaff in August 2017 and when interviewed by Mr McManus. In view of the number of witness statements to the contrary, Mr Osbaldiston had concluded that in denying that the incident took place, the Claimant was making a wilful misrepresentation of facts, and that this also constituted gross misconduct.

57. When cross-examined, Mr Osbaldiston said that he was aware that the Claimant was saying that the complaints against him were an attempt to destabilise the investigation. He said that he did not think that, if the Claimant's allegations were true, this would be an important factor in the decision. He said that he did not believe that there was a conspiracy. Later, Mr Osbaldiston said that:

"The swearing is what it is. It has no relevance what the purpose was…whether they raised it to get rid of him or not."

58. Mr Osbaldiston continued that it was "absurd to allege a conspiracy between all these people". He said that he did not recall the Claimant wanting to call Ms Collery as a witness, although when referred to pages 610-611, he agreed that it was evident that the Claimant had not been allowed to speak to witnesses, and that it was correct that he could not therefore have produced a statement from her.

59. When asked whether it was likely that the Americans did not want the Claimant to continue on the case, Mr Osbaldiston replied that it was, but that this did not mean that six witnesses got together and concocted a story that was not true.

60. When Mr Galbraith-Marten asked Mr Osbaldiston about the "common lexicon" point, the latter replied that "the contention that it's a common lexicon is preposterous". He agreed that he had not investigated this aspect, saying that he thought that the idea was "ludicrous". Mr Osbaldiston added that he applied his knowledge and experience, and repeated that the suggestion that such language would be used was preposterous. He said that "people who use the language and in the manner the Claimant did, do lose their jobs over it."

61. When referred to the Respondent's disciplinary policy, and the distinction drawn in it between misconduct and gross misconduct, Mr Osbaldiston said that the Claimant's conduct was so hostile that it demonstrated him not to be sufficiently trustworthy, and that he could not be trusted not to do it again in the future.

62. Mr Osbaldiston confirmed that he considered that the Claimant had wilfully misrepresented the facts in denying using the word c***. In re-examination he said that he did not believe the Claimant's denials of "c***" and "spy", given the weight of the evidence.

63. The letter of 18 December 2018 notified the Claimant of his right to appeal. He raised an appeal and gave the grounds of this on 11 January 2019 at pages 649-654. In summary, these were:

    63.1 The matters found against him did not amount to gross misconduct and dismissal was an unfair and disproportionate response.

    63.2 He wished to provide new evidence from colleagues about the behaviour of DOJ and FBI employees that would undermine the case against him.

    63.3 The issue of the credibility of the DOJ and FBI agents concerned had not been properly investigated.

    63.4 The matter had already been dealt with by Mr Wagstaff in August 2017.

    63.5 The use of the words spy and quisling could not bring the Respondent into disrepute, partly because they were used in an informal environment, partly because they could fairly be regarded as accurate, and partly because the matter had not been raised for over 2 years.

    63.6 Vulgar language is commonplace in the world of criminal investigation and prosecution.

63.7 Mr Luebke's evidence that he did not recall the Claimant using the words complained of, and was not offended.

63.8 His representations to Mr Osbaldiston had not been properly considered.

63.9 He had not misled anyone.

63.10 There was mitigation in the form of his outstanding record as a Case Controller, was under intense pressure with regard to the PVT investigation, and was in the front line with regard to a very difficult relationship with the US agencies.

64. On 28 January 2019 the Claimant sent an email to the Head of HR (page 662), to which were attached 4 witness statements from colleagues. Mr Rice described the history regarding Mr Ahsani and expressed the view that the DOJ had acted in a way lacking candour, transparency and integrity, and that it had sought to undermine the Respondent in order to further its own interests. Ms Collery commented on the relationship with the DOJ, referring to particular individuals and saying that this had been antagonistic from the start. She said that at the time that the Claimant had been suspended, he had been engaged in trying to delay Mr Ahsani's extradition to the USA and to keep him under house arrest in Italy. She observed that the Claimant was "the driving force and the main tactician on our side and I believe the US would have known this, hence possibly their keenness to keep him out of the loop" and that "the complaints made against [the Claimant] may be part of another device that this DOJ/FBI team were taking to undermine the position of the SFO to their advantage." Mr Barbary and Mr Humm gave essentially factual accounts of events relating to the Unaoil investigation.

65. The appeal hearing took place on 29 January 2019, conducted by Mr Staff, the notes of this following revisions suggested by the Claimant being at pages 715-718. Various aspects of the matter were discussed, including (at page 717) Mr Osbaldiston's finding that the Claimant had lied about the incident, by denying it. The Claimant said that the allegation that he had lied to Mr Wagstaff had not been put to him, and that he was not sure that Mr Wagstaff had been asked about this. Mr Staff said that "…if an event has been proved to have taken place on the balance of probabilities and it had been denied then the conclusion reached by [Mr Osbaldiston] followed."

66. There was also recorded at page 717 discussion of the Claimant's own accounts of the incident in the pub. The Claimant was recorded as saying this:

"TM said that when he was first interviewed he was asked a very narrow band of questions and he was thinking about the other allegations which were potentially much more serious and not this one so when asked he

said no and gave an honest answer which the majority of others present supported. On that basis in his view it was not open to [Mr Osbaldiston] to come to that decision when the landscape of evidence was in his (TM's) favour……"

67. Mr Staff's decision was sent to the Claimant on 8 February 2019 (at pages 719-721). Mr Staff found no procedural flaws in the investigation and stated that there was no value in speculating on the motives and credibility of the complainants. He found Mr Osbaldiston's conclusions to be reasonable, including as to the sanction of dismissal. Mr Staff referred to the additional statements produced by the Claimant, but found that these would not materially affect the original decision.

68. Earlier in these reasons I referred to the need for me to make findings about what in fact occurred on 25 May 2016. The standard of proof to be applied is that of the balance of probabilities. In addition to the evidence given to the Respondent's investigation by the various witnesses, including the Claimant himself, I have the evidence given by him in the present hearing.

69. In paragraph 23 of his witness statement the Claimant said that, in the early stages of the investigation, Mr Luebke had been the cause of a serious row because he had passed to the FBI details of an informant being cultivated by the Respondent, without the latter's permission. Because of this, and because he acted in this way while on secondment to the Respondent, Mr Luebke was referred to as a "quisling" by the Claimant and others within the organisation.

70. There was brief discussion at the hearing of what was meant by the term "quisling". The important point is not the dictionary definition, or the historical reference, but what those involved at the time meant and understood by it. I am satisfied that all concerned took this term to mean that the individual concerned was a spy.

71. The Claimant stated that he did not recall being particularly drunk, and explained why he said this, although he also said that, as stated during the disciplinary hearing, he was open to the fact that he may have been drunker than he recalls. In paragraph 19 he said this about the words he is alleged to have used:

"…..it is said that I called Kevin Luekbe…a "quisling", a "c***" and s "spy". It is my recollection that I probably did call Luebke a "quisling" but I genuinely do not believe I called him a "c***". I understand I am also said to have called him a "spy"; that also is not my recollection.

72. In his oral evidence the Claimant said that he did not recall using the word "spy", and that when he said that he did not think that he used the word "c***", that was accurate. He accepted that in the document that he produced to Mr Osbaldiston (page 622) he said that he must have been drunker than he recalled, adding "I don't think I was terribly drunk on that

night. I might have been." A little later, he said "When I read the evidence I opened my mind to being drunker than I thought."

73. The Claimant accepted that at the disciplinary hearing he said that terms such as c*** were in the common lexicon in the criminal justice system, but maintained his denial of saying it. Mr Glyn put it to the Claimant that, once the evidence had "piled up", he came up with the common lexicon explanation. The Claimant did not give a direct answer to this question, saying that he was not the most senior person in the pub.

74. On a number of occasions in the course of being cross-examined, the Claimant made observations about the evidence about what he was alleged to have said. For example, he stated that "the quality and credibility of the evidence had to be considered". I found that, (perhaps understandably given the nature of his work) the Claimant tended at times to focus on the evidence against him, perhaps in similar terms to those that would apply when considering a criminal prosecution, rather than on his own account of what happened.

75. I emphasise that, in making my findings about what occurred on 26 May 2016, I am not approaching the case as one would a criminal trial, where matters have to be proved beyond reasonable doubt. I have to reach findings as a matter of probability. The only person who has given evidence in this hearing who was present on the occasion itself is the Claimant. It is true that the other witnesses have not been present to be cross-examined: I would not expect them to be, and I take into account what they said in the course of the investigation.

76. I also emphasise that this part of my deliberations on the case is completely separate from my consideration of the reasonableness or otherwise of Mr Osbaldiston's decision.

77. I have some general observations to make. One is that Mr Wagstaff asked the Claimant over a year after the relevant event whether he had called Mr Luebke a c***, at which time the Claimant denied doing so. Apart from this, all of those who were asked about the incident in the course of the investigation were giving their account of what had been said in an informal context, over 2 years previously, when some, if not all, had been drinking. In such circumstances one would expect there to be a considerable divergence of recollection.

78. The second is that, particularly in relation to an incident of this sort, individuals' recollection of what happened may be influenced or prompted by the accounts given by others. As an example of something like this, Mr Kihm said that he recalled "quisling" being said when he was reminded of this.

79. The third general point is that there is a difference between a witness saying that they did not hear something being said, and a witness saying that (by virtue of having been present throughout a conversation) they can

positively assert that something was not said. In the former case, it might be that the disputed words were said, but the witness, for whatever reason, did not hear them.

80. I have kept these general points in mind as I have considered the evidence. It seems to me that, perhaps as another general point, the persons best placed to give an account of what was said between two individuals are those two themselves, although they are not, of course, impartial observers. There have been some variations in the Claimant's account, but it is notable that he and Mr Luebke ultimately gave similar accounts of what passed between them. Neither recalled the word c*** being used. Both recalled the Claimant calling Mr Luebke a quisling. Mr Luebke recalled the word "spy": the Claimant did not, but said that this was what he meant when he called Mr Luebke a quisling. Mr Luebke additionally stated that he was not offended by what the Claimant said, and agreed that he was in fact a "mole" – in other words, a spy.

81. I do not find Mr Brown's or Mr McArthur's lack of recollection of anything offensive being said particularly significant: as I have indicated above, the explanation could be that they did not hear what was being said between the Claimant and Mr Luebke.

82. The remaining witnesses (all officers of the US agencies) gave varying accounts. As I have already observed, this is not surprising. It is, however, worth noting the extent of the differences. In short, Mr Robell stated that he heard quisling and spy but not c***; Mr McEachern, quisling and c***; Ms Davis, "fucking quisling" (the only witness who mentioned that addition to quisling), spy and c***; and Mr Kihm, spy and c*** five or six times and, when reminded, quisling.

83. I have considered whether the correct interpretation of all of this may be that the Claimant said all of the things alleged (i.e. fucking, quisling, spy and c***) and that different individuals heard or have remembered different parts of this. The difficulty with this is that it would not be consistent with the account given by Mr Luebke and the Claimant. I find it unlikely that, if the Claimant had called Mr Luebke a c*** five or six times, the latter would not have noticed, or would have forgotten about it, or that the other witnesses would not have mentioned the word being used multiple times. Something similar applies to the evidence of the word "fucking" in addition to "quisling".

84. Ultimately, I remain of the view that the best evidence of what was said is that of Mr Luebke and the Claimant, combined. The variations in the accounts given by the other witnesses cause me to doubt their accuracy. The same is true of the seemingly additional elements in the accounts given by Mr Kihm and Ms Davis which, had they been said, would in my view have made the exchange more memorable and/or more offensive for Mr Luebke.

85. There is no real doubt that the Claimant called Mr Luebke a quisling. I find as a matter of probability that he also called him a spy, although given the common understanding of "quisling", that adds little to the matter. I find, again as a matter of probability, that the Claimant did not use the word c***.

86. I also find that, whether the Claimant said one, two or all three of these things, Mr Luebke did not take offence.

87. It is also necessary for me to decide, again on balance of probabilities, the factual issues relevant to the allegation of wilful misrepresentation of facts. As I have found that the Claimant did not use the word c***, his denial of doing so was not a misrepresentation. He admitted using the word quisling: to the extent that he denied, or doubted, using the word spy, I find this to be of little significance, as all concerned believed that this was what the term quisling meant.

88. I therefore find that the Claimant did not, in fact, make any misrepresentation.

The applicable law and conclusions

89. I first considered the complaint of unfair dismissal. Section 98 of the Employment Rights Act 1996 includes the following provisions:

(1) In determining…..whether the dismissal of an employee is fair or unfair, it is for the employee 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.

90. I first considered the issue of the Respondent's reason for dismissing the Claimant. In **Abernethy v Mott Hay and Anderson [1974] ICR 323** Cairns LJ defined the reason for a dismissal as the set of facts known to the employer, or the beliefs held by him, which caused him to dismiss the employee.

91. More recent authorities (in particular, **Royal Mail Group Limited v Jhuti [2020] IRLR 129** and **Uddin v London Borough of Ealing [2020] IRLR 332**) have considered issues arising when a person other than the manager who took the decision to dismiss manipulates the latter's decision, or fails to pass on information that might be relevant to that decision. I do not find that the present case is of that nature. The Claimant maintained in his evidence that individuals within the Respondent, including Mr Thompson and Ms Osofsky, were complicit (in the **Jhuti** sense or in the **Uddin** sense) with the US agencies in a scheme to remove him from the PVT team. The motivation for this was said to be that he was an obstacle to the plan to take Mr Ahsani to the USA.

92. Mr Galbraith-Marten advanced this case on the Claimant's behalf in his submissions, although he did not give it as much prominence as other arguments. I consider that he was right to relegate this contention to a subsidiary position.

93. I accepted Mr Osbaldiston's evidence that he made his decision without being influenced by any other person. There was no evidence that any person tried to influence him, and (I found) no reason for me to infer that this had happened. I found that Mr Osbaldiston had taken a serious view of what he believed the Claimant had said. Towards the conclusion of his evidence in cross-examination, he said in relation to the use of "quisling": "The relevance does not excuse this aggressive language. That is not how people in responsible positions deal with such matters." The Claimant's evidence that Mr Osbaldiston seemed troubled by the possibility that he had used the word c***, and that he had been reluctant even to say it, is another indication of the seriousness with which the latter regarded the matter.

94. I also found no evidence of any failure to pass on relevant information to Mr Osbaldiston, or of any form of manipulation of the information, of the sort identified in **Uddin**.

95. I therefore found that the Respondent had established that the reason for the dismissal was a reason related to the Claimant's conduct, and therefore a potentially fair reason. In this sense, I agreed with Mr Glyn's submission that the case should be viewed as a "straightforward" gross misconduct dismissal.

96. Did the Respondent act reasonably or unreasonably in treating this as a reason for dismissing the Claimant? I reminded myself that this is not a matter for the Respondent to prove: it is a question for the Tribunal. I also reminded myself of the cardinal principle that I must not substitute my own

view for that of the Respondent, if the latter was acting reasonably. I must not ask, what would I have done, but rather, has the Respondent acted unreasonably?

97. The well-known test in **British Home Stores v Burchell [1978] ICR 303** requires me to consider whether the employer had a genuine belief that the employee was guilty of the alleged misconduct; whether there were reasonable grounds for that belief; whether a reasonable investigation was carried out; and whether a reasonable employer would have dismissed the employee for that misconduct.

98. In **Sainsburys' Supermarkets Limited v Hitt [2003] ICR 111** the Court of Appeal stated that the test of the range of reasonable responses applies at every stage of the **Burchell** analysis. Essentially, the question is: did the employer act in a way in which no reasonable employer could have acted in the circumstances?

99. I find that Mr Osbaldiston had a genuine belief that the Claimant had used the words alleged; that this amounted to misconduct; that he had wilfully misrepresented the facts, in the sense that he had denied using c*** when he knew that he had used it; and that this also amounted to misconduct. I found no reason to doubt the genuineness of Mr Osbaldiston's evidence on this, and there was evidence available to him on which he could reach that decision.

100. I also find that there were reasonable grounds for Mr Osbaldiston's belief that the Claimant had used all three of the words in question. As I have already explained, there is no doubt that the Claimant used "quisling", and in my view it makes little difference whether or not he also used "spy". I have come to a different conclusion from that reached by Mr Osbaldiston as to whether or not the Claimant used "c***". This was not, however, an easy decision to make, and I cannot say that no reasonable employer could have reached the conclusion that the Claimant had said it. As set out above, there were various witnesses who maintained that he did.

101. I also find that there were reasonable grounds for Mr Osbaldiston to find that using these words amounted to misconduct. All three words are derogatory, and (on his finding) were addressed to an officer of an agency with which the Respondent was working.

102. The question whether there were reasonable grounds for the finding of wilfully misrepresenting the facts is more difficult to resolve. In paragraph 81 of his witness statement Mr Osbaldiston said that "with the weight of the witness statements" about the language used, he concluded that the Claimant's plain denials to Mr Wagstaff and Mr McManus amounted to wilful misrepresentation, and that this was a serious matter for a member of a law enforcement agency. Although he did not put the point in these words, I understood Mr Osbaldiston to mean that the Claimant must have known that he had used the word c***, and that his denial of having done so was therefore a lie.

103. Once again, I have reminded myself that the issue is whether there were reasonable grounds for Mr Osbaldiston to make this finding, and that I should not at this point be deflected by my own finding that the Claimant did not say this, and that his denial was therefore honest. As I shall explain, I have found that there was a failure to investigate this aspect. Ultimately, however, I find that I cannot say that, having concluded that the Claimant did use the word, no reasonable employer could have reached the additional conclusion that he must have known that he said it and that his denial was therefore untrue.

104. Were there reasonable grounds for the decision that this amounted to wilful misrepresentation of facts? I have concluded that there were not. I find that no reasonable employer would conclude that this term covered a denial of a few words alleged to have been spoken in an informal context over a year (when raised by Mr Wagstaff) or over 2 years (when investigated by Mr McManus) previously. On Mr Osbaldiston's approach, it seems that anyone denying an allegation which was subsequently upheld would be at risk of summary dismissal for wilful misrepresentation of the facts. Mr Staff made a similar observation at paragraph 8 of the appeal hearing notes on page 717, in the following terms: "…if an event has been proven to have taken place on the balance of probabilities and it had been denied then the conclusion reached by [Mr Osbaldiston] followed". The approach is, as I find, particularly inappropriate when, as here, the original finding is one of a matter of probability based wholly on witnesses' recollections of words that were said orally. I am satisfied that any reasonable employer would take the view that wilful misrepresentation of facts would involve something much more serious and considered than what the disciplinary process found in the present case.

105. I next considered whether a fair investigation was conducted. The relevant standard is not that of a perfect, or ideal investigation, or that of what I consider that I would have done in the circumstances. The issue is whether the investigation that was carried out fell outside the range of reasonable investigations in the circumstances.

106. In **A v B [2003] IRLR 405** the Employment Appeal Tribunal observed that, when assessing the reasonableness of an investigation, one factor might be the gravity of the charges and their potential effect on the employee. In the present case, the potential consequences for the Claimant were severe, involving not only the loss of his job but also the likely future difficulty in securing an equivalent position, as a solicitor who had been dismissed for gross misconduct.

107. Mr Galbraith-Marten submitted that Mr Osbaldiston did not investigate a central aspect of the Claimant's case, namely that the complaints were motivated by a desire to have him removed as case controller. As I have recorded above, Mr Osbaldiston's stated view was that this was an irrelevant consideration. I find that, on the contrary, this was a crucial consideration. I find that no reasonable employer would ignore the

contention that an allegation of using insulting language had been raised over 2 years after the event, not because anyone had felt insulted, but because there was a desire to have the Claimant removed from the relevant case.

108. Indeed, although Mr Osbaldiston responded that this was an irrelevant matter, his evidence in his witness statement was that he had nonetheless given it some consideration. In paragraph 77 he said that there "might have been other reasons why the DOJ / FBI / Mr Luebke did not want to take it further at that time." Mr Osbaldiston gave as examples that the FBI might have wanted to appear tough; they might have not wanted to affect the investigation at that stage; they may have wanted to protect the relationship with the UK; and they may have hoped that the Claimant would think better of his actions.

109. I find Mr Osbaldiston's use of the words "might have" and "may have" telling. All of these are ideas of his own: they might have been reasons why no complaint was made at the time, but equally they might not. It seems to me that one could equally well say that the reason why there was no complaint at the time "might have been" that nothing had happened that was thought worthy of complaint: without investigation, this is speculation. I find it inescapable that a reasonable employer would wish to investigate this aspect. A finding that the complaint had been raised when it was in an effort to have the Claimant removed from the case would be of potential relevance to both the findings about the reliability of the evidence of the alleged misconduct, and to the sanction if a finding of misconduct were made – the latter because such a finding would indicate that little offence had in reality been caused.

110. Mr Galbraith-Marten also submitted that there had been a failure to investigate the Claimant's (alternative) case that what was said was within the "common lexicon". Mr Osbaldiston did not, in fact, investigate this aspect. I find that no reasonable employer would reject the Claimant's case on this as "ludicrous" and "preposterous" without further enquiry (as noted above, Mr McEachern used the admittedly less offensive word "shit" in an email). This was, in my judgment, especially so when the timing of the complaint was unusual: the delay in its being raised might have occurred because no one had taken offence at the time, which in turn might have been because the use of such language was not unusual.

111. For essentially the reasons given in paragraph 104 above, I have also found that there was a failure to investigate the issue as to wilful misrepresentation. I find that it was not within the range of reasonable responses to take it that, once a matter that had been denied had been found proved as a matter of probability, that it followed that the denial had been dishonest. Some further questioning or consideration of this would be necessary for there to be a reasonable investigation of this point: in particular, the Claimant should have been given the opportunity to address it in the light of the primary finding.

112. Summarising the position so far, I have found that there was a failure to carry out a reasonable investigation in three respects: the Claimant's case about the motivation for the complaint; his case as to "common lexicon"; and on the issue of wilful misrepresentation. Mr Galbraith-Marten made other criticisms of the Respondent's investigation. He submitted that the lapse of time alone rendered proceeding with the disciplinary process unfair. I concluded that this ultimately added little to the point about not investigating the Claimant's case as to why the complaint had been made when it was. Mr Galbraith-Marten also referred to the refusal of the Claimant's request to speak to witnesses. This was corrected by the time of the appeal, in the sense that the Claimant had by then obtained the statements that he wanted, although Mr Staff did not investigate the point any more than Mr Osbaldiston had. The argument that, although Mr McManus had said that the issue of wilful misrepresentation should be considered, the Claimant was not specifically "charged" with it, did not seem to me to be something that of itself would have rendered the dismissal unfair. The Claimant was aware that this was in issue, and addressed it.

113. The remaining part of the **Burchell** test is the question whether dismissal was outside the range of reasonable responses. I consider that in the present case, it is appropriate to address that issue after I have dealt with the "**Polkey**" question as to what the outcome would have been if the failures of investigation I have found had been rectified: I will then be able to deal with the sanction issue on all the alternative bases.

114. I find that the only possible outcome of a reasonable consideration of the Claimant's case as to the motivation for the complaint being raised when it was is a finding that it was indeed made as part of an attempt to secure his removal as case controller. I make this finding for the following reasons:

114.1 The chronology is telling. The issue about "primacy" in respect of Mr Ahsani arose in April 2018. Ms Moser and Mr Thompson had a conversation on 25 June in which the former raised complaints about the Claimant. On 6 July Ms Moser sent the "unofficial briefer". There was an unsuccessful attempt to extradite Mr Ahsani from Italy on 10 July. On 17 July Ms Moser sent the defence team complaints to Mr Thompson. The Claimant was suspended on 18 July. Mr Ahsani left Italy for the USA on 9 August. The disciplinary process began when Claimant was interviewed about the allegations on 10 August.

114.2 The Claimant would have done all he could to prevent the extradition of Mr Ahsani to the USA: see the evidence of Ms Collery. He was an effective and charismatic leader, as stated in the peer review.

114.3 Mr Glyn contended that the chronology worked against the Claimant's case, in that by the time of his dismissal, Mr Ahsani was in the USA and that there was no longer any need to keep the Claimant out of the way. I am not certain that there was nothing that

the Claimant could have done once Mr Ahsani had arrived in the USA: but the more important point is that this submission goes no further than showing that there was no "need" for Mr Osbaldiston to have dismissed the Claimant in order to further the supposed objective. I have found that Mr Osbaldiston was not involved in any sort of conspiracy. That does not, however, have any bearing on the motivation behind the complaints themselves, which had already been made and which would hardly be withdrawn once Mr Ahsani had reached the USA.

114.4 The complaints by the US agencies were made alongside complaints by Mr Ahsani's defence team. The latter clearly wanted the Claimant removed from the investigation: the former must have known this and added their complaints in that knowledge. I find it inescapable that the US agencies and the defence team had the same reason for raising the complaints, namely that they wanted the Claimant removed so as to prevent difficulty with their joint wish to have Mr Ahsani extradited to the USA.

114.5 The relevant complaint was the sole survivor of a large number of complaints that had been found to be without merit, necessarily raising, in my judgement, a question as to why they had been made.

114.6 The complaint had demonstrably not been raised because the "victim", Mr Luebke, had been offended by what was said.

114.7 As I have found, Mr Wagstaff (correctly) told the Claimant that his removal had been at the instigation of Ms Moser.

115. The probable outcome of a reasonable investigation of the "common lexicon" point is, in my judgement, less clear. The word c*** is particularly offensive, and the suggestion that it might be commonly used within agencies such as the Respondent and the FBI is not immediately attractive. That said, I find that it is impossible to answer the question without investigating it. The most that I can say is that an investigation might, or might not, have found that the Claimant's assertion was correct.

116. I do not, however, consider that it is necessary for me to reach a firm conclusion on this point given what I have concluded on the outcome of a reasonable investigation of the motivation for the complaint. I have found that a reasonable investigation could only have concluded that the complaint was made when it was as part of an attempt to have the Claimant removed as case controller. That being so, I find that a decision to dismiss the Claimant for having used the offending words (whether all or any of "quisling", "spy" or "c***") would have been outside the range of reasonable responses. I find that no reasonable employer could have ascertained that: the Claimant was the target of an attempt to have him removed so as to facilitate a manoeuvre being undertaken by Mr Ahsani's defence team and the US agencies; that all of the other allegations had no merit; that the remaining allegation had been raised, not because anyone

had taken offence at the incident, but as part of the attempt to have him removed; but that because it was found that he had uttered the offending words over 2 years previously, he should not only be removed from the investigation, but should also be dismissed.

117. I have therefore found that the complaint of unfair dismissal is well founded.

118. The issues in relation to the complaint of wrongful dismissal and the question of contributory conduct are similar, in that they turn on my findings as to what the Claimant said on the relevant occasion. I have found that he called Mr Luebke a quisling, meaning and understood as a spy, but did not call him a c***.

119. Did accusing Mr Luebke of being a spy amount to a breach of contract that was sufficiently serious as to entitle the Respondent to dismiss the Claimant without notice? I find that it did not. Being called a spy is not, generally, something to be welcomed: but when interviewed, Mr Luebke effectively agreed that he was indeed a spy, in the terms that the Claimant meant. Furthermore, as I have already observed a number of times, Mr Luebke was not offended. I find that it cannot be a breach of the contract of employment to say to an officer of a friendly agency something that might have caused offence, but in the event, did not.

120. Finally, I have considered the issue of contributory conduct. This may arise under section 122(2) of the Employment Rights Act 1996 in terms of any conduct of the complainant before the dismissal being such that it would be just and equitable to reduce the basic award; and under section 123(6) in terms that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

121. The Claimant's dismissal was contributed to by his action in calling Mr Luebke a quisling, in the sense that this gave grounds for the complaint that was ultimately made. For all the reasons, however, that I have already given in relation to the motivation for the complaint, the findings that would have followed had there been a reasonable investigation, and the unreasonable nature of the sanction of dismissal, I find that it would not be just and equitable to reduce either award.

122. There remains the question of remedies. The parties should liaise and put forward joint proposals for when a further hearing may be convened, the time estimate for it, and any further case management orders sought.

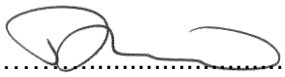
Andrew Glennie

Employment Judge Glennie

Dated 31 December 2020……

Judgment sent to the parties on:

16 Feb. 21



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For the Tribunal Office