EMPLOYMENT TRIBUNALS

Claimant: Mr A R Johnston
Respondent: North Yorkshire Fire and Rescue Service

HELD AT: Leeds **ON:** 4, 5, 6, 7, 8, 12, 13, 14, December 2017. 15 December 2017 and 4 January 2018 (in chambers).

BEFORE: Employment Judge D N Jones
Mr R Stead
Mr J Rhodes

REPRESENTATION:

Claimant: Mr H Trory, counsel
Respondent: Mr A Webster, counsel

JUDGMENT

The Tribunal holds, unanimously:

1. The claimant was unfairly dismissed by the respondent.

2. Had the respondent adopted a fair procedure, the claimant would have been dismissed in any event on the ground that his working relationship with the respondent had irreparably broken down.

3. The respondent shall pay to the claimant compensation of £1,194.70, the basic award. It is not just and equitable to make a compensatory award in the light of our finding that the claimant would have been dismissed in any event.

4. The complaint that the claimant was dismissed on the ground of having made protected disclosures, contrary to section 103A Employment Rights Act 1996 (ERA) is dismissed.

5. The complaints that the claimant had been subjected to detriments by any act or deliberate failure to act by the respondent on the ground that he had made protected disclosures are dismissed.

6. The complaint that the claimant had been dismissed or subjected to detriments because he had a done a protected act, contrary to section 27 of the Equality Act 2010 (EqA), is dismissed.

7. The complaints that the claimant had been subjected to detriments or unfairly dismissed for having alleged that the respondent had infringed the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTW(POLFT)R), are dismissed.

REASONS

Introduction

1. By a claim form presented to the Tribunal on 26 October 2016 the claimant, Mr Andrew Johnston, complained that he had been unfairly dismissed by his former employers the North Yorkshire Fire and Rescue Service, the respondent, that he had been discriminated against, the protected characteristics being race and disability, that he had been subjected to detriments for alleging his employers had breached the PTW(POLFT)R and that he was owed a number of monetary payments.

2. At a preliminary hearing on 4 September 2017 the various claims were identified. They are contained in an annexe to the order, which should be read in conjunction with these reasons. A number of complaints were withdrawn and dismissed. The Tribunal agreed to consider additional particulars of complaint related to unfair dismissal which Mr Trory submitted.

3. At the hearing, the claimant withdrew the complaints that he had been subjected to unlawful detriments as set out in paragraphs 5.17, 5.18, 5.20 of the annexe and that part of the allegation at 5.19 of the annexe that Mr Rushworth had subjected him to the detriment of refusing to consider documentary evidence that the claimant put forward indicating that the managers under investigation had misled the investigators.

Evidence

4. The Tribunal heard evidence from the claimant, from Mr Stephen Rivers, watch manager at Ripon fire station and Mr Steve Howley, the claimant's Fire Brigade Union representative. The Tribunal also had regard to a witness statement submitted by Mr Phil Knight, a retained firefighter. The respondent called evidence from Mr Neil Gillies, watch manager at Harrogate fire station and retained watch manager at Summerbridge fire station, Mr Lee Smith, group manager and formerly Station Manager, Mr Phil Whild, group manager, Mr Dave Pitt, group manager Mr Jez Rushworth, assistant chief fire officer and Mr Andrew Backhouse, councillor for North Yorkshire county council and a member of the North Yorkshire Fire and Rescue Authority. The Tribunal had regard to a significant bundle of documentation running to 2,686 pages.

5. We have anonymised the name of firefighter S because of the circumstances pertaining to his conduct to which he has had no opportunity to respond and which would impact upon his right to respect for private life under article 8 of the European Convention on Human Rights and Fundamental Freedoms.

Background/findings of fact

6. The respondent is the regional authority responsible for the provision of fire and rescue services in North Yorkshire. It operates the retained fire station at Summerbridge. It is serviced by ten firefighters, all of whom are retained, two of whom are crew managers and one of whom is a watch manager. The claimant was one of the retained firefighters and a part-time employee of the respondent. He commenced employment in that capacity on 20 August 2008. In addition, he operates his own business as a health and safety consultant.

7. In January 2011, four of the retained staff from Summerbridge agreed to cover a nearby area, Grassington. One of their number, S, had imbibed excessive alcohol such that he would not have been fit to respond to an emergency call. Another firefighter from Grassington agreed, in the circumstances, to be on call in place of S.

8. S had been subject to a final written warning for having been convicted of driving whilst over the prescribed limit. The claimant believed that S had attended fire calls when adversely affected by drink and was frequently in local public houses when on-call. The claimant raised his concern with watch manager Neil Gillies, that S should be made aware that being drunk on duty could be dangerous. The claimant raised his concern again in February 2011 when S applied for the position of crew manager. S was promoted to temporary crew manager shortly thereafter.

9. On 25 May 2011 the claimant provided first aid training to a group which included S. During the session S made a number of offensive racist remarks. The claimant challenged him but S was offensive and repeated the unacceptable language.

10. The following day, on 26 May 2011, the claimant raised a formal complaint with temporary crew manager Addis. That was escalated to station manager Render through watch manager Gillies. It was dealt with as a disciplinary matter, but this was not known to the claimant. Mr Render had instructed Mr Gillies to inform the claimant that the complaint was being dealt with. The claimant said that Mr Gillies informed the claimant that he was disappointed he had made a formal complaint and the matter should have remained “on the station”. Mr Gillies had no recollection of this.

11. We are not satisfied that Mr Gillies did make this remark. There was no contemporaneous note of it. It is a recollection of an exchange of words which took place over a matter of seconds, many years ago and memory is notoriously unreliable. The alleged remark does not square with Mr Gillies’ decision to ask Mr Render to investigate the matter. He did that because he was on a course the following week, but if had wanted to keep it in house, he could have investigated it himself, a week or so later. The claimant contends that Mr Gillies forwarded the complaint to Mr Render because by that stage the claimant had submitted the

complaint formally and in writing. That does not explain why he could not still have had a quiet word with the claimant to suggest local level and informal resolution.

12. Mr Gillies expressed his own view about this type of behaviour in his evidence. He said it should be absolutely stamped out and there was no place for it in the modern world, let alone in the fire service. Mr Gillies was a straightforward witness. He spoke as he found. He kept a distance, socially, from the crew, since he had been promoted to watch manager. We believed him when he recounted his displeasure and disapproval of racist language and we thought it unlikely he would seek to minimise the issue, as the claimant implied.

13. On 6 September 2011 group manager Whild wrote to the claimant and informed him that a full investigation of the complaint had been undertaken but that he could not divulge the outcome. He said the complaint had now been resolved. S was given a first written warning for his misconduct in using racist language on 8 September 2011, but the claimant was unaware of this or that any disciplinary action had been taken at all.

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14. On 6 April 2011 the claimant wrote to Mr Gillies to complain about a new policy concerning the booking of annual leave. Retained firefighters would have to book such leave in seven day blocks. The claimant believed this was unlawful treatment of part-time workers. The claimant had a meeting with Mr Gillies, who informed the claimant that he was simply implementing the National Conditions of Service from the Grey book. The claimant said that other stations did not operate such a policy. On 19 May 2011, the claimant submitted a formal grievance in respect of the implementation of this policy. Mr Render wrote to the claimant on 1 June 2011 and dismissed the grievance, providing reasons why.

15. The respondent committed itself to a programme of Immediate Emergency Care (IEC), necessitating a series of courses to train firefighters in its operation. Given his background, the claimant was keen to be in the vanguard of such training. He attended the initial IEC training conference in September 2011. In a publication sent to the firefighters called 'Call Out', expressions of interest were invited for those who would wish to become IEC instructors and attend the forthcoming courses. The claimant had not seen this invitation when, on 22 January 2012, he sent an email to Mr Bullamore, the watch manager responsible for the training, to enquire as to any progress on the training. Mr Bullamore replied. He informed the claimant that it had been advertised in the publication and that he should email him if he were interested and enclose his first aid qualifications. The claimant responded on 6 March 2012 to express an interest. By that stage the first two courses had been fully subscribed. The claimant undertook the course the following year.

16. In an email of 6 March 2012, Mr Bullamore had informed the claimant that due to the limited number of places full-time personnel were being chosen first. The claimant draws attention to an email Mr Bullamore sent to a retained firefighter formerly stationed in London, on 4 January 2012, in which he had said that the opportunity was open to all. In an email of 7 March 2012, Mr Bullamore wrote to group manager Stuart Simpson to copy him into the email chain about the claimant. He added, *"Neil Gillies is Andy's WM at Summerbridge and has a concern over Andy's commitment during the drill nights, so if you need to gain any more*

information regarding Andy, as I think he might be in contact with the in the new future, Neil could provide you with a good insight".

17. On 1 April 2013, the claimant drove the fire engine, 'the appliance', from Summerbridge station to an incident at the Drovers Inn, Dallowgill. The claimant had to take directions from Mr Gillies, as he was unaware of the area. Although the claimant believed this was outside the region covered by the retained Summerbridge station, in fact it was, at certain parts of the day, within it. The border changed, dependent upon when the Ripon station were responsible for this area.

18. Mr Oliver Turner, crew manager, issued the claimant with a Personal Development Plan (PDP) on 1 April 2013. It required the claimant to have training on topography to improve his knowledge of this area. In his witness statement, Mr Gillies said he was not responsible for issuing the PDP, but in the interview with Ms Machers he said he would have discussed this with Mr Turner and approved it. A literal interpretation had been placed by Mr Gillies upon the term "issuing".

19. Part of the crew had to return to the Drovers Inn, at Dallowgill, the following day as the coal bunker had relit and required extinguishing. The crew comprised the claimant, temporary crew manager S and a new recruit. They utilised a light portable pump to draw water from a well. A decision was taken not to attach a line to the portable pump hose. A section of the hose fell down the well, when an attempt was made to add an extra section to it. The correct procedure would have been to attach a line and only to detach sections of the pump to extend it when the hose had been removed from the well, because the tension would pull that part of the equipment, by force of gravity, into the well. The claimant had suggested attaching a line but T/CM S disagreed. In evidence, Mr Gillies considers he may not have attached a line, in the circumstances, although that would have been the standard procedure. He regarded the detachment of the section of hose to extend it, whilst the pump was still in the well, as a significant error.

20. On 3 April 2013 Mr Turner issued the claimant with a PDP to receive additional training on standard operating procedures for pumping water from open places. The training was said to take place on drill nights at the station. A second PDP replaced this and required the claimant to attend a course. By email of 3 April 2013, the claimant reported the incident to station manager Smith, copying in Mr Gillies. He acknowledged he had been reminded that his attempt to extend the length of the hose was not in accordance with standard operating procedures and that the decision to issue the PDP regarding pumping from open water was entirely appropriate. He accepted the course of action 'without hesitation', regretting the loss of the equipment. The equipment was subsequently recovered.

21. Photographs of the fire at this public house had been posted on Facebook by the claimant on 2 April 2013. Four complaints were lodged about this by members of the public. On 4 April 2013, an investigation was undertaken by station manager Smith. This was formalised on 11 April 2013. The outcome was a finding that the claimant had breached the respondent's policy in respect of publication of images on the internet. He recommended a disciplinary investigation. The report had been forwarded by Mr Smith to the human resources department on 30 April 2013. The claimant was not then contacted about the matter until 10 June 2013, inviting him to a disciplinary hearing which took place in mid-July.

22. By letter of 10 September 2013 the claimant raised a grievance. He complained that he had not been informed of the identity of the complainants and that he believed his Facebook account had been unlawfully accessed to allow viewing of the photographs, as he believed it was on a privacy setting which restricted access. The grievance was dismissed on 18 October 2013. It was not policy to provide members of staff with the names of complainants and the suggestion that the account had been hacked was rejected. The claimant unsuccessfully appealed the decision on 21 January 2014.

23. The outcome of the disciplinary investigation into the Facebook postings was an informal warning which was administered on 21 January 2014.

24. Between 2 and 8 September 2013 the claimant was off sick with a chest infection. Returning from his doctor's surgery, he noticed that a neighbour's car was on fire on his drive. The neighbour and others were attempting to put the fire out with a bucket of water. The claimant went to assist and prevented them from using water to extinguish the fire as this was hazardous. Upon his return to work the following night, at the drill, there was a discussion about this matter. Mr Gillies said that he had heard the claimant was involved in attempting to extinguish the car fire with water. The claimant explained what had happened. Mr Gillies said that was not what he had heard.

25. On 11 December 2013 station manager Smith received a complaint from a member of the public about a vehicle which was driving behind hers in a dangerous fashion, by tailgating, and flashing its headlights. She said the conditions were poor, in that it was foggy, and the car made a sharp turn into the Summerbridge fire station. She had said the claimant was the driver.

26. Mr Smith commenced an investigation into the complaint on 9 January 2014. The claimant was invited to an interview. He was unable to recall the registration of his vehicle. At a further meeting, the claimant said that he had been visiting a mechanic at New York Mill when he received the alert, requiring him to attend the station, and so the direction of his journey could not have been that of the car which was pursuing the complainant. Mr Smith was sceptical about the claimant's explanation. He concluded that he was the driver and had breached the staff code of conduct because of the manner of his driving which he found was reckless and aggressive. He recommended the case progress to the first formal stage of the disciplinary procedure.

27. In the investigation, Mr Smith had spoken to Mr Gillies about any knowledge he had of the claimant's driving when attending the station. Mr Gillies informed Mr Smith of a complaint that had been made in 2010 in which it had been alleged the claimant had attempted to undertake a dangerous overtaking manoeuvre. Mr Gillies had made a record of it which he described as a 'note for case'. It stated that the claimant had denied having been reckless but was sorry he may have caused concern to another motorist. It also stated that Mr Gillies had informed the claimant that if there were any further complaints made against him about his driving, it may result in disciplinary charges in the future and that a note for case would be recorded to support any future allegation. Mr Smith also had regard to an email recorded by temporary crew manager Addis on 2 May 2011. That recorded that the claimant was

one of three retained firefighters who had arrived at the station 1 May 2011, pursuant to an alert. A police car with a flashing blue light pursued and the officer looked into the claimant's car. Mr Smith asked the claimant about these two notes at the first interview. At the second interview the claimant made it clear he took exception to these matters having been raised.

28. On 16 May 2014 the claimant attended a disciplinary hearing in respect of the driving matter. Station manager Winspear agreed that the records relating to the earlier incidents should be disregarded. Having heard what the claimant said and having read a statement presented from the mechanic at New York Mill, he concluded that there was insufficient information to uphold the complaint. However Mr Winspear had concerns about some of the observations made by the claimant, such as his reference to the Emergency Workers Obstruction Act which the claimant had said would mean the complainant had been at fault, on her own account, for obstructing a vehicle which was attending an emergency. Mr Winspear decided the complaint was not established and so he did not issue a written warning. He requested the claimant to attend a blue light driving course. This was confirmed in a letter dated 20 May 2014.

29. On 22 March 2014 the claimant commenced a period of sick leave which lasted until 6 June 2014. He notified Mr Gillies by email but did not include the reason for his ill-health. The claimant submitted a sick note on 27 March 2014 which stated that he was not fit to pursue fire service activities because of a stress reaction due to fire service occupational issues.

30. On 25 March 2014 Mr Gillies visited the claimant at home whilst he was on sick leave. He had not notified the claimant in advance that he was to attend. His visit was in accordance with the respondent's policies, whereby managers were required to keep in touch with employees who were absent. He also took the opportunity to deliver some mail which had arrived at the station. Mr Gillies spoke briefly with the claimant on his doorstep. He recognised the claimant did not welcome the visit and kept it short. The claimant was very upset that Mr Gillies had attended at his home in this way.

31. On 26 March 2014 the claimant submitted a formal grievance in respect of the disciplinary proceedings which were pending. He complained that the treatment of him by Mr Gillies and Mr Smith had been unfair and was now bullying, harassment and victimisation. He complained about the records relating to earlier driving incidents which had been introduced into the investigation by Mr Smith and stated that the one described as a note for case was not accurate. He also said that Mr Gillies had sent a text in which he had accused the claimant of "*booking us off the run*", because the claimant had time out from work the previous Saturday. The claimant said this was to visit his sick father who lived in Liverpool and was at risk of having an amputation to the leg.

32. Shortly after the claimant returned to work, he felt undermined by Mr Gillies when he had a discussion on the Wednesday evening drill. It concerned a new defibrillator, which was to be provided to the station for the forthcoming Tour de France in Yorkshire. Mr Gillies did not believe such apparatus was necessary as the station already had one and other appliances and stations would have benefited from the extra defibrillator. The claimant had been asked to deliver training in respect

of the use of the new defibrillator by station manager Adele Kendall from the training centre. When the claimant raised this at the drill, Mr Gillies said that the claimant was not on the training schedule. The claimant subsequently emailed Ms Kendall to confirm to Mr Gillies that he was to assist in delivering the training. She did so.

33. On 27 August 2014 Mr Smith had a telephone conversation with the claimant. He agreed that the claimant could undertake reduced hours until the first week of November 2014 in order to take time out to assist his father to convalesce. He said the matter could then be reviewed with the possibility of unpaid leave or reduction of up to 75% of hours or a job share arrangement.

34. On 11 September 2014 the claimant attended a mediation with Mr Gillies. It was not successful.

35. Later that day the claimant was driving the appliance out of the fire station. The doors to the station started to close from above and struck a light bar on the top of the appliance. It required replacement at a cost of £1,000. Mr Dovey, the transport and logistics manager, examined the appliance and believe the nature of the damage was consistent with an impact to the front of the light bar and not to the top of it as described by the claimant in his report of the accident. An investigation was undertaken into the incident.

36. Before any recommendation had been made the claimant submitted his own report to Mr Smith, on the 25 September 2014. It was entitled, "*Observations regarding up and over appliance bay doors and the numerous accidents and near miss incidents occurring within North Yorkshire Fire and rescue service*". The claimant set out terms of reference in which he described how he had spoken to a number of people within the brigade, firefighters, managers and civilians concerned with buildings or transport as well as the door manufacturers to ascertain the extent of the problem of such incidents and to arrive at possible solutions to prevent future accidents. He concluded, at page 7 of his report, that such accidents were regrettable and avoidable and were not merely a failure of driving skill. He made six recommendations.

37. Mr Smith did not read the report but submitted it to group manager Whild. On 8 October 2014 Mr Whild met the claimant to discuss the report with him. They examined the doors and Mr Whild used a paper cup to demonstrate that the door would automatically open if it came into contact with an object. Mr Whild expressed the view that the claimant's explanation of the accident may have been dishonest, insofar as he had said the vehicle was stationary when the door came down. Mr Wild believed that the claimant had still been driving when the collision happened because of the opinion of Mr Dovey as to where the impact damage occurred, and because he believed the door would have instantaneously reversed its downward motion without causing any damage if it had touched the top of the light bar. He told the claimant that such dishonesty could lead to disciplinary action in the future but he was prepared to give the claimant the benefit of the doubt. The claimant became upset during this meeting.

38. On the same day the claimant had been responding to an alerter but was obstructed by a tractor, so that he could not arrive at the station without undue delay. He telephoned the mobile phone held on the appliance. Mr Gillies saw that the

claimant was trying to ring, because his name appeared on the mobile phone, but he did not answer it. That was because he was wanting that phone to be free to contact control.

39. At the following drill, Mr Gillies discussed the procedure for calling to notify the station that a crew member was likely to be delayed. He informed those present that they should not use the phone on the appliance. The claimant says that he was humiliated by Mr Gillies in front of others. He said Mr Gillies asked who had called the following day and when he stepped forward and accepted responsibility he was publicly humiliated. Mr Gillies denies that he asked who had phoned the appliance. He said he deliberately avoided naming anybody when he discussed the policy he wished to implement, but said the claimant had raised his hand and said it was he who had called. Mr Gillies recognised he may have given a firm message about use of the phone.

40. On 9 October 2014 Mr Gillies issue the claimant with a PDP to complete three assessed blue light drives. It stated that the assessment would particularly focus on the claimant's actions whilst exiting and entering the appliance bay.

41. On 18 October 2014 firefighter Challis submitted a complaint to crew manager Harrison. She objected to texts she had received from the claimant on the 12 and 13 of October 2014. She had been on restricted duties, being pregnant and in bed when she received the first, shortly after 10 o'clock in the evening. The claimant stated that her boyfriend should not have attended a call to duty because he was on leave at the time and that some of the crew were furious. She said she had replied to say she was not on the shout and the claimant should contact her boyfriend direct if he had a problem. The claimant replied to say that it was a bit late now and that one did not ride if one was on leave, not to mention the money and he believed a few things would be said on Wednesday about it. Firefighter Challis replied to say he should discuss it with their watch manager or crew manager and she was sick of his whining. She said the claimant replied again asking her what she was talking about. At 6.47 the following morning she received a message in which the claimant said that she had a short memory and that when her last boyfriend finished with her he was very supportive and that she would do well to remember that. A formal investigation was undertaken into Ms Challis' complaint.

42. On 22 November 2014 the claimant commenced a period of sick leave. Sick notes were submitted to cover the period up until 27 April 2015. They stated the claimant had anxiety and depression. The claimant's pay was reduced to half on 7 March 2015. On 27 April 2015, group manager Whild had given instructions to cease paying the sick pay because the period covered by that earlier sicknote on 7 April 2015 had expired and no further sicknote had been produced. On 1 May 2015 the claimant was placed on special leave by Mr Young, director of finance, pending the outcome of his grievance. From then he received full pay.

43. On 1 December 2014, the claimant submitted a grievance concerning his relationship with Mr Gillies. He said it related to several issues, he had been bullied and victimised in a continual and systematic way and it was a campaign of malevolence. He referred to the failed mediation, the incident when he believed he had been reproached for when calling the phone on the appliance, and what he

regarded as a growing list of continuous malevolence from Mr Gillies which was eroding his confidence and self esteem.

44. On 2 December 2014 the claimant submitted a further complaint about Mr Gillies. This included a complaint about the PDP issued to undertake three blue light drives. He also complained about the requirement to undertake a pumping operations course in respect of the equipment lost in the well. He complained about being reproached for attempting to put out a car fire with a bucket of water, which he said was untrue.

45. On 9 December 2014 the claimant submitted a complaint to station manager Smith in respect of the actions of group manager Whild. He said that Mr Whild had subjected him to a 45 minute verbal tirade and assault when discussing 'a minor accident with up and over doors'.

46. On 3 and 24 February 2015, the claimant had meetings to discuss his grievances. On 6 March 2015 the head of technical services, who had considered the matter, wrote to the claimant to inform him that his complaints had not been upheld. He gave his reasons in a four-page letter.

47. On 5 March 2015 group manager Westmoreland wrote to the claimant to inform him that the complaint made against him by firefighter Challis was to proceed to a disciplinary hearing which he was to attend on 23 March 2015. On 6 March 2015, the claimant submitted a complaint about firefighter Challis saying that she had made a comment he found very hurtful in the text exchange. He also complained about how the complaint had been handled and that it should not have been dealt with at Summerbridge.

48. On 28 April 2015 the claimant attended a grievance appeal meeting with Mr Thompson, the financial director of the respondent. He decided to commission a report from an external employment consultant into the allegations made by the claimant. He communicated this decision to the claimant in a letter dated 1 May 2015. He informed him that group manager Pitt would oversee the investigation.

49. On the same date the claimant's solicitors wrote to the chief fire officer and pointed out that the claimant had submitted seven grievances since 2011. The incident concerning firefighter Challis was raised and it was pointed out that she had told the claimant to 'stop whining' during the email exchange. It was said she had feigned distress at the exchange and she had reported or been encouraged to report the claimant to watch manager Gillies. It was said she should have raised the matter informally and had disingenuously triggered a formal process or had been encouraged to do so by a spiteful watch manager Gillies. The letter closed by saying that the leadership team at Summerbridge fire station were not fit for purpose, in the opinion of the author, and that their client reserved his right in respect of complaints of constructive dismissal, discrimination, stress at work and whistleblowing.

50. On 6 November 2015, the investigation report by Ms Machers and Mr Pitt was submitted to the respondent. Extensive interviews had been undertaken with the claimant and the three managers against whom the complaints had been made, together with a number of other individuals who could give material information. In

her interview with the claimant Ms Machers had identified 25 allegations. A conclusion and recommendation was made in respect of each allegation.

51. Under a heading, Conclusions and Recommendations, Ms Machers gave an overview of her findings. She said that managers had found it difficult to resolve issues raised by the claimant and that informal approaches were often misunderstood, badly managed or not attempted in the first place. She said that it would have appeared that at times the claimant's response to being managed had been considered disrespectful, difficult and disproportionately time-consuming, but she could not determine with any accuracy how aware the respondent's managers were of the impact they had on the claimant or what their intentions were towards him. She said there was no evidence of intentional malevolence cited by the claimant. She criticised the absence of formal management and organisational reviews to determine and assess how well the chain of command was managing the claimant in a holistic way. Later in the report, Ms Machers made specific conclusions in respect of each allegation and made recommendations.

52. On 8 December 2015 Dr Vincenti prepared a medical report for the occupational health department of the respondent following a 90 minute interview with the claimant on 4 December 2015. Dr Vincenti summarised the problems as a very poor relationship with the watch manager which had long since gone past the point of no return. He said that during the meeting there had been barely a moment when the claimant had anything positive to say about his treatment by the respondent, albeit he still enjoyed the role as firefighter. He diagnosed the claimant as having an adjustment disorder with predominant disturbance of other emotions. This fell within the International Classification of Mental and Behavioural Disorders. It took into account the difficulties of an anxious and depressive nature.

53. Dr Vincenti described the claimant as someone who saw things very firmly in terms of right and wrong. He said he did not compromise on what he perceived as principles of integrity. As to the independent report commissioned in respect of the claimant's grievance, he said that if it was not favourable to him, the claimant would not change his views, but if it was favourable to him the relationship with the watch manager would be no better. He did not think any psychiatrist or clinician would be able to improve the interpersonal difficulties between the two.

54. Dr Vincenti concluded there was chronic animosity felt by the claimant towards his watch manager in particular and also the respondent in general. He feared that a return to active duty, with little else having changed, would lead to fresh difficulties. He advised that in high-risk safety critical occupations, including the fire and rescue service, dysfunctional relationships could lead to catastrophically incorrect decision-making. As to any solution, he said it would not come from clinical intervention but a change of circumstances and a new approach by management and the claimant together.

55. On 15 December 2015 Mr Young wrote to the claimant to inform him his grievance appeal had not been upheld. As to the report he said, "*there was no evidence of intentional malevolence which was cited by FF Johnston*". He said nothing more.

56. On the 14, 17 and 23 of December 2015 Mr Rushworth, then head of risk management, met with Mr Smith, Mr Gillies and Mr Whild respectively to discuss the outcome of the Machers' report. Although she had recommended disciplinary action in respect of the three managers, Mr Rushworth gave words of advice in respect of their management styles. This was far removed from what Ms Machers had contemplated.

57. She had suggested that Mr Whild should face a disciplinary hearing to answer allegations he had failed to ensure a fair and robust investigation be undertaken in respect of the station doors, that he failed to consider a report the claimant had prepared which had wider health and safety implications, that he had created an environment which caused unnecessary stress and distress to the claimant, that he had applied inconsistent and inappropriate sanctions, had failed to determine the claimant's circumstances before withdrawing sick pay and failed in his duty of care.

58. In respect of Mr Smith, she suggested he should face a disciplinary hearing to answer allegations that he had failed to undertake a fair and robust investigation into compliance and standard operating procedures and lost equipment, failed to acknowledge and response to the claimant's need for time off in a timely manner, failed to undertake a further robust investigation into an accident concerning the station doors, had failed to consider a report prepared by the claimant which may have had far wider health and safety implications and that he had escalated investigation processes regarding a complaint from firefighter Challis and failed in his duty of care to the claimant.

59. As to Mr Gillies, she had suggested that he face a disciplinary hearing to answer allegations that he had failed to undertake a fair and robust investigation into compliance with standard operating procedures and lost equipment, failed to acknowledge or respond to the claimant's need for time off in a timely manner, did not seek assurance regarding the professional actions of the claimant when dealing with a car fire when off duty and failed to identify potential opportunity for recognition, did not consider alternative options for communicating with the claimant regarding the appliance phone, applied inconsistent/inappropriate sanctions in relation to an accident the claimant had had with the station doors, escalated the investigation processes regarding a complaint from firefighter Challis and failed in his duty of care towards the claimant. She also made a number of recommendations about the head of HR who should consider processes in the future and that she should face a disciplinary hearing to answer allegations that she had enabled the investigation processes regarding the Challis complaint to be escalated and that she had failed to provide robust and challenging case coordination and risk assessment of employment issues involving the claimant.

60. On 21 January 2016, Ms Dale acknowledged a subject access request which the claimant had submitted on 15 January 2016. On 1 February 2016 she provided the client with a redacted copy of the Machers' report. She informed the claimant that the information which related to others had not been disclosed because they had not provided their consent.

61. On 2 February 2016 Mr Rushworth wrote to the claimant to invite him to a meeting on 9 February to discuss his return to work. He wanted to discuss the outcomes of the grievance appeal and considered the claimant's views and offer

support. He gave the claimant the opportunity to be accompanied by a colleague or union representative. The claimant replied by email and informed Mr Rushworth that the date was not convenient due to a prior work engagement. He said that the level of redaction and lack of transparency of the investigation report was unacceptable. He said he would lodge a formal complaint with the information Commissioner. The Information Commissioner subsequently gave a decision that the redaction was appropriate. The claimant had by then received a second version of the redacted report on the 20 February 2016

62. On 9 February 2016 the claimant sent to Mr Rushworth an email about the proposed meeting. He again objected to the amount of redaction in the disclosed report. He said that for Mr Young and him to consider the matter was closed was simply to continue the cover-up and lack of transparency and honesty which pervaded the respondent. He said until he received answers the case would not be closed and he was prepared to go to court in the full glare of publicity.

63. On 12 February 2016 the claimant sent an email to Mr Rushworth. He said that until the respondent furnished him with a sufficiently unredacted version of the report which made sense of the document, he had no intention of discussing a date for a meeting or anything else. He set a 14 day deadline to receive a suitable report.

64. Mr Rushworth replied on 12 February 2016 and asked if the claimant had been able to discuss alternative dates with his fire brigades' union (FBU) representative. The claimant replied on 20 February 2016 and informed him that he was to make a formal complaint with the Information Commissioner. He said that because his questions remained unanswered, the only consistent theme seemed to be the continued obstruction and lack of transparency from managers within the brigade. He said that the misconduct of managers and their attempts to hide and avoid responsibility and accountability in their attempts to hide the truth were nothing more than acts of cowards which brought shame on the respondent. He said he was taking legal advice.

65. On 19 February 2016, the claimant's MP, Mr Julian Smith, wrote to the chief fire officer on the claimant's behalf to request a copy of the report without redactions. Later, on 29 April 2016, a similar letter was sent to the chief fire officer by Ms Flynn, a councillor. She pointed out that the report was virtually unreadable because it had been so heavily redacted and that, in her view, it could not offer any reassurance to the claimant that any of the matters of concern had been adequately dealt with or lessons learned with regards to future should behaviour and conduct of employees. She pointed out that firefighters were public servants paid from the public purse and the public were entitled to believe that firefighters were not racist bullies. To both elected representatives Mr Hutchinson, the chief fire officer, provided a response which was to the effect that much of the report pertained to management actions in the wider public service which was not personal data of the claimant to which he was entitled. He said he believed the authority was acting in compliance with the Data Protection Act 1998.

66. On 24 February 2016 Mr Rushworth wrote to the claimant and said it was imperative that they met so that they could discuss the issues, the outcome of the investigation and try to find a solution. The claimant responded and said he was

prepared to meet but not without an undertaking that he would receive some answers.

67. The meeting finally took place on 5 April 2016. Mr Rushworth informed the claimant that he would explain the actions the service had taken and those that had been considered but would not disclose anything which would compromise another's personal data. He said he would discuss the next steps proposed by the service and then they would adjourn the meeting and reconvene later on. Mr Rushworth said that the service had some unresolved questions about the report, that it had taken on the recommendations at face value and had implemented, or was in the process of implementing, those recommendations. Mr Rushworth referred to the report of Dr Vincenti and the difficulties which arose of any continued working relationship between the claimant and Mr Gillies. He asked how the matter could be moved on, and the claimant said that Mr Gillies should apologise to him so they could move forward. The claimant said that if Mr Rushworth was not prepared to reopen matters which had been already investigated, there would have to be another complaint. Mr Rushworth said he would not go through the allegations again. He told the claimant he did not regard the wholesale movement and relocation of staff as reasonable. He said that the relationship between the claimant and the service had become, in his opinion, irretrievably broken down and the only option may be to terminate the claimant's employment. The parties discussed a potential financial settlement.

68. The claimant sent Mr Rushworth an email on 14 April 2016 to say he had been ambushed and had been given an unfair ultimatum. He said that, for the first time, there had been an admission that mistakes had been made regarding the conduct of managers. He complained again about the unreasonable redaction of the report. On 14 April 2016, the claimant also submitted a further grievance in respect of the conduct of Mr Gillies, firefighter Sunderland and group manager Westmoreland with regard to their conduct into an investigation of a complaint by firefighter Challis.

69. On 9 May 2016 the claimant wrote to the chief fire officer and requested a meeting with him. In response, the chief fire officer said that the claimant had not explained the reason for such a meeting and that, on the assumption it was to address the recent grievances, the matter was subject to the meetings with Mr Rushworth which would continue. On 20 May 2016, the claimant wrote to the chief fire officer again and referred to the incidents concerning S. He said that managers had closed ranks and attempted to protect each other's failings, thus committing misconduct, there was a lack of openness and a consistent belief of managers to the myth that they were not accountable for their actions and this was little short of a disgrace. He said the buck stopped at the chief fire officer's door and asked him what he was going to do about it.

70. On 22 May 2016 the claimant wrote again to the chief fire officer. He informed him that he had evidence that managers had misled the investigation and had been untruthful. He said that if he refused to meet him and answer his reasonable questions he would be complicit in a conspiracy and that he would either have to meet the claimant or answer questions in the County Court. He said that he intended to expose the gross misfeasance in public office. The claimant had made similar remarks to Ms Sams, head of human resources, in an email dated 9 May 2016.

71. Mr Rushworth wrote to the claimant on a number occasions to attempt to arrange the further meeting, offering six dates, but he received no response. This was because of the unavailability of his union representative, Mr Howley. Mr Rushworth set a final date for 31 May 2016. He communicated this to the claimant in a letter of 24 May 2016. He stated that the respondent believed that the employment relationship had irretrievably broken down and the claimant could offer an alternative view if he did not agree. He said that the claimant had not, to that date, offered any alternative other than to raise further grievances with threats of legal action. He informed the claimant that such behaviour could not continue. There was some further correspondence with the chief fire officer from the claimant prior to the meeting, which had been rearranged for the convenience of the claimant's representative to 23 June 2016.

72. At the meeting the claimant repeated the view that he had been significantly let down and not listened to. He suggested that one way forward was for him to join the operational support reserve (OSR) and that he could try to talk to managers to rebuild things. Mr Rushworth concluded that although it was a genuine offer he had no confidence that the claimant could work on the OSR and with the managers he had complained about. All group and station managers had had some dealings with the claimant at some point.

73. By letter of 23 June 2016 Mr Rushworth wrote to the claimant informing him that he was to be dismissed on notice, with pay in lieu, on the basis that there was no trust and confidence he could be reintegrated into the service.

74. The claimant exercised his right of appeal by letter of 29 June 2016. It was heard by four members of the respondent authority on 14 September 2016. The claimant's representative again asked for a copy of the unredacted investigation report, but the panel refused this. In evidence, Mr Backhouse, the chairman of the appeal panel, said that they regarded the answer provided by the Information Commissioner's office as conclusive of the claimant's right not to see the unredacted material. The panel did not read the unredacted report.

75. Mr Howley suggested that the claimant could be placed on the OSR. In explaining his decision to the panel, Mr Rushworth said that one of the factors he had taken into account was that the claimant displayed a number of traits which had become known as Extreme Difficult Behaviour (EDB). He said that this was a phenomenon which flowed from the report of Dr Vincenti. He said such people classically do not change their position in response to reasonable replies to complaints or be swayed by evidence and would not change their stance. Mr Rushworth had recently attended a course presented by two academics in respect of managing people with EDB. Mr Howley took exception to this part of the analysis, pointing out that the claimant had never been given the opportunity to address such a concept. The appeal panel discounted it in its deliberations. It dismissed the appeal.

The law

76. The right not to be unfairly dismissed is contained within Part X of the Employment Rights Act 1996 (ERA). It is the employer to establish a potentially fair reason to dismiss an employee which can be one of those identified in section 98(2)

or is another substantial one of a kind to justify dismissal. In **Perkins v St George's Healthcare NHS Trust [2005] EWCA Civ 1174** the Court of Appeal upheld a decision that such a reason would include a breakdown of confidence between an employer and its senior executives which actually or potentially damages the operations of the employer's organisation or made it impossible for senior executives to work together as a team for which the dismissed employee was responsible. In **Ezsias v North Glamorgan NHS Trust [2011] I LR are 550**, the Employment Appeal Tribunal also upheld a decision that a dismissal was for a substantial reason of a kind such as to justify dismissal in circumstances in which working relationships with the dismissed employee's colleagues had broken down.

77. If such a reason is established, it is for the Tribunal to consider whether the dismissal was fair or unfair, having regard to whether dismissal for the reason given was reasonable in all the circumstance of the case, the size and administrative resources of the employer, equity and the substantial merits of the case, see section 98(4) of the ERA. It is well established that if an employer's decision-making process falls within a reasonable range of actions of a reasonable employer the decision will be fair. It is not for the Tribunal to substitute its own view of the fairness of the dismissal but rather to review the employer's decision within that framework.

78. If the sole or principal reason for the dismissal was because the claimant had made protected disclosures, the dismissal will be automatically unfair without having to evaluate the circumstances pursuant to section 98(4) of the ERA, see section 103A of the ERA.

79. Under section 123(1) of the ERA, the Tribunal may reduce or extinguish the compensatory award if the dismissal were found to be unfair for procedural reasons but, had the procedure been fair, the claimant would or might have been dismissed in any event, see **Polkey v A E Dayton Services Ltd [1988] ICR 142**.

80. Under section 122(2) and section 123(6) of the ERA, the Tribunal may also reduce or eliminate any compensation having regard to the conduct of the employee if it is just and equitable so to do.

81. A qualifying disclosure is defined by section 43B of the ERA. In relation to a disclosure made after 25 June 2013, an additional requirement was imposed for it to be, in the reasonable belief of the worker making the disclosure, in the public interest. A further change concerned whether the disclosure was made in good faith. Prior to 25 of June 2013, unless made to a legal adviser in the course of obtaining legal advice, a disclosure would not be protected if it was not made in good faith. After that date, this was no longer a requirement albeit if not made in good faith any compensation will be reduced by up to 25%.

82. In **Chesterton Global Limited v Nurmohamed [2017] EWCA Civ 979**, the Court of Appeal considered the circumstances in which the disclosure would or would not be made in the public interest. It held the broad intent behind the amendment was to ensure that disclosures which were made in the context of private working place disputes should not attract the protection afforded to whistleblowers. But, in a case in which the disclosure relates to the breach of a worker's own contract, or some other matter under section 43B(1) where the interest was personal in nature, there may be circumstances that make it reasonable to

regard the disclosure as being in the public interest as well as in the personal interest of the worker. The example given was of a doctor complaining of his having to work excessive hours.

83. A worker/employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by the employer done on the ground that the worker/employee had made a protected disclosure, see section 47B of the ERA. In **Ministry of Defence v Jeremiah [1980] QB 87**, the Court of Appeal held that a detriment would exist if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment. In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** the House of Lords held that an unjustified sense of grievance would not amount to a detriment.

84. By section 27 of the Equality Act 2010, a person victimises another if he subjects the other to a detriment because the other had done a protected act. By section 39(3)(c) and (d) of the EqA, it is unlawful for an employer to victimise an employee by dismissing him or subjecting him to any other detriment.

85. In **Fecitt v NHS Manchester [2012] ICR 372**, the Court of Appeal held that, for the purpose of section 47B of the ERA, it is sufficient for the protected disclosure materially to influence the employer's treatment of the whistleblower in subjecting him to a detriment rather than to be the principal reason for it, to render it unlawful.

86. In **Shinwari v Vue Entertainment Ltd [2015] UKEAT 14**, the President of the Employment Appeal Tribunal considered the circumstances in which an employer would not be held liable for subjecting the employee to a detriment, if the reason for the action was not the making of the protected disclosure itself but rather other circumstances which may be connected to it. Approving the early authority of **Martin v Devonshire Solicitors**, she gave the example of a situation in which the detrimental treatment arose as a consequence of the manner or the way in which the complaint had been brought. In that case Underhill P sounded a note of caution in saying, "*of course such a line of argument is capable of abuse. Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions, if employers were able to take steps against employees simply because in making a complaint they had, say, used intemperate language or made inaccurate statements. An employer who purports to object to 'ordinary' unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact that the distinction may be illegitimately made in some cases does not mean that it is wrong in principle"*.

87. Disability is defined, for the purpose of the EqA, within section 6. A person will be disabled if he has a mental or physical impairment which has a substantial and long-term adverse effect on his ability to undertake normal day-to-day activities.

88. By sections 20 and 21 of the EqA, an employer will have a duty to make adjustments in respect of a disabled person if a provision criterion or practice places that person at a substantial disadvantage. By paragraph 20 of schedule 8 of the EqA, an employer is not subject to such a duty if he did not know or could not

reasonably be expected to know that the person was disabled or was likely to be placed at the substantial disadvantage.

89. Under Regulation 7 of the PTW(POLFT)R, it is unlawful for an employer to subject an employee to a detriment on the ground that the employee had alleged that the employer had infringed the regulations. It would also be an automatically unfair dismissal if the reason for the dismissal was that the claimant had made such an allegation.

Discussion, analysis and conclusions

Were the disclosures qualifying and protected and protected acts?

90. The respondent accepted that the disclosures set out in paragraph 4(a) to (d) of the annex were qualifying and protected.

91. In respect of paragraph 4(e) of the annex, Mr Webster submitted that the disclosure had not been made by the claimant in the reasonable belief that it was in the public interest. He argued that the preparation and submission of the report in respect of the station doors was solely for the purpose of benefiting him in respect of the investigation which was taking place into the accident when he had been the driver of the appliance. We disagree. Whilst we are satisfied that this report would never have been written had the claimant not been involved in the accident and that in writing the report the claimant had very much in mind his own interests, there was nevertheless a public interest in the identification of a commonly experienced deficiency in the working of the station doors. In **Chesterton Global Ltd v Nurohammed [2017] EWCA 979** the Court of Appeal recognised that a disclosure may share both a public and private interest. It was common ground that there was a deficiency in the automatic system whereby the station doors closed and the claimant's report identified the problem and posed a number of considerations to reduce the risk of damage or injury. The claimant reasonably believed the disclosures to have been in the public interest but, we find, he also believed his comments might deflect any criticism of him as the driver of the appliance.

92. In respect of paragraph 4(f) of the annexe, Mr Webster submitted that the grievance submitted in March 2015 was not, in the reasonable belief of the claimant, in the public interest. In this respect we agree. The grievance concerned a continuation of his complaint that he had been subjected to bullying and harassment by his managers. He specifically raised the issue of the text exchange he had had with fire fighter Challis. We do not consider these complaints related to the interests of the public but were concerned with resolving the claimant's disputes with his employer. We reject Mr Trory's submission that a public interest arises in respect of a public sector employer, if managers are said to be acting in an improper fashion because public funds are not being efficiently used. No such support for that argument can be found in **Chesterton Global Ltd**.

93. We would also have been open to persuasion that the disclosure at paragraph 4(b) of the annex was not a disclosure which was made, in the reasonable belief of the claimant, in the public interest. This was a challenge the claimant brought because of his own interests. There was not a wider public interest in this matter

being determined. However, this matter was not raised by Mr Webster as an issue and therefore not responded to by Mr Trory and, as nothing turns upon it, we are prepared to accept it was a protected disclosure. In any event, it was a protected act within regulation 7(3) of the PTW(POLFT)R.

94. The respondent accepted that paragraph 4(c) of the annexe amounted to a protected act for the purpose of section 27(2) of the EqA.

Detriments on the ground of having made protected disclosures or done protected acts

Paragraph 5.1 of the annexe: *In 2012, WM Gillies decided not to ask Mr Johnston to train as an immediate emergency care trauma instructor*

95. It would be a detriment for the claimant to have to wait an additional year to receive the training. Was the fact the claimant had to wait an extra year to do the course because of an act of Mr Gillies, interfering in the allocation of places on the course, and if so, was it done on the ground that the claimant had made protected disclosures or because he had done the protected acts?

96. Mr Gillies denied having any involvement in respect of the claimant not being placed on the IEC course. He said that he would have liked to have one of his crew trained on this course, because there was no other member who could provide such training and he had to buy in that resource.

97. The claimant's case rests upon the email which Mr Bullamore sent to Mr Simpson of 17 March 2012, in which Mr Bullamore said they had discussed the claimant the previous week at the IEC meeting and that Mr Gillies had concerns about the claimant's commitment during the drill nights. In addition, the claimant draws attention to the inconsistency with regard to whether the course was limited to whole-time firefighters.

98. The first difficulty with this complaint is that, upon an examination of the email chain, it is clear that the claimant failed to notify Mr Bullamore of his interest in the first two courses before they were fully subscribed; so the cause of the said detriment was nothing to do with Mr Gillies but all to do the claimant not responding in time. The second difficulty is that we believed Mr Gillies when he said that he had no involvement in the selection of individuals for this course. We did not think he was disingenuous in saying he would have welcomed such a trainer amongst his crew. Thirdly an attempt to draw inferences from the email between Mr Bullamore and Mr Simpson does not stand up to scrutiny. By the date this email was sent, the course was already full. The reference to the claimant's commitment, therefore, could only have had any effect in respect of any future such course; but it is accepted by the claimant that he was allocated to the next available training event. Fourthly, the inconsistent accounts given by Mr Bullamore to the claimant, on the one hand and the former London firefighter on the other, was nothing to do with Mr Gillies and there was no evidence from which it could be inferred that it was.

Paragraph 5.2 of the annexe. *In March 2013, WM Gillies issued Mr Johnston with a personal development plan for "topography code" without justification*

99. It would be a detriment for a firefighter to have to undergo additional training if that was unhelpful and unnecessary. In this case we are not satisfied that this was the case. Objectively evaluated, we are not satisfied a reasonable employee could have regarded this as disadvantageous and a detriment. It involves studying maps on drill and answering questions about the local topography to enhance one's skills.

100. Even if it were a detriment, we do not find that Mr Gillies committed an act because the claimant had made protected disclosures or had done protected acts.

101. The claimant contends that because Dallowgill was outside the catchment area for Summerbridge fire station, Mr Gillies was subjecting him to unfair additional work. Firstly, we do not accept that this was outside the region covered by Summerbridge. Mr Gillies explained that this was a region which they were responsible for in the evenings when Ripon were not covering that area. Secondly, it was adjacent to the normal geographical region of Summerbridge and so was one which that fire service would be more likely to be called upon to service than more far-reaching areas in the county. Thirdly, it is not in dispute that the claimant was driving the appliance and did not know the direct route. It would be surprising if Mr Gillies were not to have taken some action to correct that deficiency in the claimant's knowledge, to improve his skills as a firefighter. Fourthly the PDP requirement was not excessive but necessary and proportionate, requiring the claimant only to undertake the additional work during his time on drill.

102. The claimant placed some emphasis on the discussion that took place between Mr Gillies and Ms Machers, in respect of who had issued the PDP. In saying that it was not him, we are satisfied that Mr Gillies was saying no more than the crew manager Mr Turner had dealt with the paperwork aspect and discussed it with the claimant. He had not suggested that he had not been consulted or involved in the decision at all. He clearly was. But it was a sensible one. It had no connection whatsoever with the complaints the claimant had raised about S or his complaint about less favourable treatment of part-time workers regarding holiday requirements, the last of which had been some 22 months previously. As we indicated, Mr Gillies had no concern about the issue the claimant had raised about holidays and he agreed that racist language had no place in the fire service.

Paragraph 5.3 of annexe. *In March 2013 WM Gillies admonished Mr Johnston and required [issued a PDP for the claimant to] attend a pump operators course for not allowing a standard operating procedure, even though Mr Johnston had explained that he had sought to follow the SOP but was overruled by the T/ CM Simpson.*

103. To attend a pump operators course would take two days of time and involve a degree of travelling out of the area. That could, in certain circumstances, be a detriment although, as Mr Gillies pointed out, the opportunity to undertake further training is often welcomed by firefighters in improving their skills. Recognising that detriment involves an element of subjectivity, we are prepared to accept that, in principle, this would be a detriment if the claimant felt it was unnecessary and excessive.

104. The fundamental difficulty the claimant faced in respect of this complaint was the email he sent immediately after the event when he fully acknowledged his errors and agreed with the course of action proposed. If it had been the case that he believed S was at fault or that his error was not of any real significance he would not have written this email.

105. To return to the topic six months later was indicative of how the relationship had soured over a short period of weeks. The claimant was unable to give any satisfactory explanation for his remarkable change of opinion.

106. We accepted the explanation of Mr Gillies that this was an entirely appropriate course for the claimant to have to undertake. (In fact, an agreement was subsequently reached that he did not have to attend the course but could receive training locally). The non-attachment of the line, in which S was said to have been involved and according to the claimant primarily responsible, was only part of the poor practice adopted which led to the loss of the hose. As is clear from the wording of the PDP, it was the addition of an attachment to extend the hose in circumstances which led to it falling into the well, that was the subject of the major criticism. None of this is referred to in the claimant's second email, nor in his evidence. We were told the course was specifically designed for the pumping of water from natural sources and not nearly as extensive and lengthy as the five-day course in pumping which firefighters undertook at induction.

107. The requirement imposed by the PDP had nothing whatsoever to do with the claimant's earlier complaints[1].

Paragraph 5.4 of the annexe. *In March 2013 SM Smith subjected Mr Johnston to a disciplinary process that was disproportionate to the offence (which was that Mr Johnston had posted a picture of a fire that he had attended on Facebook).*

108. It is a detriment to be subjected to a disciplinary investigation and process.

109. Mr Smith explained his reasoning for undertaking this investigation and making the recommendation he did. One complaint led to his initial enquiries. When three further complaints from members of the public were received Mr Smith was instructed, by the human resources department, to undertake a formal investigation. He recommended first stage disciplinary action because of the reputational damage caused to the service by the claimant's admitted actions and the impact they had on the occupants of the burnt premises and their relatives. These images had been seen by relatives of the occupants who lived in other parts of the country. The occupants' phones had been damaged in the fire, and, being unable to contact them, their relatives had real concern for their safety when they saw postings of the fire.

110. Mr Smith's recommendation was entirely appropriate for the reasons he gave. It is the only reason the claimant was investigated and formally disciplined. In fact, Mr Smith undertook the investigation not by his choice, but by the instruction of another department. We reject Mr Trory's submission that the admitted actions of the

[1] "Earlier complaints" is a shorthand reference to those complaints which constituted protected disclosures or were protected acts.

claimant should have been disposed of in an informal way. That was to understate the gravity of the error of judgement.

112. It is said there was an inordinate delay in the progress of this matter, albeit that is not a discrete allegation. This delay was not down to Mr Smith. He had forwarded his report on 30 April and it was the human resources department which then took some time to arrange a meeting, by mid July. The matter was then further delayed in order to address the claimant's subsequent grievance that his Facebook account had been hacked and he had been denied knowledge of the identity of the complainants.

Paragraph 5.5 of the annexe. *From January 2014, SM Smith pursued a disciplinary process against Mr Johnston in relation to this complaint even though he could have checked Mr Johnston's alibi that he had in fact (been) at work in his full-time occupation (a health and safety consultancy business) at the relevant time.*

113. A disciplinary investigation is a detriment.

114. Mr Smith accepted in his evidence that he could have checked the claimant's alibi before he recommended that the matter proceed to a first stage disciplinary process. He said he had concerns as to the claimant's honesty about this incident. This was because of the claimant's inability to recollect his own registration number when first challenged about the matter and the extraordinary lengths the claimant later went to, to undermine the account of the complainant, such as providing meteorological information as to how the weather could not have been as she had stated. It was only at the second meeting that the claimant made reference to the fact that he was with a mechanic who could confirm where he was shortly before the incident.

115. Mr Trory criticised Mr Smith for not dismissing the complaint because it had been received from someone who had connections with a group in the community who were known by Mr Smith to regard the claimant unfavourably, so it could have been vexatious. Mr Smith acknowledged that he was aware it could have been a vexatious complaint for these reasons.

116. We do not accept the way in which Mr Smith handled this matter had anything whatsoever to do with the early complaints the claimant had raised. A station manager would have to treat any complaint from a member of the public seriously and could not simply dismiss it on the grounds of the connections that complainant had with others. The explanation given by Mr Smith could reasonably have led to scepticism about the claimant's frankness. In evidence Mr Smith acknowledged he probably should have spoken to the alibi in the course of his investigation. Recognition of this shortcoming did not undermine his explanation as to why he regarded the claimant as not having been frank.

Paragraph 5.6 of the annexe. *During the course of the same disciplinary process, SM Smith used information about Mr Johnston's driving that should not have been referred to because it was three or four years old.*

117. The reliance upon hearsay complaints which arose some years previously could constitute detrimental treatment.

118. Mr Smith came across this material in the course of his enquiries having spoken to Mr Gillies. He felt that the note for case had a significance, insofar as it established that the claimant had been put on notice of the need to drive to an acceptable standard. In other words, the claimant could not be seen later to argue he had been unaware of the high standards expected, in the light of this earlier conversation. That is an understandable and logical thought process.

119. We are satisfied Mr Smith investigated the complaint having regard to such information as he thought may have been relevant. There are other considerations which, upon advice from human resources experts and employment lawyers, may have led to the deletion of any such record, or it being created in such a way as to record the employee's confirmation of the discussion. That criticism does not establish that Mr Smith was motivated in making reference to these records by reason of the fact that the claimant had made earlier complaints. We accepted Mr Smith's evidence that his inclusion of the claimant's earlier complaints in his investigation had nothing to do them. He was a good witness. He later agreed to a variation in the claimant's working conditions so he could visit his father. This did not betray a pattern of behaviour which suggested that he was seeking to punish the claimant for having made earlier complaints. Rather, he dealt as he felt best with a public complaint.

5.7 *in December 2013 and early 2014, during a period when, to WM Gillies knowledge, Mr Johnston was having to commute long distances to visit his father in hospital, WM Gillies failed to provide any support to Mr Johnston, told him that if he did not work his contracted hours he could be disciplined and failed to pass on to Mr Johnston that SM Smith had consented to him taking leave of absence or working reduced hours*

120. A failure to provide support, to single out the claimant to tell him he may be disciplined and not to pass on an important message concerning his entitlement to special leave would all be detriments. Were they because the claimant had done protected acts or made protected disclosures?

121. In his evidence Mr Gillies agreed that he was aware of the medical condition of the claimant's father and that the claimant had been visiting him. He did not agree that he failed to provide support. He said that he had addressed the drill and informed all the crew that if they did not work their contracted hours they could be disciplined, but he did not accept he singled out the claimant for such criticism.

122. The account in respect of the alleged lack of support is set out in the grievance submitted by the claimant on 26 March 2014. The claimant stated that he had booked several hours off on a Saturday for 'family time'. This had been four days before the Saturday in question. He said that on the Friday, Mr Gillies had sent him a text demanding that he booked back on call and accused the claimant of "booking us off the run". That was a reference to the station crew not being able to respond to an emergency and use the appliance because of insufficient staff being on duty. The claimant described this action as an abuse of Mr Gillies' authority as line manager.

123. No record is kept of the reason any crew member booked time off on the relevant sheet. It did not therefore include the reference to family time described by the claimant in his grievance. All Mr Gillies knew was that the claimant had taken four hours out of his on-call duty for that Saturday. Whilst he knew about his father's condition at the time, he did not think it was feasible for the claimant to have undertaken a visit to Liverpool and back and to spend time with his father within that timeframe. He had a duty to ensure that he had sufficient crew to despatch the appliance and he would regularly examine the attendance sheets in advance to confirm he had the minimum staff required. In the subsequent enquiry into the grievance, both by Mr Warren and later by Ms Machers, similar text messages from Mr Gillies to other staff members were recorded as having been sent when the availability of the appliance was jeopardised by reason of crew members booking out time.

124. We accept the submission of Mr Webster that the claimant was not being singled out for criticism, when Mr Gillies sent this text. It was understandable for Mr Gillies to have drawn the conclusion that the amount of time the claimant had booked off would not have facilitated a visit to his father and so it must have been for other purposes. Given the demands upon Mr Gillies to ensure the appliance could be used, he was entitled to challenge members of the crew for taking time off from their duty. His laconic text communication was characteristic of his manner. We are satisfied that this text communication to the claimant had nothing whatsoever to do with his earlier complaints. It was similar to messages he had sent to other crew members who had made no complaints.

125. We accept Mr Gillies' evidence that he gave a stern warning to all crew that they would be disciplined if they did not work their contracted hours. This was because of the difficulty he was facing from a number of the firefighters taking leave at short notice.

126. The claimant has amended part of this complaint, to suggest that the failure to pass on information was sometime between 6 June and 27 August. We note that errors of this type are likely when complaints are presented years after they arose. That is an example of the unreliability of human recollection unsupported by any contemporaneous documentation.

127. Mr Smith recalled speaking to the claimant on 27 August 2014 and agreeing to a relaxation in his duties for the purpose of assisting his father. In a draft email which he did not send Mr Smith set out the agreement. To alleviate the burden, he agreed to overlook the claimant's availability at Summerbridge until the first week in November whereupon he could review his circumstances. He wrote, "*we both recognised that [the respondent] could empathise with your position and support you wherever possible*". He said that other potential options from November could be for the claimant to take only unpaid leave or leave of absence for 3 to 24 months, or alternatively to reduces availability to 75% or a lesser percentage on a job share contract. In evidence, the claimant agreed this was what Mr Smith had discussed on that occasion. Mr Smith did not send the email, because he thought the matter was fully understood, but on reflection recognises that his record keeping and communication could have been improved.

128. The claimant thanked Mr Smith for assisting in an email dated 29 August 2014. He said, "*as stated in our conversation, the offer of reduced hours for a temporary period in order to assist me with supporting my parents during my father's recovery, has not been relayed to me by WM Gillies. He has hardly said two words to me since my return to duty at the end of May*". Mr Trory argued that this supported the claimant's contention that this arrangement had been made sometime before 27 August and that it should have been conveyed to the claimant by Mr Gillies earlier in the month or even sooner. The claimant is unable to say precisely when he entered into the agreement with Mr Smith if it was not 27 August 2014.

129. The claimant said he learned of the agreement for him to have time off from another firefighter, Mr Wall, in a discussion in a public house. Neither that recollection, nor the reference to a complaint in the email, satisfactorily establishes when Mr Gillies failed to act, as alleged. There is insufficient detail to examine the criticism in any context. The draft email of Mr Smith made the same day, supports his recollection that it was on 27 August 2014 that authorisation was given for special leave, which undermines any suggestion that Mr Gillies could be found wanting. The complaint is not established, on the evidence.

Paragraph 5.8 of annexe. *In April 2014, WM Gillies visited Mr Johnston at home while he was on sick leave due to work-related stress without warning Mr Johnston that he would be visiting or obtaining his consent*

130. The claimant had taken sick leave as a consequence of work-related stress, as is recorded in the sick note he submitted on 27 March 2014. He was upset by the visit from Mr Gillies, feeling it invaded his own private space at a time he was vulnerable.

131. Mr Gillies said, in evidence, that he did not know the reason the claimant was off sick at this time and, on examination of the contemporaneous documentation, there was no reason he should. Mr Trory submitted he should have been able to infer that was the cause for his absence, but the claimant had been off previously with a chest infection and there is no reason Mr Gillies should have known the illness was work-related, the sick note only being submitted after the visit. The visit took place on 25 March 2014, it having been referred to by the claimant in his grievance of 26 March 2014. The reference to this having taken place in April 2014, at paragraph 133 of the claimant's witness statement, and in the annexe is incorrect.

132. Part of the absence management policy requires line managers to visit those off sick and keep in touch. In this rural area it is commonplace for crew members to visit each other. Mr Gillies has crew members visiting his home on a regular occasion, unannounced, when they have matters they wish to raise with him urgently. In the light of the policy and the practice in the area, we are not satisfied that this visit had anything whatsoever to do with the fact that the claimant had made previous complaints. Indeed Mr Gillies could have been criticised for not visiting the claimant.

133. It is said by the claimant, that upon his return to work, Mr Gillies was unfriendly and did not engage with him and welcome him back. Mr Gillies disputes this, but does say that he does not spend any great deal of time talking to crew

members, and passing the time of day, because he prioritises administrative work which must be completed. We accept that explanation.

134. While it might be better practice to contact any member of staff before visiting to ensure it is convenient, it is apparent from the evidence that Mr Gillies takes the same approach to all his crew, regardless of whether they have submitted complaints of any form.

Paragraph 5.9 of annexe. *On Mr Johnston's return to work at the end of May 2014, after a period of sickness absence due to stress, WM Gillies failed to provide any support to Mr Johnston who had to arrange his own training at another station to prepare himself for return to operational duties.*

135. The first element of this complaint is unspecific. In evidence the claimant said that Mr Gillies did not seem particularly friendly or speak to him upon his return from sick leave. We are not satisfied that Mr Gillies behaved any differently to the claimant as to others. Mr Gillies could be taciturn at work, occupying himself with practical activities and not devoting any time to pastoral concerns for the crew. He recognised that this may be a limitation of his as a manager. We do not consider the way he behaved upon the claimant's return from sick leave was influenced by the complaints he had made about S or the holiday booking requirement which adversely affected part time firefighters.

136. The claimant did not ask Mr Gillies to arrange for training at the Summerbridge station. It is the practice for crew members to arrange their own training and the claimant agreed that he had done this himself at Ripon. Upon the admitted facts, the claimant could not sustain the claim that this was a detriment that had anything to do with his having made earlier complaints. We reject it.

Paragraph 5.10 of the annexe. *In June 2014 WM Gillies told [implied] Mr Johnston that he was lying when he said that he had been asked to deliver training on the use of a new defibrillator and failed to apologise when he found out this was in fact the case*

137. Mr Gillies did not consider the Summerbridge station required a new defibrillator, as it already had one. We accept that it is likely he told the claimant this when, to his surprise, the new defibrillator arrived. It was marked for the attention of the claimant and that is what prompted the discussion. In his evidence Mr Gillies had no recollection of a discussion about training.

138. In the Machers' investigation, watch manager Kendall was interviewed. She recalled speaking to Mr Gillies, at the claimant's invitation, to inform him that she had asked the claimant to undertake training in respect of the new device. At paragraph 128 of his witness statement the claimant says, "WM Gillies disputed my version of events and attacked my integrity, stating that I was not on the training schedule". He continues, "it turned out that WM Kendall had made an error and we were as initially instructed, supposed to receive the training". We agree with the submission Mr Webster, that it appears there was a legitimate basis for Mr Gillies to have questioned whether the claimant was to deliver training in the light of the error of watch manager Kendall. That was not an attack on the claimant's integrity, but a statement of what Mr Gillies had believed. He was corrected in respect of this by

watch manager Kendall at a later stage. We accept the claimant did not receive an apology for this misunderstanding from Mr Gillies, although an apology was given by Ms Kendall. A more considerate manager may have proffered such an apology. Mr Gillies' failure to do so had nothing to do with the earlier complaints, the last being more than two years previously. There is no evidence to warrant the drawing of the inference they were of any interest or concern to Mr Gillies at all.

Paragraph 5.11 of the annexe. *2 September 2013, WN Gillies criticised Mr Johnston for trying to put out a neighbour's car fire with a bucket of water and ignored Mr Johnston's attempts to explain that that had not in fact been the case.*

139. The claimant had said this incident occurred in the summer of 2014. In his witness statement, at paragraph 131, the claimant said it was in January 2014. Mr Webster established this could not be correct as it coincided with the time the claimant was absent as a consequence of a chest infection. It arose the year before, in September 2013. This is another illustration of the tricks the mind can play, and illustrates the effect the passage of time has on the memory. It is another allegation in which the Tribunal is invited to evaluate firstly, what had been said in a short exchange over a minute or two between Mr Gillies and the claimant a long time ago, more than four years, and then to interpret what construction should be put upon the words used.

140. The claimant's recollection is that, at a drill night, Mr Gillies had wanted to know why he had tried to put out a car fire with a bucket of water and when he explained what had happened Mr Gillies had said, 'that's not what I heard'.

141. Mr Gillies believed he may have said that it was not what he had heard when he discussed this matter with the claimant. He disputes that he was critical of the claimant or imputing that he was being dishonest.

142. Given the passage of time, the two inconsistencies as to when this event occurred and the lack of any contemporaneous note, we are not satisfied that any pejorative interpretation can be placed upon the remark of Mr Gillies that the account given by the claimant as to what had happened was not what he had heard. It is of note that there are no witnesses who were able to recall this discussion. We reject the complaint.

Paragraph 5.12. *In September/October 2014 SM Smith and GW Whild dismissed out of hand Mr Johnston's report into the health and safety issues arising from the up and over appliance bay doors.*

143. Mr Smith was somewhat surprised to be presented with this detailed health and safety report, pertaining to an accident in which the claimant had been driving the vehicle. He thought it appropriate in the circumstances to hand it over to a more senior manager. We do not regard that as dismissing it out of hand. If he had peremptorily rejected it, he would have not escalated it to his line manager to address.

144. Mr Whild did not dismiss the report out of hand, either. He visited the claimant and had a discussion about the propriety of the claimant submitting such a report and his concern about the accuracy of the claimant's initial incident report about the

accident and the circumstances in which it had occurred. Together, they visited the area where the incident had occurred and sat in the appliance to ascertain the sight-line of the doors. Mr Whild utilised a paper cup to test the response of the doors to contact with an object. They automatically reversed their direction of travel. The claimant may not have agreed with Mr Whild's reaction to, and opinion of, his report, but it cannot be characterised as having been dismissed out of hand. The complaint is dismissed.

Paragraph 5.13 of the annexe. *In October 2014 SM Smith told Mr Johnston that he would be discussing Mr Johnston's writing of the report with GM Whild, with a view to deciding whether disciplinary action should be taken against him.*

145. We reject this complaint. Mr Smith denied, in cross examination, the suggestion that he had informed the claimant he would be discussing potential disciplinary action when he forwarded the report to Mr Whild. We preferred the evidence of Mr Smith to that of the claimant. Mr Smith had considered carefully his duties as a manager and took them seriously. His evidence was consistent and he made reasonable concessions, such as recognising he should have investigated the claimant's alibi in respect of the accident complaint. The claimant, on the other hand, was not an impressive witness. His timing of when events happened was inconsistent and incorrect by many months, in several instances. Too often his explanations for his actions were self-serving and lacking in any acknowledgment of his own shortcomings. His criticisms of his managers lacked insight or understanding.

Paragraph 5.14 of the annexe. *In October 2014, WM Gillies admonished Mr Johnston in front of colleagues and visitors for trying to contact the station to explain why he would be late into work.*

146. There is no written procedure as to whether a firefighter is entitled to telephone the appliance and it is clear from the evidence of Mr Rivers, the watch manager at Ripon, that the practice varies. He agreed that it was perfectly proper for Mr Gillies to adopt the policy he did, of discouraging use of the appliance phone so that it could be available to contact control.

147. The issue is whether the claimant was admonished publicly for having called the appliance when he was delayed. According to Mr Gillies, he had known the claimant had attempted to call the appliance and terminated the call. This had been to keep the line clear so that the control room could contact the crew when responding to an emergency. He said that, at the next drill, he instructed all staff that it was inappropriate to contact the appliance on the phone. The claimant had volunteered that it was he who had done so. The claimant's evidence was that Mr Gillies asked who had called the appliance and, when he stepped forward, humiliated him. He does not say what words were used to cause the humiliation, rather his statement records how he felt. In the investigations which were undertaken for the grievance, crew member Harrison gave an account which supported the recollection of Mr Gillies, as did crew members Upton and Milner. Crew member Rowlands thought that Mr Gillies might have asked if anyone had rung the pump because he did not know who it was and that the claimant replied that it had been him. He said that Mr Gillies then told everyone not to ring the appliance and the parade ended.

148. We prefer the recollection of Mr Gillies as to how this matter was addressed supported, as it is, by the recollections of other crew members. The claimant may have felt embarrassed and identified himself when the issue was raised. It is likely Mr Gillies was firm in his instruction. We do not consider that this exchange, and the reason it was dealt with by Mr Gillies as it was, had anything whatsoever to do with earlier complaints the claimant had raised. Mr Gillies acted as he did because he wanted to emphasise the need to keep the line of free for communication between the appliance and control in emergency situations.

Paragraph 5.15 of annexe. *At a meeting in October 2014, GM Whild criticised Mr Johnston for writing the report on the doors, told hin that he had gone outside his remit, accused him of including false information in the report and told him that if he wrote another such report he would be disciplined. During this meeting GM Whild refused to allow Mr Johnston to speak, raised his voice and acted in a disrespectful and intimidating manner.*

149. Mr Whild sent a letter to the claimant, dated 9 October 2014, recording what had been discussed the previous day. He concluded that the accident had occurred because of the claimant's actions. He informed him he would instruct watch manager Gillies to formulate a personal development plan.

150. In his letter, Mr Whild was critical of the claimant for having submitted his report. He described it as non-standard, unwarranted and unnecessary. He told the claimant that such reports were not within his remit and that there were specific personnel departments within the service which undertook investigations into such matters.

151. A criticism can be a detriment, albeit justified criticism would not be. The claimant had his own separate business which dealt with health and safety matters. He may have felt he could bring some useful experience to bear on this issue which was not isolated to Summerbridge. The doors would close automatically and measures had been adopted, by placing a cone at one part of the entrance and ensuring a crew member stood at the other, to avoid any consequential difficulty.

152. Mr Whild's criticism of the claimant was not because he had made a protected disclosure in submitting a report relating to health and safety, but for the manner in which he had raised it. It was not a mere technicality of procedure. There are important reasons why a service of this type should examine health and safety concerns by and through its own designated department. There were subcommittees to discuss such matters. They sat on frequent and regular occasions. We accepted the evidence of Mr Whild that this service encouraged all its 800 staff to be alive to public safety issues and to report them in the relevant form to the appropriate department. The claimant had not raised a concern in that way, but undertaken his own extensive investigation and submitted recommendations. By speaking to the manufacturers of the door and other members of the respondent's staff, the claimant was acting outside his own remit of responsibility as a retained firefighter. He had no authority to engage in such discussions. He could not hold himself out as acting for the respondent when speaking to the manufacturer of the door.

153. More significantly, at the time the claimant chose to take on this task, he was the subject of an investigation into the accident involving the doors. The report he submitted would appear to minimise his responsibility. In speaking to others, the claimant might be thought to have a motive to influence them in any investigation in which they may be interviewed about into his culpability. At the very least, the claimant's actions were naive. Mr Whild's criticisms of the claimant about the report were justified. They were not, objectively analysed, a detriment.

154. Mr Whild's conclusion that the claimant was responsible for the accident was logically articulated in his letter. There were measures in place to avoid this type of incident and he did not accept the claimant's claim that he could not have seen the doors. By moving his head slightly to look beyond the appliance mirror the doors would have been visible. He was also troubled by the explanation of the claimant that the appliance was stationary when the impact occurred. Mr Whild had material to support his belief that the vehicle was still moving, given the opinion of the transport manager as to the site of the damage and the usual reflex action of the door when it came into contact with an object. His concern that the claimant had been dishonest was nothing to do with the making of any protected disclosure or protected act, but based upon a justified belief that the claimant had given a tailored account of the circumstances of the accident with a view to limiting criticism of him.

155. Mr Trory submitted that it was immaterial to the issue of culpability if the appliance had been moving slowly or not at all. The accident could have occurred even had the vehicle come to a halt. This logic would not gainsay an attempt to distance oneself from blame. A driver of the appliance may not have thought through all permutations which could lead to damage. A driver could understandably have thought additional criticism would be made of him if he had failed to stop the vehicle sooner, by not paying attention to the movement of the doors.

156. Mr Whild gave the claimant the benefit of the doubt in respect of whether the accident report he had compiled had been deliberately misleading. No disciplinary action was taken. In such circumstances, to point out that disciplinary action would be taken if the claimant submitted an untruthful report of an accident in future, was managerial advice. It was given because of the troubling circumstances surrounding the report of the accident submitted by the claimant. That was not, objectively analysed, a detriment, and it had nothing to do with any protected disclosure or the doing of any protected act.

157. The claimant said that Mr Whild raised his voice and was disrespectful. Mr Whild denied that. We have no independent evidence as to the tone of these conversations. We prefer Mr Whild's evidence and do not accept he behaved as alleged. The claimant was upset, but by a justified criticism.

158. We note that, in the light of her recommendations, Ms Macher appears to have accepted the claimant's allegations that Mr Smith and Mr Whild failed in their duties as managers to him and should have responded differently to the health and safety report he had submitted. She did not give any analysis as to why the views of Mr Whild as to the claimant's responsibility and poor judgment were not well founded, nor why the propriety of the claimant's actions in submitting this report were not properly called into question. We do not reach the same view as Ms Machers. Mr Whild dealt with this appropriately.

Paragraph 5.16 of the annexe. *Later in October 2014, WM Gillies issued Mr Johnston with a personal development plan requiring him to complete three assessed blue light drives because of the accident he had had with the station doors, even though this had not been required by GM Whild nor was otherwise justified.*

159. In his letter to the claimant, Mr Whild had specifically said he was to instruct Mr Gillies to formulate a PDP to monitor his driving competence over a timescale. The temporary suspension from driving was lifted. It is therefore not correct to say that this was not required by Mr Whild.

160. The PDP expressly required the emergency fire appliance driving (the blue light drives) to focus upon exiting and entering the appliance bay. It was entirely appropriate for some training development measures to be introduced following this accident and the claimant's responsibility for it. It had nothing to do with the fact the claimant had raised complaints.

Paragraph 5.19 of the annexe. *At a meeting with Mr Johnston on 5 April 2016, DCFO Rushworth refused to discuss the outcome of the Pitt/Machers' report with him.*

161. The way in which Mr Rushworth handled the outcome of the grievance appeal is criticised in our deliberations below concerning the complaint of unfair dismissal. The approach taken by the respondent to the disclosure of an unredacted version of the report was flawed. By the stage at which the claimant's employment became vulnerable to termination because of his relationship with his managers, the substance of the report should have been placed at his disposal, for the opportunity to advance reasons as to why he should not be dismissed.

162. We do not accept that Mr Rushworth refused to discuss the contents of the report because the claimant had made the protected disclosures and done the protected acts. His reason for not discussing the report was because he had been given advice that the redacted version properly reflected the right of the claimant and the respective rights of others criticised in the report. No doubt Mr Rushworth welcome this advice, because it avoided giving the claimant the opportunity to draw attention to the many criticisms which could be levelled at others; but it had nothing to do with the protected disclosures and acts.

Paragraph 5.21 of the annexe. *In April to June 2016 DCFO Rushworth refused to consider options put to him by Mr Johnston of transferring the three managers about whom he had complained to a station outside the Harrogate district or allocating Mr Johnston to the operational support pool. In doing so, DCFO Rushworth's intention was to establish the services position that the relationship between itself and Mr Johnston had become unsustainable.*

163. Mr Rushworth did consider transferring three managers to a station outside Harrogate and allocating the claimant to the OSR. He came to the conclusion that this would not be a viable solution to the difficulties that had arisen. The reason he came to this view is analysed in our considerations concerning the reason for the dismissal below.

164. We do not accept that this was because Mr Rushworth intended to establish that the relationship between the respondent and the claimant had become unsustainable. He eliminated them as viable possibilities *because* any continuing relationship was unsustainable. This was not because of the protected disclosures made or the protected acts. Regardless of those, the claimant had come into conflict with his managers, colleagues and other senior staff on many occasions. He had confronted reasonable management action designed to enhance his skills as a firefighter or to discipline him, for falling short of proper standards. Examples are the inappropriate use of Facebook for which he was given a warning, to improve his knowledge of topography when he had lost his way to an emergency call, the requirement to undergo a pump operators' course following his loss of a hose down a well, and to undertake driving exercises in the appliance after he had been at the wheel when a collision occurred with the station doors.

165. The respondent requires faith in its firefighters to understand the need to develop their skills and to learn by their mistakes. To this day, the claimant rejects these criticisms of him. For Mr Rushworth to have concluded when he did, that the employee relationship was irreparably dysfunctional, was rational and based upon other background and history than the protected acts and disclosures.

Unfair dismissal

166. The reason for the dismissal is encapsulated in a sentence in the dismissal letter of 23 June 2016: "*The employment relationship had irretrievably broken down and there was no trust and confidence that you could be successfully reintegrated into the service*". In a document headed 'the hearing manager's decision rationale', Mr Rushworth provides further explanation for this conclusion which he said was unique in his experience.

167. This was a substantial reason of a kind which could justify the dismissal of an employee holding the position of a retained firefighter. It has been recognised in the authorities we have cited above, that an employer will have such a reason in circumstances in which relationships have deteriorated to the point of irretrievable dysfunction. That is not to misuse the label "*trust and confidence*". Mr Rushworth's explanation made clear that it was not loss of trust and confidence of itself, but the threadbare working relationship with his work colleagues which sprang from that which was the heart of the matter. This is no better illustrated than by the fact that the claimant would not meet Mr Rushworth to discuss his return to work in February 2016, and for many weeks, whilst he remained on paid special leave. Whatever justifiable complaint he had about the non-disclosure of the Machers' report, the claimant was refusing to comply with the essential fundamentals of the working relationship, by laying down his own preconditions to his return to duty. We are satisfied that the respondent has established a potentially fair reason within the meaning of section 98(1) of the ERA.

168. Was dismissal for that reason, reasonable measured by the provisions of section 98(4) of ERA? We find it was not.

169. Mr Rushworth relied, in part, upon the contents of the Machers' report in reaching the view that there was an irretrievable breakdown in relationships, but did

not give the claimant and his representative adequate opportunity to comment upon it. It is true that he also had regard to the Vincenti report and the continuing behaviour of the claimant in his further correspondence, but we reject Mr Webster's submission that reliance was not placed upon the Machers' investigation. The purpose of the meeting on 5 April 2017 was to discuss the outcome of the grievance appeal to which the Machers' investigation had been integral. It was made clear that the claimant's employment may be terminated if there was no resolution of the outstanding matters.

170. Mr Rushworth relied upon the advice he had been given that he should not disclose parts of the report which disclosed the personal data of others. Reliance was placed upon the decision of the Information Commissioner's Office (the ICO) when the claimant challenged the disclosure of the redacted report upon his subject access request under section 7 of the Data Protection Act 1998. Enquiries of those whose personal data was to be disclosed pursuant to the data subject request had been made and the data controller had made a decision to respect that objection.

171. Both Mr Rushworth and the appeal panel believed that the same level of disclosure was appropriate for the hearings concerning the claimant's future employment. That was to fall into error. The way in which data is processed by a data controller will vary and depend on the circumstances for which it is being used. The use, or processing, of the personal data of Messrs Gillies, Smith and Whild, attracted additional and different considerations to the exercise involved in a section 7 data subject request, when decisions were to be made about complaints raised about others in a grievance or terminating the claimant's employment. The employer, as data controller, had to consider the right of the claimant not to be unfairly dismissed and not to be subject to detriments under the ERA, EqA or PTW(POLFT)R, in his considerations as to what he would disclose to the claimant. That was different to a determination, and balancing, of interests pursuant to the claimant's data subject request, as later evaluated by the ICO.

172. This is apparent from the data protection principles governing the processing of personal data in the Data Protection Act 1998. The data of the managers could fairly and lawfully be disclosed to the claimant in the proceedings concerning his dismissal, because they fell within more than one condition in Schedule 2 to the Act, for example "*the processing is necessary for compliance with any legal obligation to which the data controller is subject, other than obligation imposed by contract*". That would be the obligation not unfairly to dismiss the claimant or to act unlawfully by way of discrimination or subjecting him to detrimental treatment for having made protected disclosures. As would "t*he processing is necessary for the purpose of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed except where his processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interest of the data subject*". Greater restrictions arise in respect of sensitive personal data, but even in such circumstances, processing by way of disclosure is authorised in the situation which prevailed, in one of the conditions in Schedule 3: "*The processing is necessary for the purpose of exercising or performing any right or obligation which is conferred or imposed by law on the data controller in connection with employment*." The information concerning Messrs Gillies, Smith and Whild was not sensitive personal data, but this serves to emphasise how the levels of

confidentiality prayed in aid to justify the redaction of the report were taken to unreasonable lengths.

173. Fairness, in the context of handling the grievance the claimant had submitted and the disciplinary proceedings which emerged, necessitated the opportunity for the claimant and his representative to be able to respond to the reasons for which Mr Rushworth was contemplating terminating the employment contract. Sight of the material which gives rise to that contemplation, or a fair summary of it, was essential. The claimant had been provided with a partial, and skewed, view of the outcome of the investigation. Because of the extensive redaction, it gave the impression the criticisms were all one way: against the claimant. In fact, they were not. The claimant and his representative were deprived of the opportunity of drawing attention to errors of judgment of managers to advance a case to mitigate the criticisms of him. We are satisfied that no reasonable employer would have maintained the objection to the disclosure of the full report to the claimant and his union representative.

174. Mr Rushworth incorrectly said, on 5 April 2016, that the redaction was restricted to personal data. We note that a significant amount of the redaction had nothing to do with the personal data of the managers. Much of the redaction related to advice to the respondent more generally.

175. Of much graver concern was the statement made by Mr Rushworth that the service was in the process of implementing the recommendations, which had been taken at face value. That was not true. No disciplinary action was to be taken against any of the hearing managers, who had already been spoken to by Mr Rushworth himself. The claimant and his representative were misled. To deny access to the report was poor judgment. To mislead about intentions to implement it was improper.

176. Mr Rushworth categorised the claimant as a person of extreme difficult behaviour. He had recently attended a conference presented by two academics. This concerned managing individuals who fell within a particular medical and personality profile. This was referred to at the appeal as a consideration Mr Rushworth had in mind in making his decision. It was discounted by that panel in its determination. Nevertheless, Mr Howley, and the claimant, had no opportunity to make representations about such matters in the hearings before Mr Rushworth, because they were unaware of their significance. That was a further denial of natural justice and was properly criticised as an unfair stigmatising of the claimant.

177. We do not accept the submission of Mr Trory that the respondent did not act reasonably in concluding that there had been an irretrievable breakdown in the employment relationship. The comments of Dr Vincenti accurately summarised the depths to which working relations had sunk between the claimant and, not only, Mr Gillies but the respondent as a whole. We agree with that assessment and consider Mr Rushworth and the appeal panel were entitled to reach that opinion, regardless of the contents of the Machers' report. One cannot escape the fact that from mid-2013 the claimant has not been able to accept any criticism of his conduct from his managers. Moreover, by the time the meetings took place with Mr Rushworth, the claimant had broadened his attack, to level serious accusations of dishonesty, misconduct and impropriety against the senior management of the respondent.

Wherever the fault lay, it cannot be suggested that a reasonable employer could not have reached the conclusion that the relationships had broken down to the point of no manageable return.

Dismissal for the reason, or principal reason, that the claimant had made protected disclosures. Dismissal for having done protected acts.

178. We have considered whether the reason for the dismissal was because the claimant had made protected disclosures, because if so, that would render the dismissal unfair under sections 103A of the ERA. We have also considered whether the doing of protected acts contributed in more than a trivial way to the reason for the dismissal as this would render the dismissal unfair under regulation 7 of the PTW(POLFT)R and unlawful under sections 27 and 39(4)(c) of the EqA.

179. The background demonstrates that, regardless of those complaints and acts protected in law, a collapse in the working relationship, so critical to a disciplined service of this type, had occurred. We repeat our observations at paragraph 164 and 165. The content of the grievances concerning the claimant's allegations of bullying and harassment were not protected, being about his personal dealings rather than public interest ones, but they were repeated many times and became intractable. The manner in which the claimant raised concerns, rather than the fact he raised them, amplified the problem. The report he submitted into the station doors was one such example. It was not the proper manner in which to raise that health and safety issue; it involved an unauthorised investigation whereby the claimant interviewed a range of staff and a supplier without permission and was tendentious, marginalising the claimant's responsibility for an accident. Accusations of spiteful conduct on the part of Mr Gillies for his handling of the Challis complaint was without any justification and suggesting Ms Challis was being manipulated or was disingenuous was similarly misconceived. It illustrates the pervasiveness of the hostility felt by the claimant to his colleagues.

180. We reject Mr Trory's submission that the service failed to give any consideration to the claimant's return to work at Summerbridge. The claimant himself recognised, by the end of the proceedings, that a return to Summerbridge was out of the question and his proposition that the other managers be moved, and Mr Gillies be dismissed, was unreasonable and unrealistic. That belated recognition reflected a broader lack of insight into the feasibility of a return to work.

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181. Would or might the claimant have been dismissed had the procedures been fair? This would have involved disclosure of the unredacted report in early 2016 or, at the very latest, by the date of the appeal. It would also have involved Mr Rushworth explaining his thought processes about 'extreme difficult behaviour' and allowing Mr Howley to make representations upon them, although we accept the evidence of Mr Backhouse that this was disregarded by the appeal panel.

182. There were enormous obstacles to overcome to reintegrate the claimant into the service. We have addressed these in paragraphs 177 to 178 above. They are identified in the report of Dr Vincenti. The only way this could be achieved would have been to place him on the operational staffing reserve (OSR). That would have

minimised the opportunity for him coming into contact with Messrs Gillies, Smith and Whild and, on the rare opportunities when he did, would have required an element of trust in the claimant responding to any appropriate instructions given. By the final stage of the hearing, the claimant had abandoned the suggestion he should have been returned to Summerbridge.

183. If the claimant worked in the OSR, he would have had to report to a new management team, albeit the line of command would lead to Mr Rushworth and Mr Hutchinson, whose integrity the claimant had challenged. In any fair disciplinary process, the decision makers would have to consider whether the breakdown in relationship would have been confined to the claimant's previous managers or whether it would not be replicated in the new department.

184. There was little scope for optimism. The claimant's distrust had extended beyond his dealings with Messrs Gillies, Smith and Whild. Without having met Mr Rushworth, he accused him of dishonesty, Mr Young of the same and others of being cowards and closing ranks. He made accusations of misfeasance in public office. His behaviour with the occupational health nurse had been difficult. He confronted the chief fire officer in correspondence and said he too would be complicit if he took no action. In a letter from his solicitors to the chief fire officer, firefighter Challis was accused of feigning distress at the receipt of a text from the claimant and of triggering an inappropriate formal process or having been encouraged to do so by a spiteful watch manager.

185. The annotation of the unredacted report by the claimant demonstrated that he could not accept the findings which were not in his favour. This intransigence and lack of insight was apparent upon his consideration of the unredacted report. In his witness statement the claimant criticises those areas in which Ms Machers did not uphold his complaint. An example is the criticism he made throughout, including during this hearing, that Mr Gillies had interfered with his placement on the IEC course; it was overwhelmingly clear that it was the claimant's own failure to apply sufficiently early which led to him not being accepted. His negative attitude to Mr Smith and unfair criticisms levelled at him wholly failed to recognise the lengths to which he had gone to assist the claimant in the summer of 2014 when his father was convalescing.

186. Dr Vincenti identified problems in successfully returning the claimant to work. He drew attention to certain features of the claimant's character which led him to confront authority and fearlessly fight for what he believed was right. Dr Vincenti said these traits probably serve the claimant well in business, but in a conflict with a watch manager and other members of senior management, those traits had contributed to the drawing up of battle lines and fortifications between which there was little common ground. Although Mr Trory acknowledged that the prospect of a return to work with Mr Gillies had been ruled out as unachievable, he drew attention to the comment at the conclusion to the report, that the solution would not come from clinical intervention but a change of circumstances and a new approach by management and the claimant together. Mr Webster, on the other hand, drew attention to Dr Vincenti's description of a chronic embitterment and animosity not only to Mr Gillies but to the respondent in general. This was the greatest significance, he submitted, when one had regard to the risks of catastrophically

incorrect decision-making in high risk safety critical operations which were bedevilled by dysfunctional relationships.

187. Not only the history of the working relationship between 2013 and 2016, but the history of this litigation demonstrated that there was no prospect of the claimant being able to adapt successfully to reintegration in a different part of the organisation. There was no manager he had not fallen out with and he maintained unrealistic criticisms and lack of insight during these proceedings. We conclude that the claimant would have been dismissed in any event, had the procedures been fair. In those circumstances it is not just and equitable to make any compensatory award.

188. We recognise, in so concluding, that we are departing from criticisms made of the managers by Ms Machers in her report. Were they to have had the managerial shortcomings she suggested, there might have been the possibility that other managers could have had a better opportunity of reintegrating the claimant. We do not find there were such errors. It is unnecessary to explore in any detail the reasons we did not come to the same views as Ms Machers, as we heard evidence and considered documents she may not have seen, and she interviewed witnesses we have not heard from, but whose interviews we have read. An illustration of a different viewpoint may, however, be useful. A recommendation was made by Ms Machers that Messrs Gillies, Smith and Whild and the head of human resources should have faced disciplinary action for escalating an investigatory process regarding a complaint from firefighter Challis. In her interview with the investigation officer to her complaint, Ms Challis had said she did not want to pursue mediation with the claimant, but wanted her complaint to be dealt with formally. She expressed her concern about returning to work at the same station as the claimant. She expected him to apologise. When he had sent her several texts, she was in bed. She had been on restrictive duties as she was pregnant. The claimant's texts had nothing to do with her, but concerned her boyfriend. To have rejected Ms Challis' request for a formal investigation in these circumstances would have been questionable, to say the least. We can see no grounds to suggest the managers should have been disciplined for dealing with the complaint in the way they did.

189. Mr Webster asked the Tribunal to reduce the basic award on the ground it would be just and equitable to do so having regard to conduct of the claimant prior to the dismissal. We do not consider it would be just and equitable to do so. This was not a dismissal in respect of which the respondent relied upon the claimant's conduct but rather another substantial reason to justify his dismissal. Whilst that would not preclude us in law from extinguishing or reducing the basic award, we do not consider it would be just and equitable to do so in the circumstances. There were serious shortcomings in the way the respondent handled the process and it would not reflect the justice of the case to extinguish the basic award in those circumstances.

Disability discrimination

Disability

190. We find that the claimant was a disabled person at all material times. He had a mental impairment, adjustment disorder with mixed symptoms of emotion disturbance. It is categorised in the International Classification of Mental and Behavioural Disorders (ICD 10).

191. It had a substantial and long-term adverse effect on the claimant's ability to undertake normal day-to-day activities. The effect upon the claimant is recounted in his medical records and set out in his witness statement dealing with disability. The stress and anxiety commenced in the autumn of 2013. He had low mood, difficulty sleeping, fatigue and exhaustion. He received a course of cognitive behavioural therapy in early 2014 to 2015. He became irritable with his son and would struggle to get out of bed in the morning and do everyday tasks such as cooking and cleaning. He had panic attacks. His GP signed fitness to work notes certifying that the claimant could not undertake firefighter duties from March 2014 to May 2014 and from November 2014 until April 2015.

The duty to make adjustments

192. There was a provision criterion or practice that the claimant worked at the Summerbridge fire station under the management of watch manager Gillies, station manager Smith and group manager Whild. From November 2014, that placed the claimant at a substantial disadvantage, because his adjustment disorder precluded him from being able to work with these managers, for the reasons set out in Dr Vincenti's report.

193. The claimant no longer pursues the suggestion that it would have been a reasonable adjustment to remove those managers from responsibility for that fire station but does suggest a reasonable adjustment would have been to place him with the OSR. That was a relatively new department which provided a fire crew or staff on demand to any part of the service within North Yorkshire. There were approximately eight members of staff in the OSR. Such an adjustment would involve the claimant not being sent to Summerbridge, but there were many other stations where he could have been sent and the prospects of him coming into contact with Messrs Gillies, Smith and Whild were slim. Moreover, there was no history of the claimant refusing to take instruction and orders in any firefighting operation, so that the prospect of any major confrontation arising even if he did have to report in an emergency to these managers was negligible.

194. The Equality and Human Rights Commission's Code of Practice on Employment provides examples of reasonable adjustments to discharge the duty under section 20 and 21 of the EqA. Transferring a disabled worker to fill another vacancy or to sign him to a different place of work are specific examples, see para 6.33 and well-recognised in practice.

195. We are not satisfied that transferring the claimant to the OSR would have been a reasonable step to avoid the disadvantage, in the circumstances of this case. That is because, given the history and the deep-seated hostility felt by the claimant

to the respondent, there was no prospect of him being able to discharge the duties of a retained firefighter with this organisation anywhere. His level of distrust was such that he would not have responded to managerial criticism or guidance in a different part of the service. The relationship would have quickly broken down and caused further ill health and trauma.

Employment Judge D N Jones

Date: 26 January 2018