EMPLOYMENT TRIBUNALS

Claimant: Mr R Holden

Respondent: Lancashire Fire and Rescue Service

Heard at: Manchester (remote public hearing via CVP)

On: 7 September 2021
5 October 2021

Before: Judge Brian Doyle

Representation
Claimant: Ms T Ahari, counsel
Respondent: Ms L Kaye, counsel

RESERVED JUDGMENT

The claimant was fairly dismissed by the respondent. The claim is not well-founded. It is dismissed.

REASONS

1. These are the written reasons for the Tribunal's reserved judgment following two days of a final hearing on 7 September 2021 and (part-heard) on 5 October 2021. The hearing was conducted as a remote hearing in public via the Cloud Video Platform (CVP).

The claim and the issues

2. Acas early conciliation commenced on 10 February 2021 and concluded on 17 March 2021 [17].

3. The ET1 claim form was presented on 9 April 2021. It appears at [1-16] of the electronic hearing bundle. The claim contains a remaining complaint of unfair dismissal only. A second complaint in relation to holiday pay had been settled between the parties. It is important to note that there is no complaint of wrongful dismissal.

4. The ET3 response form contains the respondent's grounds of resistance [22-37].

5. Because standard case management orders were issued at the time of service of the claim, the claim has not been the subject of a case management hearing. A formal list of issues had not been settled prior to the final hearing.

6. In a case of this kind, the Tribunal would normally be concerned to answer the following questions that also arise for consideration here:

    (1) What was the reason or principal reason for dismissal (here misconduct)?
    (2) Was it a potentially fair reason?
    (3) Did the respondent genuinely believe the claimant had committed misconduct?
    (4) Were there reasonable grounds for that belief?
    (5) At the time the belief was formed, had the respondent carried out a reasonable investigation?
    (6) Did the respondent otherwise act in a procedurally fair manner?
    (7) Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?
    (8) Was the dismissal within the range of reasonable responses?
    (9) Were all the relevant circumstances reasonably taken into account, including length of service, previous record and any mitigation?

7. Nevertheless, at the commencement of the hearing, with the parties' input, the Tribunal identified and agreed the following central issues that appeared to arise from the claim and the response as follows:

    (1) Was the decision that the claimant had committed gross misconduct on the evidence a perverse decision?
    (2) Was the sanction of summary dismissal a harsh or disproportionate sanction?
    (3) Did the respondent treat the claimant inconsistently with two other employees involved in the incidents that gave rise to the dismissal of the claimant?

The evidence

8. The Tribunal had before it an electronic hearing bundle comprising 293 pages (inclusive of witness statements). References to the bundle appear in square brackets above and below.

9. The key documentary evidence was as follows:
    (1) Witness statements taken in the internal investigation [38-49, 56-70]
    (2) FBU notes taken in internal investigation [50-55]
    (3) Internal investigative reports [74-95]
    (4) Disciplinary hearing notes, including FBU notes [100-122]
    (5) Disciplinary outcome letter [123-126]
    (6) Claimant's appeal [127-130]
    (7) Appeal hearing notes [133-139]
    (8) Appeal hearing outcome [140-141].

10. The respondent's witness evidence is derived from the witness evidence of Emma Price (Station Manager), who carried out the disciplinary investigation [268-275]; Steve Morgan (Area Manager), who carried out the disciplinary hearing and who took the decision to dismiss the claimant [276-283]; and Ben Norman (Assistant Chief Fire Officer), who heard and determined the claimant's appeal against his dismissal [284-287].

11. The claimant gave evidence in his own behalf [288-293]. He called no further witness evidence.

Assessment of the evidence

12. The claimant was not an obviously compelling witness. The Tribunal detected echoes in his presentation as a witness in these proceedings of how he appeared to have presented to the managers concerned in the various stages of the respondent's internal procedure. He was not a dishonest witness, before this Tribunal at least, but he seemed to lack the self-awareness and insight that better witnesses possess when giving evidence on their own behalf.

13. The respondent's witnesses, in contrast, were impressive witnesses, who gave measured and detailed accounts of the disciplinary process in which they were engaged with the claimant. Their evidence focussed on the questions that any Tribunal must answer in an unfair dismissal complaint. Their evidence was consistent within and between themselves. There was no detection that it lacked independent reflection or that they had collaborated to produce an account favourable to the respondent. Their evidence accorded with and was corroborated by the documentary evidence. They made concessions or expressed doubts where it was appropriate to do so. Their evidence was compelling and persuasive.

14. The Tribunal has had no hesitation in drawing its findings of fact in the main from the accounts of the respondent's witness statements. They not only provided a consistent and informative history of this matter, but they also supplied a convincing insight into how the three managers concerned approached the disciplinary task. What they thought and believed was here as important as what they said and did.

15. The claimant may be reassured that his evidence and his account has not been overlooked by this Tribunal. The respondent's defence has been measured and tested against the claimant's history of the events, his perception of them and his understandable concerns about what he believed to be unfair treatment by his employer. Ultimately, however, his standing as a witness was found to be less impressive than the respondent's witnesses and the analysis of events that is spoken to by the documentary evidence.

Rule 50

16. A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or to protect the Convention rights of any person. In

considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression. Such orders may include an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, using anonymisation or otherwise, in any documents entered on the Register or otherwise forming part of the public record. Any party, or other person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order under this rule is made, may apply to the Tribunal in writing for the order to be revoked or discharged, either based on written representations or, if requested, at a hearing. "Convention rights" has the meaning given to it in section 1 of the Human Rights Act 1998.

17. Reference in the findings of fact is made to several (now former) colleagues of the claimant (existing employees of the respondent) who were involved to varying degrees in the matters that led to a disciplinary investigation of events, and the subsequent disciplinary process brought against the claimant and two of his colleagues. The Tribunal has not heard evidence from these employees. They were neither parties nor witnesses in these proceedings. As a result, it is right that they should be afforded anonymity, having carried out the balancing exercise required by rule 50 of the Employment Tribunals Rules of Procedure 2013.

18. The Tribunal refers to these employees as Recruit 1, Recruit 2, and Crew Manager X.

19. Neither the claimant nor the respondent's three witnesses have the same expectation of privacy or anonymity. The Tribunal was asked by claimant's counsel to afford the claimant anonymity, "on instructions", but without serious grounds being advanced for doing so within the discretion afforded by rule 50. The Tribunal considers that counsel was correct not to press the application further.

Findings of fact

20. The respondent is Lancashire Fire and Rescue Service. It is the statutory, county-wide emergency fire and rescue service for the county of Lancashire.

21. The claimant, Mr Richard Holden, commenced employment with the respondent service on 13 June 2014. He worked as a part-time on-call firefighter (and part-time Crew Manager) until his dismissal on 12 November 2020. At the time of the dismissal, he was undertaking the apprenticeship full-time recruits' course, which commenced on 1 May 2020.

22. It is not in dispute that, prior to the events leading to his dismissal, there had not been a single incident or negative comment regarding his behaviour or attitude. All feedback from peers and management had been positive. Throughout his employment, he stood up for the respondent service's STRIVE values (described below and found at [71] in the bundle), both personally and by supporting others against bullying, and standing up to dishonesty. He devoted his own time to support the service with campaigns on mental health, recruitment, community, and charity events.

23. The claimant quite appropriately relies upon proof of his long-term commitment to the values the respondent service places such importance upon. He had included in his evidence some past examples of standing up for those values, and doing the right thing, in an email sent to his unit manager in 2016 about practising scenarios in an area of broken asbestos without protection [178] and again in an email when he pointed out falsification of important dates in the service's system across the area of three fire stations to which his work was linked [179]. On that occasion, he was told not to cause trouble and to be grateful that he was about to start a full-time job.

24. It is against that background that the claimant had been awarded the respondent's "LFRS star award" in 2018, and he had been used on posters promoting STRIVE values within the service [186]. Working for the respondent and receiving awards and positive feedback from management was something of which he was very proud and rightly so.

25. The claimant gave the Tribunal in his witness statement some detail of his personal background and of his previous experience of "workplace banter", which the Tribunal has noted, but which it is not necessary to rehearse here. It has not been ignored. It is not unimportant as context. The Tribunal has considered the evidence that appears at [180].

26. In September 2020, the claimant attended Brathay Hall Residential Centre as part of his training as a recruit to a full-time role, alongside other recruits. The claimant was much older than the other recruits on the course, as many of the recruits were in their twenties, whereas he was in his forties. He tried his best to join in conversations and to be part of the group.

27. On the evening of Tuesday 15 September 2020, a conversation took place between the recruits in the claimant's group. The claimant recognised that several things were said by the group which were not appropriate for work time, although the feeling was that the recruits were in their own time. The claimant and one other recruit (Recruit 5) were not sat in the group. Most of the conversation was around partners. The topic turned to sexual matters, including a discussion of their partners' reduced interest in sex after having a baby. One recruit (Recruit 2) gave advice on "blow job" techniques in that context.

28. Although the claimant did not join in these initial conversations, and he felt uncomfortable about them, the conversation moved on to the subject of "pegging". One recruit, Recruit 2, mentioned "pegging", and how her last partner had enjoyed being "pegged". The claimant asked about the meaning of the word because he had no idea what it meant. He had the impression that he was the only one who did not know what this meant. Recruit 2 explained what "pegging" was. Another recruit, Recruit 1, said he also enjoyed it. The topic changed after that. The claimant left the group and went to bed.

29. The next day, Wednesday 16 September 2020, as the group were leaving Brathay Hall in the minibus, an instructor, Crew Manager X, asked the group what they had learned from the course. Recruit 1 responded: "We've learned a lot about pegging sir". Crew Manager X replied in a manner which made the

claimant feel that he understood what the term meant. No one else spoke. The claimant asked the instructor: "Have you heard of pegging, sir?" The claimant had been surprised, as the instructor was of a similar age to the claimant, but he seemed comfortable with it being brought up. He said that he had heard of it and then said: "Don't knock it until you've tried it, Mr Holden". He also mentioned “tromboning” (a term for another sexual practice) as something that the claimant would not know about if he had not heard of “pegging”.

30. There were several other things discussed by the group then which the claimant was not involved in, including a discussion about one of the recruit’s female relatives. The Tribunal has noted what has been said about those discussions, but it does not consider it necessary to record them further here.

31. On Thursday 17 September 2020, Watch Manager Charlie Cottam gave a talk to the group about inappropriate language and comments between colleagues. The claimant struggled to hear what was said. He thought it related to disagreements at Brathay Hall. Due to the nature of the course, there had been several disagreements within teams during team-building exercises.

32. On Friday 18 September 2020 there was a health and well-being lecture. The claimant’s group was asked for a team name. The claimant shouted out “peggers”, which he thought was from a suggestion by someone else, probably Recruit 1. Someone sat in front of the claimant immediately told him he should not have said it. The claimant was shocked. He had thought it was a bit cheeky, which was stupid because he knew what it was, but it had been just used in normal conversation that week. The instructor misheard it as “beggars” and Recruit 1 corrected her, spelling it out. At the end of the lecture, the claimant went and apologised to the instructor. He was upset that he had said an offensive word to her and could have caused her discomfort.

33. The claimant became aware that an investigation would be carried out regarding inappropriate comments made surrounding “pegging” during the course. He was interviewed on 21 September 2020 alongside the other members of his group. The claimant’s investigative statement is at [46-49]. The claimant believed that he gave honest and straightforward answers and he had admitted his part. He was not asked at this stage about the first instance of the word being used at Brathay Hall.

34. The claimant believed that he answered honestly and immediately in confirming his involvement on the minibus when asking the driver if he knew what “pegging” was. His position was that, while he knew the meaning of the term because of what he had been told on the Tuesday evening, he did not understand the gravity of the term until the Friday night, after researching it when he returned home [46]. He confirmed that he said “peggers” as a potential quiz team name, and that it was stupid to have done so [47].

35. When asked to sign the interview notes as correct, the claimant saw that they had written Thursday, not Friday, in respect of his knowledge of the meaning of the term, and he corrected the notes [47]. When signing his notes, he mentioned the instructor’s (Crew Manager X’s) involvement in the conversations, knowing that at least one other recruit was going to do so and he did not want to be seen to be hiding anything. He was asked if he thought

it was relevant to write it on his notes. He started to do so, but he decided against it as he felt that he had done what he should by mentioning it [48].

36. That accounts for the claimant's perspective on the events that were the subject of the investigation. The Tribunal now examines that investigation from the perspective of the investigator.

37. In September 2020 the respondent appointed Station Manager Emma Price as the Investigating Officer in relation to the events that are the subject of this claim. As noted, it was alleged that inappropriate comments had been made by apprentice recruits while they were on a 3-day residential course at Brathay Hall in Cumbria on 14-16 September 2020. The course outline programme appears at [165].

38. The apprentices that were the subject of the investigation were the claimant and 7 other recruits, who together made up a particular "squad" on the course: Recruits 1-7. Emma Price also spoke to Crew Manager X in relation to the role that he had played. She also took a statement from Watch Manager Charlie Cottam.

39. What had prompted the investigation was a report by Crew Manager X of a conversation on a minibus relating to "pegging". A further report of the term "pegging" being used during a lecture came from one of the lecturers.

40. Before conducting the investigation, Emma Price consulted her line manager, Group Manager Neil Taylor, and the respondent's Head of Human Resources, Liz Sandiford. They drew up a list of questions to put to the witnesses that were intended to cover the relevant ground and to produce the necessary evidence. While interviewing the witnesses, however, it became apparent that there had been an earlier occasion when the term "pegging" had been discussed while the recruits had been at Brathay Hall. This had not been anticipated when planning the interviews and compiling the questions. All the witnesses mentioned this, however, and what they told Emma Price was recorded in their statements. There were no separate questions and answers in relation to this aspect for that reason.

41. Emma Price produced an investigative report [74-83], in reliance upon statements taken from the various witnesses [38-49] and [56-70]. She considered further documents [71-73]. She later produced disciplinary investigative reports for three of the individuals involved, being the claimant [84-87]; Recruit 1 [92-95]; and Recruit 2 [88-91].

42. As a result of her investigation, Emma Price concluded that there had been inappropriate discussion or mention of the sexual term "pegging" on three separate occasions. She identified "pegging" as being a sexual practice in which a woman performs anal sex on a man by penetrating his anus with a strap-on dildo.

43. Emma Price considered that on the evening of Tuesday 15 September 2020, after the course programme had finished for the day, the group of recruits in question were socialising at Brathay Hall. Recruit 2 instigated a conversation about "pegging". All the squad, apart from Recruit 5 and

Recruit 6, joined in this conversation to some degree.

44. Her investigation also led her to conclude that the following day, Wednesday 16 September 2020, while the squad were being driven by Crew Manager X in the minibus from Brathay Hall back to Lancashire, a conversation started about “pegging”. The statements taken were not all consistent. Several witnesses said that the claimant started the conversation by asking Crew Manager X if he knew what “pegging” was. Recruit 1 joined in, and others laughed along. Crew Manager X did not object at the time, but when he returned to the Service Training Centre in Chorley, Lancashire, he raised the issue with Watch Manager Charlie Cottam as he thought the conversation had been inappropriate.

45. Emma Price recorded that the following morning, Thursday 17 September 2020, Watch Manager Cottam addressed the recruits. He reminded them of the standards and behaviour expected of them, and of the respondent service's values. He did not specifically mention the conversation on the minibus. Several recruits took it to be a reference to that. All remembered being reminded of what they should and should not be doing in terms of their behaviour.

46. On Friday 18 September 2020, as Emma Price also found, the recruits were taking part in a Health and Wellbeing Support lecture at the Service Training Centre. They were asked to come up with a team name. The claimant shouted out the name "peggers", which Emma Price considered was clearly intended to be a further reference to “pegging”. The trainer misheard and started to write "beggars" on the board. Recruit 1 corrected her and he repeated "peggers."

47. Emma Price also found that, after Recruit 5 had left the minibus on the journey home, the claimant had made a negative comment about her to the effect that she was annoying.

48. Emma Price discussed her findings with her line manager, Group Manager Neil Taylor, and with the Head of Human Resources, Liz Sandiford. They noted that the initial conversation at Brathay Hall on 15 September 2020 took place in the recruits' own time. Although it was inappropriate, as they were on a residential course, it was viewed as less serious than the other two incidents. As a result, those recruits who had only been involved in that discussion, and who took no active part in the other incidents, were treated more leniently.

49. Emma Price set out her recommendations in relation to everyone at page 9 of her investigative report [82]. Only the claimant, Recruit 1 and Recruit 2 were subject to the subsequent disciplinary procedure. This was because they were deemed to be the most culpable. As will be explored further below, disciplinary hearings were held for them on 12 November 2020. Area Manager Steve Morgan was the hearing manager, and he (and not Emma Price) decided the disciplinary outcomes.

50. Emma Price believed that there were differences in the culpability of the claimant, Recruit 1 and Recruit 2 such as to justify their different treatment in the disciplinary process.

51. In relation to Recruit 2, although she had instigated the conversation about "pegging" at Brathay Hall, she took no active part in the other two incidents, and she reported feeling embarrassed when it was raised again. Emma Price considered that she showed remorse during her investigative interview with her. She had accepted that her actions had been inappropriate. She had also demonstrated this insight into her failings during the disciplinary hearing. She was given a 12-month final written warning.

52. Emma Price considered that Recruit 1 was involved in all three incidents and that he was as equally as culpable as the claimant. However, in her view, the difference between the two was that Recruit 1 had been very open and honest during the investigatory interview. He volunteered information to her that he need not have done, even to his own detriment. He was clearly remorseful. He fully accepted his culpability and he understood that what he had done breached the respondent service's core values. She believed that he had reflected on what had happened; that he had learnt a lesson from it; and that he would in future comply with the service's values. He was given an 18-month final written warning and demoted from Crew Manager (his part-time role) to Firefighter.

53. In Emma Price's assessment, the claimant was also an active participant in all three incidents. In contrast to Recruit 1, in her view, he was not open and honest during the investigative procedure. He sought to minimise his culpability, claiming in effect that he was naïve, and he did not know what he was saying when he was talking about "pegging". Emma Price regarded the claimant as inconsistent in his accounts. He came across as defensive and unremorseful. He had an air of superiority about him, in her opinion. She did not believe that he was willing to change his behaviour as he did not accept that he had done anything wrong.

54. In relation to the claimant's interview (and subsequently the disciplinary hearing), Emma Price picked up on some inconsistencies. When taking a statement from someone, her practice was to write notes during a face-to-face interview and later type up the statement based on that interview. She then sends the interviewee a copy of the statement so that they can check it for accuracy and make any amendments or additions as necessary.

55. Emma Price interviewed the claimant on 21 September 2020. Also present was the Head of Human Resources, Liz Sandiford, and Tom Cogley, a representative from the Fire Brigades Union, in support of the claimant.

56. As can be seen from the claimant's investigative statement, at question 15 Emma Price asked him when he understood that the term "pegging" referred to a sexual activity. He told her that it was the Thursday night. This was inconsistent with everyone else explaining that the term had been discussed and explained on the Tuesday night at Brathay Hall, and the further conversation about it on the minibus on the Wednesday. Emma

Price believed that the claimant knew what the term meant, and that it was a sexual term, after the conversation on the Tuesday night. However, when she sent him his statement, he corrected that part of it. The correction was to the effect that it was Friday night when he understood it to be sexual. Emma Price assessed this as lacking credibility. It suggested to her that he was trying to escape the consequences of his actions by asking the respondent to believe that he had no idea what the term meant and that he was naïvely shouting out words that he did not know the meaning of. This was contrary to the witness evidence. For her, it demonstrated a lack of integrity and honesty. It showed no insight into what had happened nor any hope that he would change.

57. Emma Price also concluded that this deception was also in his answer to question 13 when he said that he only found out that the term “pegging” was sexual after the health and well-being lecture and suggested that he did not know it was inappropriate. He also played down his involvement in the conversation on the minibus, claiming that he was confused, did not realise the gravity of what it was, was simply asking what the term meant, and only found out later. This did not fit with in with it having been talked about on the Tuesday night and Emma Price believed it was a lie.

58. Emma Price was also of the view that during the claimant’s disciplinary hearing, this deception was continued. Despite having confirmed that the term was explained in detail by Recruit 2 on the Tuesday night, and that he knew what the term meant, he tried to minimise his involvement by suggesting that he only used the term innocently and it was only when he got home on Friday night that he searched on the Internet and fully understood its meaning. Emma Price regarded this as untrue.

59. In her evidence, like the other managers involved, Emma Price has referred the Tribunal to the respondent’s expectation that its employees must comply with its Code of Conduct [156-164]. This states that: "As an employee of Lancashire Fire and Rescue Service you are an ambassador of the Fire and Rescue Service. In this regard, you are expected to conduct yourself, both on and off duty, in a manner appropriate and compatible with your employment with the Service." In particular, the Code talks about core values referred to as the "STRIVE" values, which stands for Service; Trust; Respect; Integrity; Valued; and Empowered [71].

60. In Emma Price’s assessment, all recruits that took part in the discussions about “pegging” breached those values, but all apart from the claimant took responsibility for their actions, were remorseful and, she believed, would be able to demonstrate those values in their future employment with the respondent service. In her view, the claimant's lack of honesty, and his attempts to minimise what he had done during the investigation and disciplinary hearing, were in fact separate and further breaches of the respondent’s values. She regarded him as having displayed a lack of integrity, showed that he could not be trusted, and demonstrated a lack of respect to the respondent service and the disciplinary procedure by not being honest. His lack of remorse and acceptance of wrongdoing, she considered, also meant that he was less likely to amend his behaviour in

the future. There would therefore be the possibility that he would breach the values again in some way, making him an unsuitable employee.

61. The Tribunal notes the claimant's perspective upon the conclusions of Station Manager Emma Price in her investigative report. In section 4.2 of the investigative report [80], it was suggested his responses called into question his honesty and integrity as it was clear from the conversation at Brathay Hall that "pegging" was something of a sexual nature. The claimant's position was that he knew that from the discussion on Tuesday night, but he did not understand [47] or realise the gravity of what it was until the Friday night [46]. In his view, it was only after looking online and reading an article on the Internet on Friday night that he understood this was a taboo subject.

62. The Tribunal next considers the evidence and its findings through the prism of the disciplinary hearing.

63. Area Manager Steve Morgan was appointed as the disciplinary hearing manager for three separate hearings all arising from the same incidents. The separate hearings took place on 12 November 2020. The three individuals concerned were the claimant and Recruits 1 and 2. The allegations related to inappropriate references to the sexual practice of "pegging" that took place while they were participating in the apprentice firefighter recruits course during September 2020.

64. Steve Morgan heard all three cases separately. He based his decisions on the report and appendices prepared by Station Manager Emma Price, along with a summary of the report and appendices presented by Group Manager Neil Taylor. He also heard from the individuals themselves, along with their representatives.

65. Steve Morgan considered that the evidence presented to him was clear that on three occasions "pegging" had been discussed or referenced (to varying degrees) by the three individuals who were the subject of the disciplinary hearings and that this was in breach of the core values of the respondent service.

66. He considered that the first occasion was on 15 September 2020 when all the apprentice recruits, including the three concerned, were on the residential course at Brathay Hall, Cumbria. The course focused on teamwork and the core values of the respondent service, encapsulated in the "STRIVE" values (already noted above).

67. Steve Morgan found that in the evening of that Tuesday, after the course had finished for the day, the recruits had some free time and were chatting. Recruit 2 brought up the topic of "pegging", a sexual practice where a woman performs anal sex on a man using a strap-on dildo. Recruit 2 explained what this practice involved. The rest of the group, including the claimant and Recruit 1, joined in the conversation. Steve Morgan regarded this as being something mentioned in the statements of all the witnesses and admitted by the claimant during the disciplinary hearing. See the typed notes taken during that hearing [100-105]. In paragraphs 9-12 of those notes, it is recorded that the claimant said he participated in the conversation. He asked what "pegging" was. Recruit 2 told

him that it was when a woman uses a strap-on dildo on a man. The claimant confirmed that he left that conversation knowing what "pegging" was.

68. This conversation, and the fact that the term had been explained, was also confirmed by Recruits 1 and 2 during their hearings. Steve Morgan considered it was relevant that, while the claimant said that the conversation about "pegging" had lasted about 15 seconds (paragraph 11 of the hearing notes), Recruit 1 said it was for significantly longer, being approximately 10-15 minutes. (The Tribunal recognises that there might have been a difference in the total length of the conversation in contrast with the length of a particular topic within it). Steve Morgan believed that the conversation lasted longer than the 15 seconds that the claimant said it did and that he was trying to suggest that he was not fully aware of its meaning after that conversation, which Steve Morgan believed to be incorrect. During her disciplinary hearing, Recruit 2 said that it was a brief conversation, but she had explained the meaning of the term to everyone in her group, as a result of which they all knew what it meant and that it would be inappropriate to use it in another context outside of that conversation. Steve Morgan regarded this to be compelling evidence that the claimant knew what "pegging" was because of the discussion on the Tuesday evening.

69. However, later in the disciplinary hearing (paragraph 16), the claimant said that, after he returned home on the Friday evening, he made a search on the Internet to get an idea of what "pegging" was, suggesting that he had not known earlier. In addition, as Steve Morgan regarded as apparent from the statement the claimant gave to Station Manager Emma Price, he also suggested during the investigation that he was unsure of the meaning of the term until later than he was.

70. In paragraph 2 of his statement, the claimant stated that he had first heard of the term at Brathay Hall. However, in paragraph 3 he claimed that he did not pay much attention and "only found out later what it was." Steve Morgan regarded this as contradicting what the claimant told him in the disciplinary hearing. He believed that the claimant lied in his statement. In paragraph 5, the claimant said that he only understood the gravity of the term at the end of the day on Friday, a comment he repeated in paragraph 13. Steve Morgan believed these comments also to be lies. In paragraph 15, the claimant initially told Emma Price that he first understood the term to relate to sexual activity on Thursday night. He then later corrected this statement to say it was in fact on Friday night. Steve Morgan believed that these statements were not true. It was on Tuesday, during the initial conversation at Brathay, that the term was fully explained to the claimant.

71. In Steve Morgan's assessment, in relation to the discussion of "pegging" at Brathay, the recruits were taking part on a residential course and this topic was inappropriate and amounted to misconduct. However, he took account of the fact that the conversation had taken place after the course content had finished for the day and was in the recruits "down time". Therefore, he treated it less seriously than the other two incidents.

72. However, in relation to the claimant, Steve Morgan believed that he deliberately tried to mislead Emma Price as the investigating officer, and

himself as the hearing manager, into accepting that he did not really know what the term meant until Friday night (after the incidents had occurred) to minimise his culpability for his involvement in the subsequent incidents. Steve Morgan believed that the claimant lied about this, and that this was a serious breach of the expected standards of behaviour required by all employees in the respondent service.

73. The second incident took place on the following day, Wednesday 16 September 2020, on the minibus journey back to Lancashire from Brathay Hall. The term “pegging” was again discussed. The investigative statements gave varying accounts of exactly what was said and by whom.

74. Recruit 1 said that he and Recruit 2 started the conversation and then others joined in. He recalled that the claimant said that he did not do “pegging” (which Steve Morgan regarded as further evidence that he knew what the term meant). Recruit 2 stated that the claimant asked the driver (Crew Manager X) if he was familiar with the term “pegging”. Recruit 3 said that everyone apart from Recruit 5 was involved in the conversation, but he did not know who instigated it. Recruit 4 said that the claimant asked the driver if he was aware of the term “pegging” and that he just came out with it. The claimant said he did not know what it was. Recruit 7 said that he thought that Recruit 1 brought the subject up first in response to a question about what they had learnt on the course. Recruit 1 said that he had done it (that is, “pegging”) and the claimant pointed at Recruit 2. Crew Manager X said that the “pegging” conversation was brought up by the claimant, who asked him if he knew what “pegging” was. Crew Manager X said that he did, and he queried why he was being asked that. The claimant said that he mentioned “pegging”. It was a new term that he had heard the others discussing and he asked the driver what it was, as he was confused. The driver had heard of it, but the claimant had not until Brathay, and he thought it was a common thing.

75. Steve Morgan concluded that, from the statements referred to within the investigation, while it was not entirely clear whether the claimant or Recruit 1 had instigated the conversation on the minibus, it was clear that the claimant had taken part in it. Steve Morgan did not believe that he was simply confused about the term and was simply asking Crew Manager X if he knew what it meant. The claimant understood the term after it had been discussed on the Tuesday evening. Steve Morgan believed that he discussed it again on the minibus deliberately, knowing it was inappropriate and seeking either to embarrass people or seeking to make people laugh. In the disciplinary hearing, the claimant sought to convince Steve Morgan that he was naïve and was wondering if he was the only person who had not heard of it. Due to his lack of honesty around his knowledge of the subject, as detailed above, Steve Morgan did not believe this explanation of his motives. He believed that the claimant was simply trying to minimise his culpability.

76. Crew Manager X had reported his concerns about the conversation on the minibus to Watch Manager Cottam. The following morning Watch Manager Cottam addressed all the recruits about acceptable behaviour. He did not explicitly refer to the comments made on the minibus, although some of the recruits took it to be a reference to that incident. Despite this lack of specific reference to the conversations, Steve Morgan would have expected the

recruits to reflect on what had been said and behave more appropriately thereafter.

77. However, there was a third incident on Friday 18 September 2020. This took place at the respondent service's training centre in Chorley, Lancashire. It involved the suggestion to use the word "peggers" as a team name for one of the exercises being carried out during health and well-being training. Steve Morgan noted that there was again some variation in the statements as to exactly who said what.

78. Recruit 1 said that it was not his idea and that someone else put forward the name "peggers". He thought that Recruit 2 or someone out of vision behind him had shouted it out, and that others laughed and joined in. During his disciplinary hearing, however, Recruit 1 said that, having thought about it further, it was most likely that the claimant had shouted the name out, and he – Recruit 1 – had corrected the trainer when she had started to write "beggars" on the board.

79. Recruit 2 said that someone said "peggers" and the trainer started writing "beggars" on the board, but that Recruit 1 then said "no, peggers."

80. Recruit 3 said that the claimant and Recruit 1 came up with the team name "peggers". They both shouted out the name "peggers", but he was not sure if it was at the same time. Recruit 4 said that the claimant or Recruit 1 shouted out "pegging." Recruit 7 said that the claimant and Recruit 1 said "pegging." They kept saying "peggers", but the trainer thought it was "beggars". Recruit 5 said that she believed that the claimant shouted out "pegging". Recruit 6 said that someone behind him shouted out "peggers", but he did not say who that was.

81. In his statement, the claimant acknowledged that he said "peggers" to the trainer. He said that he apologised to her at the end. During the disciplinary hearing, he said that he was the one who said it and that someone told him he should not have said that. He said that he did not have it in his mind that it was something that he should not say. The trainer misheard it and Recruit 1 spelt it out. As someone had given him a hard time about it, he searched on the Internet when he got home (that is, on the Friday) for a full description.

82. As a result of this evidence, Steve Morgan was content that the claimant had shouted out the name "peggers". He believed that the claimant knew what it meant and that it was inappropriate at the time that he shouted it out. He did not accept that the claimant was unsure of the meaning at that time and that he only found out later.

83. In relation to the three disciplinary proceedings, Steve Morgan found that Recruit 2 instigated the first conversation about "pegging" while at Brathay and that she laughed along when it was raised on the minibus, but that she played no active part in that second conversation. She was not involved in the suggestion that the name be used during the health and wellbeing lecture. Steve Morgan believed that Recruit 2 was honest with the investigating officer (during the investigation) and with him (during the disciplinary hearing) and that the whole experience was a source of considerable embarrassment for

her. He gave her a 12-month written warning as he believed that that was commensurate with the level of her culpability.

84. Steve Morgan found Recruit 1 to have been an active participant in all three conversations and therefore was more culpable than Recruit 2. However, he considered Recruit 1 to have been open and honest during the disciplinary hearing. He appeared remorseful and willing to change, accepting responsibility for his actions, and recognising the inappropriate and unacceptable nature of the three conversations. Steve Morgan demoted Recruit 1 from a Crew Manager (in his on-call capacity) and gave him an 18-month final written warning. This was more severe than the sanction given to Recruit 2 because of the greater involvement of Recruit 1.

85. Steve Morgan considered that, like Recruit 1, the claimant had participated in all three conversations. He believed that, after the initial conversation at Brathay, the claimant knew exactly what the term “pegging” meant. Had he made a full and open admission of his part in these incidents during the investigation and during the disciplinary hearing, Steve Morgan would likely have dealt with him in a similar manner to Recruit 1. However, in Steve Morgan’s assessment, the claimant displayed a lack of honesty and integrity in his attempts to evade culpability. He repeatedly tried to suggest that, when he used the term, he did not really know what it meant. Additionally, he sought to create a position wherein he did not understand the meaning of the term “peggers” until the Friday evening, which was at odds with, and inconsistent with, the views of colleagues who participated in the initial conversation.

86. Steve Morgan considered that he had given the claimant ample opportunities during the disciplinary hearing to be honest and to tell him truthfully what part he had played, but he failed to take these opportunities despite Steve Morgan reaffirming this on more than one occasion. He found that this amounted to a further breach of the STRIVE values on top of the breach caused by the inappropriate comments in the first place. The claimant’s attitude during the disciplinary hearing did not suggest to Steve Morgan that he was remorseful or willing to change. He could not be confident that similar behaviour would not be repeated in the future. As a result, Steve Morgan felt that the claimant’s culpability was significantly higher than that of Recruits 1 and 2.

87. Steve Morgan decided that the claimant’s overall conduct amounted to gross misconduct, which justified immediate dismissal. He confirmed this in a letter to him dated the 13 November 2020 [32].

88. The Tribunal also notes the claimant’s perspective on the disciplinary hearing. He asserts that both he and Crew Manager X were asked about their conversation and they both confirmed the claimant’s account of what he said on the minibus [103]. They were not asked to confirm what was said by others before or after. The claimant’s concern was that much of the inquiry at the disciplinary hearing was based on his changing the day on his investigative statement from Thursday night to Friday night [103 and 104] and the belief that this was dishonest. The claimant’s trade union representative's notes confirmed that he had said Friday night from the start.

89. The claimant took issue with the findings of the disciplinary hearing, as follows.

90. In the disciplinary outcome letter [123-125] Steve Morgan stated that he found the claimant's version of events "implausible". It was found that he "participated in the discussion around pegging on Tuesday 15 September". In his submissions in support of his appeal [128] the claimant stated that this was not put to him during the investigation. In his view, this did not feel like work time or inappropriate at the time. His only involvement was to ask what something meant. He was not involved in any other way.

91. The second issue was that he had "instigated and participated in the inappropriate discussion on the return minibus framed around pegging". The claimant's position was that he did not raise the issue and that this was supported by statements from Recruit 7 [38]: "I think it was first brought up by Recruit 1. Recruit 1 said we've learned a lot about pegging"; Recruit 4 [40]: "I can't remember how the conversation started and I think Recruit 1 jumped in"; and Recruit 1 [64] when asked who started the conversation: "Recruit 2 and me".

92. The claimant considered that he had admitted that he had asked the driver if he knew about "pegging", but this was only after it had been brought up. Although there was a general conversation involving the whole minibus, he just asked that one question and was not involved in the general conversation. Crew Manager X's statement recorded [68]: "nobody was uncomfortable, but as an instructor I should have stopped it". The investigative report found [76]: "On the return journey home on the minibus in response to a question what have you learned posed by the instructor (Crew Manager X), Recruit 1 made the comment we've learned a lot about pegging and R Holden asked the driver what pegging was". In the claimant's analysis, the finding that "you instigated" the discussion went against the statements given in the investigation and the respondent's own investigative report. He maintained that his only involvement was to ask one question of the instructor; that all the evidence supported this; and that this did not suggest any inconsistency or implausibility.

93. The third issue arose from the conclusion that the claimant "also admitted inappropriately introducing pegging into the discussion around team names in the health and well-being segment". The claimant did use "peggers" as a team name. He thought that Recruit 1 said it as well. The claimant was told it was inappropriate by one of the team. Recruit 1 spelt out the word to the instructor. This is confirmed in the claimant's statement [47]. The claimant's position is that he did not understand the gravity of this at the point that he said it, but it was still a stupid thing to do, as he understood it was a sexual practice. His assertion is that from being first introduced to the term three days earlier, with two of eight people actively participating in it, and an instructor who did not see anything inappropriate with the conversation, he had no reason to think it was so inappropriate.

94. The claimant pointed to all the witness statements confirming his statement, except Recruit 1 who said that it was Recruit 2. See [39, 45, 61, 65]. The claimant believed that he had not been inconsistent. The claimant observed that a focus of Steve Morgan's finding that the claimant's version was "implausible" seemed to be question 15 in his interview [47] where he changed

Thursday night to Friday night. He believed that this was consistent with what he said all along and with his asking the instructor the one question on the minibus, which had been confirmed by several witnesses, including the instructor. It was also his statement as recorded by his trade union representative [50], but Steve Morgan still found it implausible despite (in the claimant's view) all the evidence.

95. The claimant appealed the decision to dismiss. Steve Morgan attended the appeal hearing managed by Assistant Chief Fire Officer Ben Norman on 14 December 2020. At that hearing, Steve Morgan explained his reasoning for coming to the conclusions that he had. In Steve Morgan's observation of the appeal hearing, the claimant admitted during the appeal hearing that he had known what the term meant on the Tuesday at Brathay, but he still maintained that he was confused about the term when he used it. Steve Morgan believed that the claimant was still not being fully open and honest during the appeal hearing.

96. The Tribunal now turns to the appeal stage.

97. Ben Norman is the respondent's Assistant Chief Fire Officer. On 14 December 2020, he was the appeal hearing manager for the claimant in relation to his dismissal because of Area Manager Steve Morgan's decision on 12 November 2020. The claimant was accompanied by his trade union representative, Tom Cogley. Ben Norman heard from Steve Morgan, accompanied by HR adviser, Bob Warren.

98. The claimant had submitted an appeal notice raising two points: (1) the severity of the sanction was too severe; and (2) the sanction was inconsistent with similar cases [127]. On 9 December 2020, the claimed emailed further grounds of appeal in a letter of three pages [128-130]. This set out challenges to the conclusions reached by Steve Morgan about the claimant's culpability based on the witness statements that had been taken by Emma Price as part of the investigation.

99. These documents were discussed at the start of the appeal hearing because they both set out very different grounds from each other. Ben Norman wanted to know upon which basis the appeal would proceed. The claimant discussed the matter with his trade union representative. He then asked that the appeal proceed based on his first appeal notice and that he would refer to the second (longer) document if required. He did not in fact refer again to that second document. None of the points covered in that document were raised or considered by Ben Norman. So far as he was aware, these points had not been raised in the initial disciplinary hearing.

100. Appeal hearing notes were kept and transcribed by HR adviser, Emma Bolton [133-135]. Steve Morgan explained how he came to his decision. Ben Norman noted that a significant factor was the claimant's lack of honesty during the investigation. Steve Morgan highlighted how it was clear that the claimant knew what the term "pegging" meant on Tuesday and that he used it knowingly and inappropriately after that. In his statement, however, he had said that it was only on Friday that he knew what it meant, suggesting that he had been using it innocently or naïvely. Steve Morgan had found the claimant to be

evasive and trying to confuse the issues, rather than being open and honest as the other individuals had been.

101. Ben Norman asked Steve Morgan why Recruit 1 had been treated differently and more leniently, despite making the same comments as the claimant. Ben Morgan response was that Recruit 1 had answered his questions honestly, not denying anything, and even implicating himself. In contrast, the claimant had not been truthful, suggested that he did not know what the meaning of the word was, and tried simply to divert blame to other individuals. It was only when pushed during the hearing that the claimant accepted that he knew what the term meant on the Tuesday. This demonstrated a lack of trust and integrity. It was this dishonesty which led to a more severe sanction being imposed on the claimant than on Recruit 1.

102. The claimant then gave his account to Ben Norman. He admitted that he did know what the term meant on Tuesday and that he used the term on the occasions described in the investigation. He said he did bring it up on the minibus by asking the driver what it meant, as he wanted to know if it was a common term, as he was the only one who had not heard of it. This again appeared to be suggesting that he had been naïve and innocent. He said that he was confused rather than dishonest and that, as an older man, he wanted to fit in on the course. He maintained that he had been honest during the investigation and the disciplinary hearing. He said that the sanction of dismissal was too severe and not consistent with that of Recruit 1.

103. During the appeal hearing, Ben Norman formed the view that he also saw evidence of the dishonesty and evasive behaviour that the hearing manager, Steve Morgan, had cited in his correspondence with the claimant. This referred to the claimant declaring that he did not know the meaning or inappropriateness of the term used at the Brathay residential, on the return journey or at the Friday training event. On challenge from Steve Morgan, including reference to the amended statement taken by Emma Price, there was (in Ben Norman's analysis) an acceptance by the claimant that he was aware of the meaning, offensive nature and wholly inappropriate nature of the term used on multiple occasions.

104. Having considered all the representations made to him, Ben Norman concluded that Steve Morgan's conclusions about the claimant were correct; and that making the inappropriate comments, and then being disingenuous about it in the investigation and disciplinary hearing, did amount to gross misconduct. Ben Norman found that the decision to dismiss the claimant summarily was the right one. The claimant had broken the trust and confidence needed to maintain the employment relationship. The different treatment of Recruit 1 (and by implication Recruit 2) was justified by the difference in the way that they had co-operated with the investigation, and the honesty and integrity that they displayed.

105. Accordingly, Ben Norman upheld Steve Morgan's decision. He wrote to the claimant confirming the outcome of his appeal on 21 December 2020 [140-141].

Submissions

106. Both counsel made oral submissions at the conclusion of the evidence. The Tribunal has recorded those submissions in its notes of proceedings. It has also tested its conclusions against those submissions.

Claimant's submission in his witness statement

107. The Tribunal reproduces the concluding section of the claimant's witness statement in which he effectively makes a submission rather than gives evidence:

> "While I was certainly naive during the days we are discussing, Mr Morgan concluded in the hearing on 12 November that I had been dishonest, evasive and restricted. I haven't been in any way dishonest or evasive at any point as is proven by my immediate and complete admittance of my part in each of the circumstances questioned at each meeting. If restricted at all in my responses in the initial investigative meeting on 21 September, that is purely because I answered succinctly all questions asked, accepting my part in full no matter how trivial, and not trying to deflect blame by pointing out how others were involved.
>
> At no point has there been any dishonesty, in fact Mr Morgan commented during the hearing on how honest my responses had been.
>
> I was the only one dismissed, the respondent's investigation showed my involvement was less than that of [Recruit 1] who was not dismissed. The increased severity of my treatment seems to be based Mr Morgan feeling my answer to one question is implausible, and my not showing as much remorse and emotion.
>
> Along with Mr Morgan finding I 'instigated' the minibus comments against all the evidence, the question he finds implausible is [47] question 15, I 'understood' on Friday night, despite this being consistent with earlier comments [46] about knowing 'the gravity' on Friday night and my clear acknowledgement I was wrong in [47] question 16 'when you made the suggestion you knew it was sexual activity' which I confirmed. I have confirmed all along I knew it was a sexual activity, and I knew and accepted it was stupid to say it, and for that reason I apologised to the instructor immediately at the end of the lecture, but I did not understand the gravity of the comment when I said it until afterwards on Friday night.
>
> It is admitted through my statement and backed up by the witness statements that: (a) I asked a question when the subject was brought up one evening; (b) I asked a question when it was brought up the next day; (c) I wrongly used the word for a quiz team name, but I immediately apologised and have accepted throughout it was stupid and that I knew what the word meant.
>
> Against this, [Recruit 1] who was treated less harshly was proven through the investigation to be more involved than me in all three incidents, blamed others for his actions and [121] even in the hearing with Mr Morgan was changing his

story with the explanation 'misremembered'. There is no dishonesty in my case and the severity of my dismissal is much too harsh."

Relevant legal principles

108. The relevant legal principles in a complaint of unfair dismissal by reason of conduct are well-known, but bear summarising here.

109. The headline principles are: (1) What was the reason for the dismissal falling within the Employment Rights Act 1996 section 98(1) and (2)? (2) Was the dismissal for that reason fair and reasonable in the terms of section 98(4)? (3) Did the dismissal result from a fair procedure? (4) How did the Acas code of practice apply and was it complied with?

110. The question is whether the respondent acted reasonably and not whether the claimant suffered unfairness or injustice. The test is an objective one. It is not for the Tribunal to step into the respondent's shoes or to substitute its judgment for that of management or by promoting what it might have done in these circumstances in place of what the respondent did. The test focuses upon how a reasonable employer might or would have behaved in these circumstances. That test is predicated on the range of reasonable responses available to a reasonable employer in similar circumstances. The Tribunal takes care not to adopt a "substitution mindset".

111. See *British Leyland (UK) Ltd v Swift* [1981] IRLR 91 CA; *Iceland Frozen Foods v Jones* [1982] IRLR 439 EAT; *Foley v Post Office, HSBC v Madden* [2000] IRLR 827 CA.

112. The test is based upon the set of facts or beliefs known to the employer at the time of the dismissal. Account is also to be taken of the size and administrative resources of the employer: section 98(4).

113. The importance of a fair procedure is underlined by the decision in *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 HL. The *Polkey* principle emphasises the importance of a fair procedure involving a reasonable investigation and a fair hearing. The Acas Code of Practice also stresses the staged approach to a decision to dismiss, involving an investigation; informing the employee; inviting the employee to a meeting; affording the employee a right to be accompanied; making a decision; and extending an opportunity to appeal.

114. In a conduct dismissal, the well-known guidance in *BHS Ltd v Burchell* [1978] IRLR 379 EAT is to be accounted for. Did the employer have a genuine belief that the employee had misconducted himself? Was that genuine belief based upon reasonable grounds? Did it follow upon a reasonable investigation? Has the employer accounted for any mitigation? Has the employee's record and length of service been considered? Has the employee been treated consistently with other employees (in similar situations)? Is dismissal a proportionate sanction?

115. The Tribunal has also taken account of *Hadjioannous v Coral Casinos* [1981] IRLR 352 EAT. In conduct dismissal cases, treatment of other

employees in similar circumstances is relevant: (1) if there is evidence that the dismissed employee was led to believe he would not be dismissed for such conduct; or (2) where the other cases give rise to an inference that the employer's stated reason for dismissal is not genuine; or (3) if, in truly parallel circumstances, an employer's decision can be said to be unreasonable in a particular case having regard to decisions in previous cases. Arguments based on disparity should be scrutinised carefully and would rarely be properly accepted. Counsel were agreed that only point (3) was relevant to the present case.

Discussion and conclusion

116. What was the reason or principal reason for dismissal?

117. Here the only reason is clearly the claimant's alleged misconduct in respect of his participation in conversations about, or use of, the terms "pegging" or peggers". That is a potentially fair reason for dismissal.

118. Did the respondent genuinely believe the claimant had committed misconduct?

119. This is not really in issue. There is no serious suggestion that the respondent put forward a sham reason for dismissal to rid itself of this employee. This was an employee with a good service record prior to the week in question. The evidence before the Tribunal indicated that the managers concerned were simultaneously very disappointed that a previously well-respected employee had behaved so inappropriately and perplexed that the fact that he had such a good record underlined their concern that he did not appear to appreciate the inappropriateness of his conduct. There has been no real challenge to the respondent's genuine belief that the claimant had committed the misconduct in question.

120. Were there reasonable grounds for that belief?

121. The Tribunal has set out the evidence before it – and the findings of fact that it has made in reliance upon that evidence – in some detail, examining it both from the perspective of the employee and from the perspective of the employer. The employer had reasonable grounds for its belief that the claimant had committed the misconduct in question and that it amounted to gross misconduct.

122. At the time that belief was formed, had the respondent carried out a reasonable investigation?

123. It is important to observe that an internal workplace investigation is not to be judged by the standards of a criminal investigation or a judicial fact-finding exercise. The investigating manager is expected to act reasonably in the circumstances of the case. The investigation is to be judged not by what the Tribunal might have done, but by the range of reasonable responses to the task of uncovering the essential facts of the conduct under examination.

124. Unusually, the Tribunal had the advantage of hearing evidence from the investigating manager, Emma Price. In most unfair dismissal cases, it is necessary only to hear from the decision-maker and the manager who heard an appeal. Emma Price was the relatively least experienced of the three managers concerned. However, she went about her task with care and diligence. Witnesses who needed to be interviewed were interviewed; questions that needed to be asked were asked. Proper representation was afforded at this initial stage and not simply at the decision and appeal stages. There was a consistent structure to the interviews. Detailed notes were taken and cross-checked. A considered investigation report was prepared, with findings and recommendations, together with an appendix of documents. Inconsistencies and gaps in the evidence were laid out.

125. The Tribunal is satisfied that, at the time the respondent's belief was formed that the claimant had committed gross misconduct, the respondent had carried out a reasonable investigation.

126. Did the respondent otherwise act in a procedurally fair manner?

127. The claimant has not sought to challenge the respondent's procedure. He was right not to do so. The respondent acted in accordance with its own internal procedures, which in turn accorded with what is expected of an employer by the Acas Code of Practice and by the case law on the essence of a fair procedure in conduct cases.

128. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

129. The Tribunal concludes that it did. The Tribunal takes care not to step into management's shoes or to judge what the employer did by the standard of what the Tribunal itself might have done. It guards against the substitution mindset. Nevertheless, by either standard, the respondent was entitled to conclude that the claimant committed the misconduct in question; that it amounted to gross misconduct; and that dismissal was a sanction open to it.

130. Was the dismissal within the range of reasonable responses? The Tribunal concludes that it was.

131. Were all the relevant circumstances reasonably taken into account, including length of service, previous record and any mitigation? The Tribunal concludes that they were. Although these considerations were not expressly addressed in the respondent's witness statements, the cross-examination of the management witnesses made plain that these were factors that were present in the mix.

132. The Tribunal turns finally to the claimant's particular objections to the fairness of his dismissal.

133. Was the decision that the claimant had committed gross misconduct on the evidence a perverse decision?

134. It is often said by the appellate courts that employment tribunal decisions are not expected to be the product of sophisticated legal drafting and that they are not to be subjected to a search with a fine toothcomb looking for inconsistencies, contradictions and gaps in the reasoning. The same courtesy is to be extended to an internal workplace disciplinary decision and more obviously so.

135. The claimant has sought to highlight contradictions in the internal workplace witness evidence and to undermine the respondent's key findings as to his honesty, reliability and trustworthiness. His counsel approached this objective in a measured and proportionate way, and the claimant cannot be criticised for seeking to show that the decision to dismiss was perverse. The Tribunal's decision to reserve its judgment was largely influenced by the need to consider the perversity ground with some care.

136. The Tribunal notes that it is not being asked in this claim to decide a wrongful dismissal complaint. Its task otherwise would have been to make its own findings of facts as to what happened during the week of the recruits' course and to do so on the balance of probabilities. That would have required it to subject the internal workplace evidence to "a fine toothcomb" to establish the facts of what was said and done, and when, and by whom.

137. However, in an unfair dismissal claim, attempts by claimants to establish that they did not commit the misconduct in question, and that the employer was wrong to conclude that they did, are usually given short shrift. Of course, the Tribunal can be persuaded to take a different approach if the contention is that the reason given for dismissal was a sham reason or that the true reason was an inadmissible reason or that no reasonable employer could have reached the decision that it did.

138. The Tribunal rejects the claimant's submission that the decision that he had committed gross misconduct was perverse. The Tribunal is satisfied that that was a decision that was open to an employer acting reasonably in the circumstances of this particular case. The respondent acted within the range of reasonable responses in weighing the evidence, considering the weaknesses or contradictions in the evidence (which the claimant has highlighted) and in reaching a conclusion as to the claimant's conduct.

139. The Tribunal records that it was not impressed by the claimant's attempts to distinguish between when he knew that "pegging" was a sexual term, and when he knew what the term meant in terms of sexual practice, and when he understood that the term was inappropriate or that the sexual practice was "taboo", or when he recognised the "gravity" of the term or the use of it. By any measure, he became fully aware of what the term meant on the Tuesday evening. He should have recognised at that point that the continued use of the term in a workplace setting (which the recruits' course was) would be inappropriate. Nothing that he learnt later in that week, much less as a result of his Internet searches on the Friday night, changed that basic position. All else is sophistry on his part. The respondent was entitled to regard that as adversely affecting his credit and credibility.

140. Was the sanction of summary dismissal a harsh or disproportionate sanction?

141. Once the respondent had concluded that the claimant had committed gross misconduct, summary dismissal was obviously a disciplinary sanction open to it, unless exceptionally there were factors that it could or should have taken account of that would have caused a reasonable employer to have substituted a lesser sanction (as it did in relation to Recruits 1 and 2). The Tribunal is satisfied that there were no mitigating circumstances and that, indeed, the claimant had given the respondent cause to consider that there were aggravating circumstances in the way in which the claimant had interacted with the disciplinary process at all three levels. The claimant's length of service and previous record might otherwise have led to a different conclusion.

142. The Tribunal is satisfied that the sanction of summary dismissal was not a harsh or disproportionate sanction.

143. Did the respondent treat the claimant inconsistently with two other employees involved in the incidents that gave rise to the dismissal of the claimant?

144. Recruits 1 and 2 were given final written warnings. Recruit 1 was also demoted. The claimant was dismissed summarily. Given that all three employees were to varying degrees and at different times involved in the inappropriate use of sexual terminology in a workplace setting, the differential treatment of the claimant in comparison with his two colleagues calls for an explanation. That explanation has been provided by Steve Morgan and Ben Norman in their evidence to this Tribunal as recorded in the findings of fact above.

145. Although there was a passing reference made in the claimant's evidence to the effect that Recruit 1 was treated leniently because of a family connection with the fire service, that line of argument was quite properly not pursued further. If the claimant also intended to imply that his reputation for challenging inappropriate practice meant that he was regarded as a troublemaker, and that this was an opportunity to dispense with him, the Tribunal is unable to accept any such characterisation of the evidence.

146. The Tribunal is satisfied by the explanation for the differential treatment of the three recruits provided by Steve Morgan and Ben Norman. Their reasoning for and their calibration of the disciplinary sanctions handed down withstands scrutiny. It is supportive of the general care and diligence that was taken by the three managers in the disciplinary procedure to establish the facts, to consider the outcomes, and to visit those outcomes with appropriate sanctions tailored and fitted to the individual employees concerned.

147. The respondent did treat the claimant inconsistently with the two other employees involved in the incidents, but its explanation for that inconsistent treatment (more properly, differential treatment) that gave rise to the dismissal of the claimant has been more than adequately explained and fell comfortably within the range of reasonable responses.

148. For the avoidance of doubt, the Tribunal is also satisfied with the respondent's explanation of why only these three employees were subject to disciplinary action, and not other recruits or employees concerned.

Disposal

149. In summary, applying the test of fairness in section 98(4) to the respondent's reason for dismissal – that is, conduct in the terms of section 98(1) and (2) – the claimant was fairly dismissed. His complaint of unfair dismissal is not well-founded. The claim is dismissed.

_____

Judge Brian Doyle
Date: 17 October 2021

RESERVED JUDGMENT & WRITTEN REASONS
SENT TO THE PARTIES ON

19 October 2021

FOR THE TRIBUNAL OFFICE