EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4107050/2020 (V)

Held on 7, 8, 9 and 10 December 2021 (By CVP)

10 **Employment Judge: B Campbell**

Mr C Ketterer	**Claimant** **Represented by:** **Ms L Neill –** **Solicitor**
Scottish Fire and Rescue Service	**Respondent** **Represented by:** **Ms M MacDonald –** **Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:

1. the claimant was not dismissed by reason of taking part, or proposing to take part, in the activities of an independent trade union at an appropriate time;

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2. the claimant was fairly dismissed from his employment with the respondent by reason of his conduct; and

3. his claim is therefore dismissed.

INTRODUCTION

30 1. This claim arises out of the claimant's employment by the respondent. The claimant worked as a Firefighter. He was dismissed by the respondent on 25

June 2020. The respondent maintains he was rightly dismissed for committing an act of gross misconduct. The claimant argues that he was both automatically unfairly dismissed by virtue of carrying out trade union activities, and that he was in any event unfairly dismissed in the more general sense.

2. The Tribunal heard evidence from the claimant himself and also from Mr Alex Muir of the Fire Brigade Union on his behalf. It also heard evidence from the following witness for the respondent – Mr Gibby Lamont, Group Commander, Mr Roddie Keith, Area Commander and Ms Anne Buchanan, board member and appeal panel chair.

3. Generally each witness was found to be credible and reliable in the evidence they gave. Inevitably there were some more minor conflicts over certain facts or events, or the parties did not agree over the proper way of evaluating those matters in the context of the role the claimant fulfilled with the respondent and standards which applied to it. Any relevant issues are dealt with in more detail below.

4. The parties jointly produced a bundle of productions, and an agreed statement of facts and list of issues. The claimant provided a separate bundle of documents dealing with losses and remedy. References in square brackets below are references to the page numbers of the main bundle.

5. The parties' representatives helpfully provided written notes of closing submissions which were carefully considered in reaching the outcome in the claim.

6. Employees of the respondent have titles to indicate their level of seniority. They customarily use those titles in the workplace. In this judgment the convention is used of specifying a person's title the first time they are referred to and then reverting to 'Mr' or 'Ms'. This is simply for convenience.

LEGAL ISSUES

7. The following legal issues had to be decided, as agreed by the parties:

1. **Was the Claimant automatically unfairly dismissed contrary to s.152 Trade Union and Labour Relations (Consolidation) Act 1992 ('TULR(C)A'),**

    1.1 In sending the message for which he was dismissed, was the claimant in the taking part or proposing to take part in 'activities of an independent trade union at an appropriate time' within the meaning of s.152(1)(b) of TULR(C)A 1992?

    1.2 If so, was so doing the reason for the Claimant's dismissal?

2. **Was the Claimant unfairly dismissed contrary to s.98 of the Employment Rights Act 1996?**

    2.1 If the Claimant was not dismissed in relation to trade union activities as at 1 above, what was the reason for the Claimant's dismissal?

    2.2 Was the reason for dismissal a potentially fair reason within the meaning of s.98(2) of the Employment Rights Act 1996?

    2.3 Did the Respondent hold a reasonable belief that the Claimant had committed the misconduct alleged?

    2.4 Did the Respondent carry out a reasonable investigation into the Claimant's alleged misconduct?

    2.5 Did the Respondent act reasonably in all the circumstances treating the alleged misconduct as sufficient to dismiss the Claimant?

    2.6 In the alternative, was the Claimant's dismissal fair for some other substantial reason?

    2.7 Were there any procedural defects in the disciplinary procedure and, if so, did such defects render the dismissal unfair?

3. What remedy should be awarded to the Claimant if successful?

3.1 If the Claimant is found to have been unfairly dismissed, what compensation should be awarded?

3.2 What steps has the Claimant taken to mitigate his losses and did the Claimant unreasonably fail to mitigate his loss?

3.3 Should any compensation awarded be reduced to reflect the Claimant's contributory conduct?

3.4 If the dismissal is found to be procedurally unfair, should any compensation be subject to a ***Polkey*** reduction on the basis that such flaw made no difference to the ultimate outcome?

APPLICABLE LAW

8. By virtue of Part X of ERA, an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the dismissal. Unless the reason is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA. Should it be able to do so, a tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4), taking in the particular circumstances which existed, such as the employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that analysis.

9. Where the reason for dismissal is the employee's conduct, principles established by case law have a bearing on how an employment tribunal should assess the employer's approach. Relevant authorities are considered below under the heading 'Discussion and Conclusions'.

10. Courtesy of section 152(1)(b) of TULR(C)A an employee will have been automatically unfairly dismissed if the reason, or principal reason, for the

dismissal was that they had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time. There is no further statutory clarification of what will qualify as 'activities of an independent trade union' but there is a body of case law dealing with the concept and again
5 relevant authorities are discussed below in the section headed 'Discussion and Conclusions'. 'Appropriate time' essentially means outside of the hours the employee was required to work, or within those hours if they had been given special authorisation by their employer to carry out the activities.

FINDINGS IN FACT

10 11. The following findings of fact are made as they are relevant to the issues.

12. The claimant was employed by the respondent as a Firefighter. The respondent is the public emergency service in Scotland appointed to deal with fire safety and prevention, and related services.

13. The respondent recognises the Fire Brigade Union (the **'union'**) in respect of
15 its body of Firefighters in Scotland. The claimant was a member of that union. He did not hold any other status, such as shop steward or staff representative.

14. The claimant began his service with the respondent on 19 October 2009. At the time of the events relevant to the claim he was based at the Pollok fire station on the south side of Glasgow.

20 15. The respondent operates a **'Human Resources Code of Conduct'** (the **'Code'**) [152-182]. This sets various standards expected of employees, including the claimant in his role. In its introduction section the respondent explains that it is a public body, funded by public resources and that the Scottish public has high expectations of its employees. It goes on to state that
25 therefore *'all employees are obliged to perform their duties with integrity, impartiality and efficiency'*. The Code covers conduct both during and outside of working hours. Within the Code, at section 2, are 'Standards of conduct' such as duty, selflessness, integrity, honesty, leadership and respect. Those are also referred to as the respondent's 'values'. Section 7 covers the use of
30 social media.

16. The respondent also has a free standing **social media policy** (the **'Policy'**) [142-151]. This is predominantly designed to deal with how employees use social media platforms to interact with the public in the course of their duties, such as by promotional activity, rather than governing how staff may use social media in a personal capacity. However, section 5 of the Policy deals with 'Personal use' and contains passages as follows:

> ***'PERSONAL USE***
>
> *Social media sites such as Facebook and Twitter are a very useful and popular way for keeping in touch with friends, family and colleagues and exchanging information and news.*
>
> *However, employees who use social media sites should be mindful that they might be more vulnerable to criticism of misuse due to the public profile of SFRS. They should therefore be aware that, as an employee of SFRS, they must not post anything which may bring the organisation into disrepute or which could cause distress or offence to fellow colleagues or members of the public through their use of such sites.*
>
> *While there is no intention to restrict any proper and sensible exercise of any individual's rights and freedoms, it is expected that all staff will conduct themselves in such a way as to avoid bringing the organisation into disrepute or compromising its reputation, effectiveness or the security of its operations and assets.*
>
> *All staff should be aware that SFRS takes the posting of offensive material or the harassment, bullying or victimisation of its staff or the public via the internet and social media sites during personal time as seriously as if it had occurred in the workplace or during working time. All staff should be aware that any inappropriate posts made on social media sites might result in action under the SFRS Disciplinary Procedure and, in extreme cases, civil and criminal law.'*

17. The policy goes on to give examples of situations which may lead to disciplinary action. Those include:

'Employees must not display images or make comments that are clearly offensive or in any way harass, intimidate, bully, victimise or discriminate against other members of staff or the public on any social networking site.'

18. At section 6 of the Policy the respondent states that breach of the Policy *'will be taken very seriously and may result in disciplinary action when appropriate.'*

FBU negotiations with respondent over pay and conditions

19. For much of 2019 and into 2020 the respondent was in negotiations with the union over changes to the role of Firefighter. The respondent wished to broaden the role to include the following responsibilities:

    19.1 Out of hospital cardiac arrest;

    19.2 Out of hospital cardiac arrest +;

    19.3 Response to terrorist activity;

    19.4 Safe and well; and

    19.5 Slips, trips and falls.

20. Those duties were different to what could be described as the core tasks of fire fighting and fire safety, and were generally not welcomed by Firefighters who saw them as a dilution of their role. In return for accepting the changes the respondent proposed a pay increase.

21. The union had rejected a pay offer in return for expansion of the role in the summer of 2019 and, following further consultation and an improved pay offer, a ballot of affected members was held on 28 February 2020. This involved around 1,500 staff across Scotland, up to the level of Area Commander. The union again recommended the rejection of the pay deal and this is the way the members voted, by around 60% to 40%. The role of Firefighter was therefore not expanded as the respondent wished.

Call out on 14 February 2020

22. In the early hours of 14 February 2020 the claimant was on duty and shortly before 3am he attended an emergency call out as part of a four-person crew. An individual with impaired mobility was trapped in the toilet of his home. The fire engine, or appliance, in which they were travelling, was re-routed from the original address to an alternate address so that a set of keys to the first address could be picked up from the caller's cousin. The Crew Commander leading the crew was instructed by the Operational Support Centre to turn off their emergency blue light in making the detour. They picked up the keys, travelled to the caller's home and assisted him, helping him into his wheelchair. He had not been trapped, but was unable to get up.

23. The claimant and other members of his crew were frustrated at being called out over the incident. They believed it had not been a genuine emergency and the caller was known from having made similar calls in the past. The claimant perceived the demeanour of the caller and his cousin to indicate that they were trivialising the status of his role and recognising that they were wasting the Firefighters' time.

24. Against the background of the approaching pay and conditions ballot there was discussion among the crew about whether this type of incident was within the scope of Firefighters, and whether there might be more call outs of a similar nature if the role was expanded. A secondary concern they had was that they were attending the incident at least partly under 'blue-light' conditions when in their view they should not have been, as it was not a true emergency. This it was felt could have created an issue had there been a public safety issue on the way such as a road traffic accident.

WhatsApp and twitter posts, newspaper article

25. The claimant's shift finished around 9am and very shortly after he posted a message in a closed WhatsApp group made up of six people, including himself, all of whom were employees of the respondent. The message was reproduced in full [95]. It described the events of the call out and in the process

referred to the caller in degrading terms and using a number of profanities. The message began with the words *"For yous that are still in-between a yes and a no vote"* before going on to describe the incident. It ended by saying *"Just to recap we got turned out under blue lights to an address then for control to come over and tell us to head to another address to pick a set of keys up to let us into the first address never heard anything like this before it's an absolute disgrace [angry face emoji] no emergency what so ever."*

26. According to the claimant this was typical language that he would use verbally among his colleagues on a day to day basis, and they would not be offended by it. He did however admit that he only used that language in his post because his audience was limited to five work colleagues, and that it would not be acceptable in other circumstances. He accepted in evidence that if made public, it could damage the trust of the public in the respondent.

27. The claimant's WhatsApp message ('the **post**') was circulated more widely by at least one other person in the group, whose identity or identities could not later be established. The claimant himself did not send it to anyone else. The post was copied to other WhatsApp groups made up of employees of the respondent, both at the Pollok station and in other stations in the West of Scotland. Some included more senior employees of the respondent. By 10am that day the content of the post was widely known about.

28. One of the claimant's fellow crew members at the call out on 14 February 2020 was Trainee Firefighter Lamb. He posted a message on a different WhatsApp group shortly after the claimant's post and after seeing it. The text was also produced, referred to as 'Text Message Number 2' [107]. It also contained a description of the incident, referred to as a *'social care call'*. Again the caller was referred to pejoratively and using swear words. The message ended *'Think this has confirmed for me how I'm voting in the ballot…'*

29. Within days of the claimant's and Mr Lamb's posts, a separate post was put on the twitter platform by an anonymous account. This contained a copy of the incident report relating to the claimant's call out on 14 February 2020. It showed details of the address of the caller, although not their name, and

information about the timing and nature of the call. Some of the details were obscured. Sometime shortly afterwards the tweet was deleted. It was later established that the incident report had been photographed and posted to a WhatsApp group of employees of the respondent by Crew Commander Christine Anderson on 14 February 2020, most likely in response to her seeing the claimant's and/or Firefighter Lamb's WhatsApp posts. However, it could not be ascertained whether she or someone else had posted it using the twitter account. Ms Anderson received a disciplinary sanction including demotion for her actions but was not dismissed. That sanction was decided on around two months after the claimant's dismissal.

30. The respondent's Chief Officer Martin Blunden attended a meeting in connection with the pay and conditions negotiations at Newbridge, Edinburgh around 24 January 2020. It was attended by a number of Firefighters and union representatives. He was reported to have made a comment about the amount of time Firefighters spent in bed (a reference to their taking permitted daily rest breaks during shifts). It was apparently taken by staff to be an unfair criticism of their work levels and commitment. This was reported in an article by the Sun on 25 January 2020. A copy of the article taken from the Sun website was produced [183].

Initial fact-finding investigation

31. On 15 February 2020 the claimant's Station Commander Craig Carenduff was asked by his Area Commander, Roddie Keith to investigate the origins of the post, which by then had been widely circulated among employees, and the incident which had prompted it.

32. Mr Carenduff ascertained that it was someone on the claimant’s crew who had created the post and interviewed him along with other employees at the station. Each interviewee was advised not to make a formal admission of creating or sending the post at that stage, in case a more formal procedure was to follow. They were reminded of the need to abide by the respondent's Code, Policy and values. They were also warned that social media posting may involve a breach of individuals' data protection rights.

33. Mr Carenduff prepared a 'briefing report' covering his actions and findings, dated 20 February 2020 [101-103].

Disciplinary investigation

34. Group Commander Gibby Lamont was appointed to investigate the claimant's conduct on and around 14 February 2020. He was based at a different station and did not know the claimant. He was at a grade above those subject to the negotiations over pay and expansion of the role, and did not vote in the ballots.

35. The claimant was interviewed by Mr Lamont on 30 April 2020 about the incident on 14 February and his WhatsApp message. He was joined by a union representative, John Malcolm. Another Station Commander, Eddie Kenna, attended. A note of the interview was produced and not challenged [97-100]. It is accepted as an accurate summary of the discussion.

36. The claimant confirmed that he was aware of the Code, the Policy and the respondent's values. He gave an account of the call out on 14 February and how he felt about it. He said her was *'stressful shocked and angry'*. He admitted he had added the post to the closed group. He said he had done so to vent his anger to his close friends. He initially said that he did not have the pay proposal in mind, or attempt to influence people's voting intentions, but when directed to the wording of the post agreed that he had tried to influence people. He apologised for the post.

37. Mr Lamont did not deny that the claimant had a right to discuss the pay ballot with work colleagues, or to try to persuade them to vote in a certain way if he wished to. However, he took from the claimant's change of position on the matter when asked that his honesty and integrity were in question. Mr Lamont accepted that in retrospect, the call out on 14 February 2020 was not an emergency, but said that this may not have been appreciated when the initial call came through. He also accepted, whilst finding that the language used by the claimant in the post was inappropriate, that the claimant and the rest of his crew had acted professionally during the call out itself.

38. Mr Lamont set out his findings in a report [46-57]. This had various sections titled 'Background', 'Scope of Investigation', 'Method of Investigation', 'Findings', 'Conclusions' and 'Recommendations'. It referenced a number of documents as appendices. Those included correspondence, notes of his interviews with witnesses and the note which Mr Carenduff made covering his initial fact-finding exercise.

39. As well as interviewing the claimant, Mr Lamont met with the following, which meetings were noted:

    39.1 Firefighter Alan Duffy;

    39.2 Firefighter Craig Lamb;

    39.3 Station Commander Carenduff;

    39.4 Watch Commander David Tonner;

    39.5 Watch Commander Steven Young;

    39.6 TSC Chris Casey; and

    39.7 TSC Andrew Craig.

40. Mr Lamont decided not to interview any of the members of the closed WhatsApp group. He therefore took no steps to try to ascertain who had shared the claimant's post. He did so because he felt it would serve no useful purpose after the post had been so widely shared, and after the claimant admitted to being its author. Further investigation would be impractical and potentially limitless. He understood that some action may have been taken against some of the staff who shared the post and could be identified as such, but was not sure.

41. Mr Lamont made the following findings in his report:

    41.1 The post was created and distributed with the intent to influence the outcome of the Scotland-wide pay and conditions ballot which was to take place a short time after; and

41.2 The content, tone and context of the post demonstrated that the claimant may not have upheld the values of Respect and Teamwork as those are set out in the Code, was in breach of the Policy and separately breached the respondent's Dignity and Integrity at Work Policy (which was not produced to the Tribunal).

42. Mr Lamont recommended that formal proceedings be commenced in the form of a disciplinary hearing. He also recommended that the use of WhatsApp groups for discussion of work matters be discontinued at the Pollok station, and staff be reminded of the terms of the various policies potentially transgressed.

43. Mr Lamont was asked to undertake a similar investigation into Mr Lamb's post and did so. He prepared a report which in evidence he confirmed contained similar conclusions to those he had reached regarding the claimant. The report was not produced. He was not involved in any further process relating to Mr Lamb. He was not asked to attend any disciplinary hearing.

44. The claimant's training records were also appended to the report. They showed a number of modules had been completed on 16 March 2020 and five were awaiting completion.

Disciplinary hearing

45. Area Commander Roddie Keith had been provisionally identified to chair a disciplinary hearing to deal with the matter, dependant on the outcome of Mr Lamont's investigation. On reading Mr Lamont's report he decided that a hearing was appropriate. It was he who had asked Mr Lamont to conduct the investigation. He would have done so irrespective of whether there had been negotiations over pay and conditions going on at the time, based on the content of the post and the extent of its circulation.

46. Mr Keith had had no previous involvement with the claimant.

47. By letter of 11 June 2020 [110-111] the claimant was invited to attend a disciplinary hearing on 25 June 2020. It enclosed the investigation report of

Mr Lamont with appendices. The allegations to be considered were said to be:

- *'That you posted inappropriate comments about an operational incident on social media;*
- *That in doing so you showed disrespect to a vulnerable member of the public; and*
- *That your actions may have brought the Scottish Fire and Rescue Service into disrepute.*'

48. It was stated that the claimant's conduct was potentially:

- *'A breach of the SFRS Code of Conduct;*
- *A breach of SFRS Values (Respect/Teamwork);*
- *A breach of SFRS Social Media Policy; and*
- *A breach of SFRS Dignity and Integrity at Work Policy'.*

49. It was spelled out that the claimant may be found to have committed an act of gross misconduct, and that his dismissal might result from that.

50. The claimant emailed Mr Keith on 22 June 2020 to confirm he would be able to attend the hearing. On the day of the hearing he was accompanied by a union representative, Mr Alex Muir. An HR officer was also present, and a note taker. The meeting took place in person. A copy of the minutes of the meeting were prepared in printed form and are accepted as a suitably accurate summary of the discussion [113-121].

51. The meeting began at 9.30am. The claimant had finished a night shift shortly before. He did not request a rescheduling of the meeting or say that his ability to participate was impaired.

52. Mr Muir presented three character reference documents on the morning of the hearing. Mr Keith allowed them to be considered as part of the evidence.

Two were from Watch Commanders. One of them was from multiple individuals who had worked with the claimant, or knew him in a work capacity, or in relation to extracurricular activity such as football. The documents, although not produced to the tribunal, were accepted to be supportive of his character.

53. Mr Lamont presented the findings he had made in his investigation.

54. Mr Keith had prepared a set of questions for the claimant which are covered in the minutes under the heading 'Questions and Points of Clarity' [118-119]. The claimant confirmed that he had sent the post, but only to the friends in the closed group. He said he did not share it anywhere else, and did not know who had. Mr Keith accepted these answers to be correct. He explained that he had sent the post out of frustration, calling to mind previous similar incidents including some with the same caller, or another where he had to wait four hours with a caller for an ambulance to arrive, or another where a colleague was assaulted. The claimant said that the crew had behaved professionally towards the caller on 14 February, which Mr Keith also accepted to be true. He mentioned the caller's cousin referring to 'getting the fire service out again' in a jocular way. Mr Keith asked the claimant if he would now give a different answer to the question whether he had abided by the respondent's values. He had said in the investigation that he believed he had. The claimant did not say yes or no explicitly, but said that due to nerves he *'just said yes'* at that time.

55. Mr Muir made some additional representations on the claimant's behalf. He expressed concern at it taking around four months to reach a disciplinary hearing, emphasising the stress this caused the claimant. He asked for it to be noted that the claimant had finished a shift that morning at 8am, and was scheduled to begin his next shift at 6pm that evening. He did not say what Mr Keith should make of that, or ask for any arrangements to accommodate the claimant. Mr Keith took the comment to be for the purpose of ensuring that the meeting was concluded in time to allow the claimant to prepare for his next shift.

56. Mr Muir commented that views posted on social media could often be misconstrued or taken out of context, and that that the greater damage had been caused by whoever shared the claimant's post rather than the claimant himself. He asked for the claimant's evidence as to why he was frustrated to be taken into account, and expressed his thanks for Mr Lamont's sympathetic approach during the investigation. He said that the claimant was under no illusion about the seriousness of his actions.

57. The claimant read out a prepared statement. His case was based on mitigatory factors and seeking a less severe sanction, as he had admitted to creating the post. He said that:

    57.1 He was very remorseful and apologetic;

    57.2 He acknowledged that he had failed to meet the required standards;

    57.3 He sent the post only to trusted friends and never intended it to be shared outside of that group;

    57.4 He took full responsibility for his actions; and

    57.5 He would never act similarly again.

58. At the end of the meeting Mr Keith adjourned in order to try to reach a decision. He did so alone. He considered the contents of the investigation as well as the submissions of the claimant and Mr Muir in the hearing.

59. Mr Keith arrived at the view that the correct sanction was either a final written warning, to last 18 months, or dismissal. He ultimately decided that allowing the claimant to remain in the respondent's service was not appropriate because the content of the claimant's post was so vile and shocking, the breaches of various standards of conduct were so serious and the ongoing reputational risk to the respondent of the post being spread further, and in particular the degree of reputational damage if it were made public, were so great. He believed that the combination of the derogatory language used about the caller, and the presence of other identifying details, could have allowed the individual to be recognised with serious consequences for public

trust. He considered that allowing the claimant to return to his role would send out a *'difficult'* message about what standards of conduct were acceptable. He believed that there was still a risk of the post becoming public. His decision therefore was that the claimant should be dismissed.

5 60. Approximately two hours later he resumed the meeting and confirmed his decision verbally to the claimant, namely to dismiss him with immediate effect for gross misconduct. Mr Keith explained the matters he had considered and conclusions he reached, which are recorded in the minutes [119-121]. In summary:

10 60.1 He found the language used by the claimant vile, shocking and derogatory towards a vulnerable member of the community;

60.2 The role of a Firefighter involves helping and protecting the community;

60.3 In mitigation, it was noted that the claimant admitted creating the post;

60.4 However, Mr Keith did not accept that the post was intended only for

15 the members of the group where the post was initially added. He believed it was intended to reach a wider audience and in doing so influence them in the way they voted in the pay ballot;

60.5 The post may have already brought the respondent into disrepute, and continued to pose that risk through still being in circulation;

20 60.6 The claimant had breached the Code in relation to the values of respect and leadership as they are defined;

60.7 He had also breached some of the respondent's other values, particularly in relation to teamwork;

60.8 He had breached section 5 of the Policy;

25 60.9 He had breached the Dignity and Integrity at Work policy by failing to ensure that his personal conduct was professional, compliant with the Code and his own job description; and

60.10 The relationship of trust and confidence between the claimant and the respondent had been destroyed.

61. Mr Muir thanked Mr Keith for the fair and open manner in which the process had been conducted. It is noted that the claimant disputed in evidence that Mr Muir had said that. However, there is no sufficient reason to believe that the note taker or another person added something as clear to the minutes if it had not been said. Mr Keith did believe that Mr Muir made the comment. The claimant admitted being upset at the end of the meeting and may simply not recall what Mr Muir said. He agreed in his evidence that he had the opportunity to raise any issues with the disciplinary hearing minutes in his appeal, but did not do so. Mr Muir could not recall saying anything beyond an expression of thanks in a general way. In his evidence he said that it was not an important enough matter to try to correct at the appeal stage.

62. The decision was confirmed by letter dated 30 June 2020 [122-124]. The claimant's option to appeal was explained.

63. There was a dispute between the claimant's and Mr Lamont's evidence as to what happened during the adjournment in the disciplinary hearing. Both were asked to leave the hearing room, as was Mr Muir the union representative. The claimant stated that Mr Lamont approached him to say that the hearing was going worse than he anticipated, and he was sorry. Mr Lamont denies saying that, and said that he briefly offered the claimant some support by way of more general comments as he could see he was upset.

64. There may not be a great deal of difference between the parties' evidence on this point, and it may simply be a matter of interpretation of Mr Lamont's remarks. It is found that Mr Lamont did make some consolatory comments which he intended to be supportive, in recognition of the process being a difficult one for the claimant. Beyond that no finding is made, and there was no suggestion that Mr Lamont was other than impartial in carrying out the investigation itself, or was aware of Mr Keith's decision before it was delivered to the claimant. The conversation had no bearing on the fairness of the respondent's overall process.

65. Mr Keith did not believe that the claimant had a legitimate complaint to make about the subject matter of the call out on 14 February 2020. That is, he considered that it was already within the scope of the claimant's role (and those of his crew) and not a new type of task which was part of the expanded set of duties being negotiated. He also considered that if the claimant were aggrieved about a call out, he should have raised this with the respondent's Operational Assistance team who deal with such concerns.

66. Mr Keith formed the belief that the claimant's post was intended to influence the way his colleagues voted in the upcoming ballot. He did not take issue with that in itself and it was not part of the reason why he found that the claimant had committed an act of gross misconduct or should be dismissed. He accepted that the claimant was entitled to vent his frustrations about his job with his colleagues, but by writing the post in the terms that he did he relinquished control of where it ended up. He also conceded that WhatsApp was not as public a platform as twitter, but believed the claimant had intended his post to be copied and pasted elsewhere, which was easily done.

67. Mr Keith also chaired a disciplinary hearing to consider the conduct of Trainee Firefighter Lamb who had sent a post of his own about the same incident [107]. He was given a final written warning and a punishment transfer. Although his message was also derogatory, he considered it did not reach the same level of profanity as the claimant's post, or denigrate the caller personally to the same degree. It also contained less information about the incident, such as its location. Mr Lamb was recognised as less experienced than the claimant also, and considered to be more open to influence. He had read the claimant's post before writing his own.

68. Mr Keith accepted that no action was being taken to investigate whoever had circulated the claimant's post beyond the initial group. The post had appeared on at least three other WhatsApp groups and he considered that there would be practical challenges in investigating the wider picture. He considered that authoring the message was more serious than sharing it among colleagues.

Appeal

69. The claimant appealed against the decision to dismiss him by letter dated 4 July 2020 [125]. He said that this was *'on the ground of severity of sentence.'*

70. The appeal was acknowledged by HR and the claimant was then invited to an appeal hearing on 24 August 2020.

71. The appeal was heard by a panel of three people from the respondent's board. They were Ms Anne Buchanan, the chair, Mr Malcolm Payton and Mr Bill McQueen. Ms Buchanan's background was in nursing. She had been a registered general nurse and had become a director of NHS Fife before retiring. Members of the respondent's board also sit on its Staff Governance Committee and it was common for them to sit in employee appeals.

72. The claimant was represented by Mr John Malcolm of the union. Mr Keith attended and addressed the panel on the disciplinary process he had followed and his rationale for dismissing the claimant. A note was taken of the meeting and is accepted as a reasonably accurate summary [128-137].

73. The only new witness evidence came from Mr James Tonner who attended in person. He spoke in support of the claimant's character, and also referred to incidents where he believed it was not appropriate to call out Firefighters. The panel did not find his evidence to be particularly relevant.

74. The claimant provided eight further character references, including one from the charitable trust of a football club and others on behalf of multiple Firefighters. Ms Buchanan could not recall in evidence how many character references were considered by the panel in total, but they did look at all the material they were provided with.

75. Once all parties had addressed the panel it adjourned to consider its decision. Around 45 minutes later the panel returned and Ms Buchanan confirmed that they had decided that the decision to dismiss was appropriate. They did not think the claimant's mitigating circumstances were sufficient to exonerate him in the act of making *'very pejorative'* comments about a vulnerable and

disabled member of the public, which went against the respondent's core values. They accepted that he was genuinely remorseful, but felt that it did not detract from the language he had used and the risk of the message being spread further. They took the view that as soon as the claimant added his post to the WhatsApp group, he lost control of what happened to it afterwards. They recognised his reasons for venting frustration among colleagues, but saw that putting the complaint down in writing was a different matter. They recognised the effect of the dismissal on the claimant's career, but still believed that the nature of the message warranted that outcome. The claimant's appeal was therefore rejected. The panel's decision was unanimous.

76. A letter confirming the appeal panel's decision was sent to the claimant on 27 August 2020 [139]. This concluded the respondent's disciplinary process.

77. Evidence was heard from Mr Alex Muir, who assisted the claimant in relation to the disciplinary process. He had been an operational Firefighter for nearly 43 years but is now a representative of the union within the respondent, covering the West of Scotland.

78. Mr Muir confirmed that the ballot was being widely discussed in January and February 2020, both in work and outside of it. Both Mr Carenduff and Mr Keith notified him that the matter of the WhatsApp messages was being investigated, although they did not give him details initially. He confirmed that the claimant was emotional and distressed by the end of the disciplinary hearing. Mr Muir was hopeful that a lesser sanction than dismissal would be imposed. He had highlighted to Mr Keith before the hearing that there was a range of possible sanctions short of dismissal open to him.

79. Mr Muir also accompanied Mr Lamb to his disciplinary hearing. He was not involved in any process involving Ms Anderson. He was not at the meeting attended by Mr Blunden which was the subject of a press report. He had heard it was a tense meeting and voices were raised at it.

THE PARTIES' SUBMISSIONS

80. Both parties provided full written submissions which they addressed orally in the hearing. Those are not reproduced or summarised in detail, but the parties' arguments are referred to below in dealing with the identified issues
5 in the claim.

DISCUSSION AND CONCLUSIONS

The reason for the claimant's dismissal – was it automatically unfair or potentially fair?

80. The respondent argues that the claimant was dismissed by reason of conduct,
10 under section 98(2)(b) ERA. This was said to be the sole reason for his dismissal. The respondent argues that he was not performing activities which fell within the scope of section 152(1)(b) TULR(C)A by creating and sending the post which led to his dismissal.

81. More specifically, the respondent submitted the following:

15 81.1. The claimant was a member of the union, but had no additional status to that;

81.2. Influencing a ballot is not a trade union activity, and in any event the claimant did not realistically influence the overall outcome, given the scale of the exercise;

20 81.3. The claimant was acting in a personal capacity and in the manner of 'a campaign of his own without any reference to the union' as the term was used in ***Hall-Raleigh v Ministry of Defence EAT3/79*** rather than with the authority or even the knowledge of the union;

81.4. He was, in any event, acting maliciously or unreasonably so that any
25 protection he was entitled to should be removed, in line with the EAT judgment in ***Lyon and another v St James Press Ltd 1976 ICR 413.*** Whatever union-related activity he may have been carrying out, there was no good reason to phrase his message in the way that he did;

81.5. He was personally unsure whether or not his post was intended to influence people's voting intentions in the ballot;

81.6. Other employees in their own way were trying to influence their colleagues' voting intentions, but were not disciplined;

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81.7. Mr Keith's evidence was clear that the ballot was not a factor in his decision, and all that mattered to him was the content of the post and the claimant's intention that it be shared among his colleagues.

82. The claimant argues both that he was undertaking such activity, by trying to influence his colleagues' voting intentions, and that this was the sole or principal reason for the respondent deciding to dismiss him.

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83. In particular, he puts forward that:

83.1. Contrary to the finding made, the claimant's conduct did not fall within the scope of the social media policy – because WhatsApp was not a form of social media as defined - and this pointed to an ulterior motive for dismissal. WhatsApp was not a potentially public forum like twitter or Facebook and Mr Keith was erroneous in the basis of his belief why WhatsApp was different from, say, SMS text messaging;

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83.2. This led to Mr Keith forming an unsustainable belief that the message was intended to travel further than the original group;

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83.3. Some of the questions Mr Lamont asked the claimant pointed to a real concern about the claimant's intent to influence colleagues. Had this not been a relevant consideration for the respondent there would not have been such questions, or recorded findings in relation to the issue. Similarly Mr Keith would not have needed to make a finding that the claimant intended to influence his colleagues' voting intentions if it had not been important;

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83.4. In a similar vein, Mr Lamont's finding that the claimant had not been candid on certain matters, and Mr Keith's ready acceptance of the

investigation report supported the idea that comments on the ballot, and their potential consequences, were the true focus of the process;

83.5. The finding that the claimant's post was capable of bringing the respondent into disrepute when the caller could not be identified from it suggested an excessive approach;

83.6. The respondent did not properly or fairly judge his conduct against the standards allegedly breached; and

83.7. Any further failures on the respondent's part as set out in paragraph 38(f) to (r) of the particulars of claim.

84. The claimant submitted that the question of whether an employee's actions come sufficiently close to the relationship between employer, employee and trade union so as to gain the protection of section 152 is a question of fact and degree, as per ***Luce v London Borough of Bexley [1990] IRLR 422***. He also made reference to ***Collier Industrial Waste Ltd v Logan EAT/415/95*** to illustrate that an employee need not be a trade union official, or even a member, to be protected. That was a case where the original tribunal made a factual assessment, per ***Luce***, and the EAT did not see fit to interfere with it.

85. It was raised that the sharing of information which is confidential, or obtained by irregular means, may still be protected. As recognised in ***Morris v Metrolink Ratpdev [2018] IRLR 853*** the nature of industrial relations is such that irregular methods of obtaining or sharing information will sometimes be used, and the value of the statutory protection should not be removed too readily if that is the case. By extension, it should only be in limited cases where, for example, the activities were carried out dishonestly or in bad faith, that the protection should be removed - ***Bass Taverns Ltd v Burgess [1995] IRLR 596***. The offensive wording of the claimant's message was substantially true and did not detract from its purpose.

86. It was further argued that the timing of the activity relied on did not prevent it from being protected. The post was sent after the claimant's shift ended and so was outside of working time.

Was the claimant taking part in trade union activities

87. It is proposed to deal first with the question of whether the claimant *'had taken part…in the activities of an independent trade union at an appropriate time.'*

88. It is recognised in the authorities that this is not restricted to the acts of individuals who hold any office or status within the union in question, or even require to be members, although the claimant was. What appears most critical in the authorities is that the act in question relates closely enough to the relationship between union and employer, including any negotiations or other dialogue between them. An employee acting in that context may be protected even if they do so in no official capacity.

89. What is clear in this case is that by early 2020 negotiations had been going for some six months between the union and the respondent over changes to the role of Firefighter. A ballot among members had been held, which rejected the proposal as the union had recommended. The matter was one of significant importance on both sides and occupied much time and involved a great deal of dialogue among employees, in and out of work. It was a hot topic and clearly to some an emotive one. At the time the claimant issued his post it was known that a further ballot was shortly to take place in connection with an improved pay offer. It was telling that within an hour of the claimant sending his post to five friends, it was known by many more colleagues of different ranks across the West of Scotland.

90. The claimant's message was clearly on the face of it sent with a view to influencing his colleagues, at least within the group where it was posted. It was related to the negotiations over pay and conditions, which are fundamental rights and functions of a recognised trade union. The wording of the post was crude and disrespectful to a member of the public, but it was not misleading or disingenuous in what it narrated. It described an incident which

the claimant was frustrated at the prospect of there being more of, were the respondent's proposal to be accepted. It was relevant to the debate that was being held about whether the deal should be approved. There is no identifiable rule in the legislation or the authorities to say that activity which would otherwise fall within the scope of section 152(1)(b) should be excluded because it is too small in scale – i.e. that the intended or actual degree of influence is too small. Therefore, even if the claimant had only intended to influence five other people, the nature of his activity, which is relevant, is the same.

91. It is therefore found that the claimant was undertaking activities of a type protected under section 152(1)(b) by sending the WhatsApp post of 14 February 2020.

Were the activities the sole or principal reason for dismissal

92. However, and again considering the evidence, it is found that this was not the sole or principal reason for his dismissal. In particular it was noted that Mr Keith was adamant in his evidence that the claimant had every right to try to influence his colleagues' voting intentions, that others were doing similar in a variety of ways, and that this had no bearing whatsoever on the reason for him deciding to dismiss. That evidence in itself is not conclusive on the point, but it must be recognised and it goes some way to determine what the true or main reason for dismissal was.

93. Mr Keith's evidence was that the only way in which the claimant's intent behind the post, as opposed to its content, was relevant was in establishing how wide an audience the clamant envisaged the post would have. Mr Keith concluded that by effectively bookending his account of the call out with language which referenced the upcoming ballot, the claimant thought it would reach a wider audience. His belief was genuine. The claimant of course denied that this was what he intended, but it is what is in the mind of the respondent which must be considered in this context, and in that way Mr Keith's evidence is accepted on this point.

94. As recorded above, Mr Keith considered the claimant's conduct so serious because it represented to him an egregious breach of standards which carried an ongoing risk of damage to the respondent's reputation with the public. That was all to do with the wording of the account of the call out and not it being tied in to the negotiations over pay and conditions.

95. The wider evidential context of Mr Keith's evidence was also considered. The ballot took place across Scotland, involving some 1,500 union members. The outcome was clear cut and known by the time Mr Lamont's investigation began. The claimant could not reasonably have been thought to have influenced the result to the extent of whether the proposal was accepted or rejected. His overall influence was more marginal.

96. Therefore, considering the evidence in this case, the parties' detailed submissions and the authorities referred to, the judgment reached by the tribunal on this aspect of the claim is that:

96.1. the claimant was participating in the activities of an independent trade union at an appropriate time by the issuing of his WhatsApp post, owing to his motive being to influence union member colleagues in relation to a ballot over pay and conditions;

96.2. he therefore was potentially protected by section 152(1)(b) TULR(C)A;

96.3. this was not however the sole or even the principal reason for his dismissal, and therefore he was not automatically unfairly dismissed according to that provision; and

96.4. that the respondent has satisfied the onus on it to prove the reason for dismissal was a potentially fair one in terms of section 98(1) and (2) ERA, namely the claimant's conduct.

General reasonableness of the respondent's process

97. In assessing the overall reasonableness of an employer's actions in such cases ***British Home Stores Ltd v Burchell [1978] IRLR 379*** will apply. That decision requires three things to be established before a conduct dismissal

can be fair. First, the employer must genuinely believe the employee is guilty of misconduct. Secondly, there must be reasonable grounds for holding that belief. Third, the employer must have carried out as much investigation as was reasonable in the circumstances before reaching that belief.

5 ***Burchell part 1 – genuine belief***

98. In relation to the first part of the ***Burchell*** test, Mr Keith gave clear evidence to the effect that it was the claimant's conduct which caused him to make the decision to dismiss. That evidence is accepted. The post, which the claimant to his credit never denied sending, largely speaks for itself in terms of its tone 10 and language. It was a wholly inappropriate way to refer to a vulnerable member of the public, which again to his credit the claimant accepted in retrospect.

99. Mr Keith's account of why he considered it posed a risk to the respondent, and the message which would be sent out more generally by allowing the 15 claimant to return to his duties, was accepted. There were a number of breaches of standards which the respondent set of its employees, including those contained in the Code and the Policy. The claimant was trained on those, was aware of them and accepted that he had breached aspects of each. He did not come to the disciplinary hearing to argue that his conduct 20 was acceptable – his approach was to raise mitigatory circumstances and ask for leniency in the sanction.

100. Similarly, his appeal was based on the severity of the sanction imposed by Mr Keith and not either that he hadn't committed the act under review, or that it was in any way undeserving of disciplinary action.

25 ***Burchell part 2 – reasonable basis for belief***

101. It is next necessary to consider whether the respondent had reasonable grounds for holding the belief that the claimant was guilty of misconduct.

102. Considering the question of whether Ms Keith as dismissing officer had reasonable grounds on which to make a finding of gross misconduct, it is found that there was sufficient evidence to do so.

103. The fact that the claimant committed an act of misconduct of some degree of severity was not in issue, as he agreed that he had at the disciplinary and appeal stages. As discussed above, he admitted to sending the post and, in the process, breaching a number of standards of conduct. He was remorseful and apologetic, and promised he would not act in the same way again. He was prepared to take responsibility for his actions.

104. The only real decision Mr Keith had to make was whether that conduct was serious enough in nature to qualify as gross misconduct. Given the standards set by the respondent and the unnecessary ongoing risk posed by the existence of the post in a number of different places, it was reasonable for him to view it that seriously. The post was extremely disrespectful to a vulnerable individual. If made public, it would be embarrassing to the respondent and could damage the trust of the local community. The posting of related material in the form of the incident report on twitter, a public forum, illustrated how easily that could be done.

Burchell part 3 – reasonable investigation

105. The third limb of ***Burchell*** requires consideration of whether the employer carried out as much investigation as was reasonable in the circumstances in order to reach its genuine belief in the employee's misconduct. That does not require an employer to uncover every stone, but no obviously relevant line of enquiry should be omitted.

106. Considering again the disciplinary allegations raised, the evidence gathered and the claimant's response to them, it is found that the respondent's investigation met the required legal standard. The legal test, as emphasised in ***Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23*** is whether the investigation fell within a band of reasonable approaches, regardless of whether or not the tribunal might have approached any particular aspect

differently. There was no material area of enquiry or witness which the respondent failed to follow up. At the time of the process the claimant did not raise issues with the sufficiency of the investigation. He admitted to the single central act which the investigation was concerned with. The scope of any reasonable investigation was limited as a result, per ***Royal Society for the Protection of Birds v Croucher [1984] IRLR 425,*** to matters such as who he had anticipated would see his post.

107. In submissions the claimant listed actions not taken by the respondent as part of its investigation. Those were:

107.1. Not interviewing the initial recipients of the WhatsApp post;

107.2. Not interviewing another recipient of the message, Crew Manager Chris Kerr;

107.3. Not speaking to other recipients of the post to ascertain who had sent it to them; and

107.4. The fact that Mr Lamont had by his own admission reached decisions without evidence was also a criticism.

108. The above suggested steps were options the respondent could have taken, but consciously did not. The explanation for that, given by Mr Lamont, was that in light of the speed and extent to which the post was shared more widely, it was impractical and of lesser value to investigate extensively. Nevertheless Mr Lamont understood that some action may have been taken against at least some of those sharing the post, although he did not know any details for certain.

109. Despite being options for the respondent, it did not render the investigation of the claimant's conduct unreasonable that they were not taken. It is unclear how pursuing them would have been helpful in clarifying what the claimant did or the consequences of that. The existing investigation covered those issues. Those additional steps may or may not have led to action being taken against other employees (and possibly such action was taken – no conclusive

evidence was led on either side) but that is secondary to the investigation of the claimant's own conduct. Therefore it was not established how the respondent's investigation was rendered unreasonable in the ways suggested.

5 **The band of reasonable responses**

110. In addition to the ***Burchell*** test, a tribunal must be satisfied that dismissal fell within the band of reasonable responses to the conduct in question which is open to an employer in that situation. The concept has been developed through a line of authorities including ***British Leyland UK Ltd v Swift [1981] IRLR 91*** and ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439.***

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111. The principle recognises that in a given disciplinary scenario there may not be a single fair approach, and that provided the employer chooses one of a potentially larger number of fair outcomes that will be lawful even if another employer in similar circumstances would have chosen another fair option which may have had different consequences for the employee. In some cases, a reasonable employer could decide to dismiss while another equally reasonably employer would only issue a final warning, or vice versa.

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112. It is also important that it is the assessment of the employer which must be evaluated. Whether an employment tribunal would have decided on a different outcome is irrelevant to the question of fairness if the employer's own decision falls within the reasonableness range and the requirements of section 98(4) ERA generally. A tribunal must not substitute its own view for the employer's, but rather judge the employer against the above standard. How the employee faced with disciplinary allegations responds to them may also be relevant.

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25 113. Mindful of the above approach which a tribunal must take in dealing with the question of reasonableness, it is found that dismissal of the claimant was within the band of reasonable responses open to the respondent in these circumstances.

114. In particular, it was reasonable on the evidence before him for Mr Keith to conclude that the claimant anticipated his post would be circulated more

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widely than the initial closed group, given the emphasis added to it relating to the ballot and the prominence of that issue among the Scottish workforce at that particular time. It was also reasonable for him to believe that the claimant's conduct breached the respondent's various values in a serious way and that because of the extent to which the post had spread, that it would send the wrong message to colleagues about those values were the claimant permitted to return to his role. It was further reasonable for him to consider that there had been both an irretrievable breakdown in trust in the claimant, and the creation of a material risk of damage to the trust of the public, and that at the time he made his decision that risk was still present. He may reasonably have taken a different view on one or more of those matters, but his conclusions, individually and cumulatively in the form of the decision to dismiss, were reasonably open to him.

115. Therefore, whilst dismissal of the claimant may have fallen closer to the more harsh end of the band of reasonable responses, it did fall within that range on the evidence in this case.

Further submissions and issues raised by the parties

Social media

116. It was part of the claimant's case that WhatsApp did not fall within the definition of social media. A distinction should be drawn, it was said, between it and other forms of communication such as facebook and twitter. Those platforms are essentially public, albeit that restrictions can be placed on the ability of others to view one's content. WhatsApp is a private messaging service and by its nature more restricted. Messages are only sent to individuals or predetermined groups, who tend to be known personally to the sender. A message cannot be made available to the public at large on WhatsApp.

117. Whilst there are differences in degree of accessibility between WhatsApp and other communication media, any distinction in principle had no real relevance in this particular case. The respondent found that the claimant had breached its social media policy. There was no precise definition of social media in the

policy, nor is there a single definitive definition elsewhere. The policy also referred to 'the internet' and did not read as taking a restricted approach to its application. The more rapidly and widespread an initially restricted message is shared, the more meaningless any distinction becomes. The respondent was entitled to consider the claimant's use of WhatsApp to be an example of social media. If it fell outside of any narrow definition then it was so adjacent to the term that the clarity of the policy should still have served as a warning to the claimant about the respondent's position on written statements, whether made in print or electronically. The policy made clear, for example, that employees could come under scrutiny for things they created outside of work as well as in the course of their work. It emphasised the particular reputation the respondent had and, by extension, which its employees should not damage.

118. In any event, as the claimant was dismissed for a set of lapses in standards, only one of which was a breach of the social media policy. Even if a finding had been made that the policy did not apply to this particular act, adequate grounds overall were established to justify dismissal.

Consistency of treatment

119. The issue of consistency of treatment was raised in submissions, although only by the respondent. A dismissal which on the face of it may appear fair can be rendered unfair by being inconsistent with comparable treatment by the employer of its other employees. However, employment tribunals are restricted to the extent they can compare different scenarios in order to conclude that an employer acted inconsistently to the detriment of a particular claimant.

120. The EAT decision in ***Hadjioannou v Coral Casinos Ltd [1981] IRLR 352*** confirms that an inconsistency argument can only be well founded if one or more of the following apply:

120.1. The employer has treated conduct similar to that which the current employee is accused of more leniently in the past, thus creating an expectation of how it will be dealt with in later cases;

120.2. Previous treatment of similar conduct goes so far as to suggest that conduct is not the real reason for dismissal in the current case; and/or

120.3. Employees in 'truly parallel' circumstances are treated differently.

121. The three possible comparison cases were those of Mr Lamb, Ms Anderson and Mr Blunden.

122. Taking Mr Lamb first, his circumstances were clearly similar to those of the claimant. He was part of the same crew as the claimant on 14 February 2020, and also issued a WhatsApp message in similar terms about the incident which was then more widely circulated. He was subject to a final written warning and a punishment transfer. His case could not fall within either of the first two categories in ***Hadjioannou*** as the events occurred at the same time and did not inform the claimant's own behaviour. They could however arguably be considered as truly parallel cases. Mr Keith's analysis of the individuals' respective messages was that Mr Lamb's was not quite so offensive as that of the claimant. This is a very fine distinction to make on a plain reading of them, and not in itself sufficient to distinguish the two cases. However, by virtue of Mr Lamb being a trainee and considered more open to the influence of his more experienced colleagues (including the claimant), and the fact that he sent his message after reading the claimant's, the cases are not 'truly parallel' in the narrow sense envisaged by ***Hadjioannou.***

123. Considering next Ms Anderson, again her circumstances could not fall within the first two types of case in ***Hadjioannou*** for the same chronological reasons. She acted after the claimant and was disciplined after he was. Her circumstances were more different from the claimant's than Mr Lamb's were. She committed a data breach as a result of photographing the incident report and sharing it among colleagues. She was not found to have uploaded the report to twitter, and there was a lack of clarity in the evidence as to exactly how much of the report was uploaded and to what degree it was redacted. The report in itself as a document is different in nature to the claimant's post giving an account of the same incident. Ms Anderson was demoted. On the

incomplete evidence available to the tribunal this could not be said to be a truly parallel case.

124. Finally Mr Blunden should be considered. His circumstances are even less similar to those of the claimant. Even though the meeting Mr Blunden attended took place some three weeks before the claimant's post, the two events are not similar and the claimant did not in any event give any evidence to suggest that his perception of the respondent's standards was influenced by whatever Mr Blunden may have said at the reported meeting. Clearly on the evidence available (essentially a tabloid newspaper article since none of the witnesses had attended the meeting) the cases are not truly parallel either.

125. Therefore it is found that there is no evidence of the claimant being treated inconsistently as compared to colleagues in relevant circumstances.

The claimant’s Convention right to freedom of expression

126. The claimant suggests that his right to freedom of expression under Article 10 of the European Convention on Human Rights and Fundamental Freedoms may be infringed if his dismissal is not found to be unfair. The Convention was incorporated into UK domestic law by the Human Rights Act 1998 ('HRA').

127. It appears clear that the respondent is a public authority as the term is used within section 6(3)(b) HRA. It performs functions of a public nature. That question is one of fact and degree, as the body of case authorities illustrates, but the nature of the respondent’s purpose and functions, and the way it is state-funded, appears to make the situation clear.

128. The employment tribunal itself is expressly stated to be a public authority – section 6(3)(a) HRA. As such, the tribunal is bound by section 3 HRA to read primary (and subordinate) legislation and give it effect in a way compatible with Convention rights, as far as it is possible to do so. That could include the ERA.

129. The way in which an employment tribunal should consider any effect Article 10 has on a claimant's dismissal was set out by the EAT in ***Hill v Great Tey Primary School Governors [2013] ICR 691***. In ***Hill*** the employee was dismissed for making critical comments about her employer publicly. She

complained first about the treatment of a child, and then also about the fact that she was suspended for raising it with the child's parents.

130. In that case as in this, the employee in question argued that their dismissal by reason of exercising their right to freedom of expression was unfair.

5 131. At paragraph 45 of the judgment Mr Justice Langstaff set out the approach to take, paraphrased as follows:

131.1. Ask whether what happened could fall within the ambit of freedom of expression. If so, hold that the [public authority employer] would be bound to respect the exercise of that right, unless it could be qualified 10 under Article 10(2);

131.2. Therefore the tribunal must identify from the specific circumstances listed in Article 10(2) whether there was an aim which the restriction on free speech sought to serve;

131.3. Then the tribunal must satisfy itself that the restriction or penalty 15 imposed in light of that aim was prescribed by law, whether statutory or common law;

131.4. If so, consider if the restriction or penalty was 'necessary in a democratic society'. This will involve looking at whether the measure concerned was appropriate to the legitimate aim to which it was said 20 to relate, and that the extent of the interference which it brought to the exercise of the right was no more than proportionate to the importance of the particular aim it sought to serve.

132. Considering the facts of the case as found above, it is noted that the claimant was dismissed for a number of lapses in the standards the respondent set for 25 people in his role. The essence of those lapses was the language he used about a member of the public he had been called to assist. The evidence of the respondent's witnesses, particularly Mr Keith, was that he was completely entitled to complain about his work to colleagues and to seek to influence their voting intentions in relation to proposed changes to the Firefighter role. It was 30 not acceptable however to abuse the trust of the public and his employer in

him by referring to a member of the public in vulnerable circumstances using insulting language.

133. The tribunal's finding therefore is that the act of dismissal did not impinge on the claimant's right to freedom of expression. His right to hold opinions was not interfered with and nor was his ability to share information and ideas. He was free to do those things without breaching the respondent's standards. Therefore, the analysis required as laid out in Hill was not applicable and the issue of the claimant's Convention rights does not have a bearing on the fairness of his dismissal.

134. If this is not correct, and the claimant's dismissal did in some way infringe his rights under Article 10(1), then per ***Hill*** it would be necessary to assess whether Article 10(2) applied so as to justify that. There are two ways in which it could, as follows:

    134.1. the protection of the reputation or the rights of others – namely protection of the respondent's reputation with the general public and the protection of the individual caller's right to respect for private and family life under Article 8; and

    134.2. preventing the disclosure of information received in confidence, namely the circumstances of the call out and in particular the claimant's health.

135. The penalty of discipline was imposed by law, namely the contract of employment between the parties which incorporated the standards of behaviour which the claimant was found to have breached and the disciplinary rules and procedures which sat alongside them as a corrective measure or deterrent. As confirmed in Hill, that would be a legitimate basis.

136. It would next be necessary to consider whether the restriction was 'necessary in a democratic society'. The extent of the respondent's interference was significant, as it terminated the claimant's employment. However, that must be weighed against the respondent's aim, which is taken to be preserving the trust of the general public, whom Firefighters will necessarily encounter and assist in vulnerable and sensitive circumstances. It is accepted that the duty

not to abuse that trust, including by unnecessarily sharing the details of those encounters and by referring to those individuals by way of crude and disparaging language, is of very high importance. The sanction was therefore appropriate in the claimant's circumstances.

5 137. Accordingly, if it is necessary to consider whether a curtailment of the claimant's rights under Article 10(1) is justified under Article 10(2), by carrying out an assessment as prescribed in ***Hill*** it is decided that such justification was shown. The claimant's dismissal was therefore fair for the reasons explained elsewhere in this judgment.

10 **Conclusions**

138. As a result of the above findings it is not necessary to address further matters such as the respondent's alternative argument that the claimant's dismissal was for some other substantial reason in terms of section 98(1)(b) ERA, or questions in relation contributory conduct, reduction in compensation under
15 the ***Polkey*** principle***,*** mitigation of loss or other aspects or remedy.

139. The claimant will understandably be disappointed that he has not succeeded in his claim. He showed genuine remorse for his isolated act of misconduct, and may not have appreciated fully the seriousness of that act at the time. On the evidence there were no issues generally with his performance,
20 commitment to the role or popularity among his colleagues. The loss of a role he held in high regard caused him an evident amount of anguish. However, the legal tests which a tribunal must apply in a case of this nature are such that despite all of that, the respondent was entitled, even if not bound, to dismiss him in a way which was fair. This is what they decided to do and his
25 claim is therefore unsuccessful and must be dismissed.

Employment Judge: Brian Campbell
Date of Judgment: 04 February 2022
Entered in register: 07 February 2022
30 and copied to parties