EMPLOYMENT TRIBUNALS

Claimant: Mr N Farmer

Respondent: West Yorkshire Fire & Rescue Authority

Heard at: Leeds **On:** 25 and 26 September 2017

Before: Employment Judge Licorish

Representation
Claimant: Mr J Iveson, Lay Representative
Respondent: Mr D Finlay, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaint of unfair dismissal fails and is dismissed.
2. The claimant's complaint of breach of contract in respect of notice pay fails and is dismissed.
3. The hearing to determine remedy which was provisionally listed to take place on 4 December 2017 at Leeds Employment Tribunal is vacated.

REASONS

1 The claimant was employed by the respondent fire authority from 21 September 1987, most recently as a watch commander, until his summary dismissal on 9 January 2017. Early conciliation began on 1 April and ended on 27 April 2017. By a claim form presented on 26 May 2017, the claimant complains of unfair dismissal and breach of contract (notice pay). The respondent resists the claimant's complaints. Its primary position is that the claimant was fairly dismissed for gross misconduct.

The hearing

2 During the hearing the Tribunal first heard evidence on behalf of the Respondent from Scott Donegan (station commander), who carried out a preliminary investigation into disciplinary allegations made against the claimant, Chris Kirby (area manager), who conducted a subsequent investigation into a wider set of allegations, Jim Butters (Area Manager), who took the decision to

dismiss the Claimant, and Ian Brandwood (chief employment services officer), who considered the claimant's appeal.

3 The claimant thereafter gave evidence. He chose to call former colleagues Nigel Hodson-Walker, Chris Jolly, David Bree, Andrew Imrie, Pat Rivers and David Williams. The claimant submitted additional witness statements from John Mann, John Iveson, Andy Reece, Graham Cunliffe, Jane Mitchell, John Durkin, Kevin Spencer, Simon O'Hara and Steve Mitchell. It was explained to the parties that the Tribunal could attach only such weight to those statements as was appropriate in the circumstances, in view of the fact that those witness were unable to confirm under oath the accuracy of their evidence, nor were they available to be cross-examined by the respondent or questioned by the Tribunal.

4 I was also provided with an agreed bundle of documents (initially comprising 519 pages) to which I was selectively referred. An additional document was added to the bundle by consent during the course of the hearing. References to page numbers in these Reasons are references to the page numbers in the complete bundle of documents before the Tribunal.

5 Oral submissions were completed sufficiently late on the second day of the hearing with the effect that the Tribunal reserved its decision.

The issues

6 At the outset of the hearing, the issues were discussed and agreed according to the claimant's pleaded case. Having further taken into account the contentions made and submissions presented during the course of the hearing, I summarise the issues to be determined by the Tribunal as follows.

7 In respect of the unfair dismissal complaint:

7.1 It was agreed that the reason for the claimant's dismissal was a reason related to conduct, which is a potentially fair reason under section 98(2) of the Employment Rights Act 1996 (the ERA).

7.2 Did the respondent hold its belief in the claimant's misconduct on reasonable grounds following a reasonable investigation including a fair procedure? The burden of proof is neutral here, but the claimant's challenges to the fairness of the dismissal are identified according to paragraph 25 of the grounds of his claim as follows:

7.2.1 the respondent failed to adopt a fair procedure when it obtained evidence from "Silent Witness" CCTV footage in breach of relevant policies;

7.2.2 the respondent did not undertake a reasonable investigation into the allegations against the claimant. Specifically, it relied on evidence obtained in breach of the Data Protection Act 1998 (DPA) and failed to investigate the claimant's allegations of historic bullying by station commander Ian Stead;

7.3 Did the decision to dismiss fall within the range of responses open to a reasonable employer in that line of business of that size and in those circumstances? According to paragraph 25 of the grounds of the claimant's claim:

7.3.1 it was unreasonable to treat the allegations as gross misconduct, particularly in view of alleged inconsistencies in the way in which the respondent deals with allegations of misconduct among other officers;

7.3.2 the respondent failed to take account of the claimant's previous long service and clean disciplinary record, and mitigation put forward during the

disciplinary process including his apology, and his explanation of the context in which the comments were made including his ill health.

7.3.3 the sanction was disproportionate to the findings of misconduct, given the adverse impact on the claimant's pension entitlement.

7.4 If the dismissal was unfair, did the claimant contribute to the dismissal by blameworthy conduct? In terms of any reduction to the compensatory award, this requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct as alleged.

8 In terms of the breach of contract complaint, it is not disputed that the claimant was dismissed without the three months' notice that he was ordinarily entitled to receive. In which case, has the respondent proved, on the balance of probabilities, that:

8.1 the claimant committed the acts on which it relied in terminating the claimant's contract,

8.2 any of those acts amounted to a fundamental breach of his contract, and

8.3 it dismissed for that reason or, having dismissed, decided not to pay the claimant in lieu of notice for that reason?

Background

9 Having considered all of the evidence, both oral and documentary, the Tribunal makes the following findings of fact, on the balance of probabilities, which are relevant to the issues to be determined. Some of my findings are also set out in my Conclusion below in an attempt to avoid unnecessary repetition.

10 In addition, the parties fell into dispute in respect of a number of matters. As a consequence, where I heard or read evidence on matters on which I make no finding, or do not make a finding to the same level of detail as the evidence presented to me, in accordance with the overriding objective that reflects the extent to which I consider that the particular matter assisted me in determining the identified issues.

11 The claimant started to work for the respondent fire and rescue authority as an operational firefighter in September 1987. Firefighters work under a national collective agreement, the National Joint Council for Local Authority Fire and Rescue Services Scheme Conditions of Service ("the Grey Book"). From 2010, the claimant was employed in the respondent's operation resource pool (ORP) as a watch commander B, providing cover across a number of fire stations in West Yorkshire, including Wakefield. The ORP comprises firefighters, crew commanders and watch commanders to cover all operational roles on the respondent's fire engines.

12 Between 2013 and 2015, the respondent's fire fighters took part in official industrial action in respect of proposed changes to their pension scheme. This period resulted in enduring bad feeling. Pat Rivers (a former station manager in the ORP) stated in evidence that he saw a marked change in the claimant's demeanour from around this time. He described the claimant as "*paranoid*" in that he thought that he was a "*target and people were out to get him*". The claimant was also accused of intimidating the younger members of his crew by general manager Dunkley, an allegation which the claimant considered amounted to "*bullying*" (pages 165 and 319). There was a subsequent "building bridges" exercise in an attempt to repair working relationships, which the claimant considered "*a nightmare*" and about which he subsequently complained (pages 170 and 334).

13 In around 2013, Pat Rivers also explained that Ian Stead had been accused of bullying a firefighter at Wakefield. The claimant tried to intervene to calm the situation, but his attempts were not well received by Mr Stead.

14 The claimant was also elected as a UKIP councillor in 2014. He outlined his "*fears for the future*" in this respect in May 2014. The chief fire officer in email correspondence described the claimant as "*unloved and lonely*", following his election (page 317). In May 2015, the claimant raised further concerns with his Fire Brigades Union (FBU) representative about possible problems in the future for this reason (page 316). In March 2015, the claimant raised an issue about his attempted removal from the ORP, which he considered to be "*intimidation and bullying tactics employed by management since my election last year*" (page 163). He also raised concerns about being excluded from a "sod cutting" ceremony in 2015 (page 340).

15 In June 2016, the claimant was scheduled to cover for the usual green watch commander at Wakefield fire station. This "tour of duty" comprised 2 days (on 17 and 18 June) and 2 nights (19 and 20 June). On Saturday 18 June 2016, Ian Stead arrived at Wakefield and subsequently raised concerns about the claimant's behaviour which triggered a preliminary investigation, carried out by station commander Scott Donegan.

16 On 24 June 2016, Scott Donegan telephoned the claimant to inform him that there would be no case to answer in respect of an earlier incident. The claimant had sent a "reply all" email containing comments critical of the respondent's recent staff survey when he had intended to email Ian Brandwood (chief employment services officer) only (page 363). However, Mr Donegan also informed the claimant that he had since received details of further allegations which he would be investigating. Mr Donegan later saw the claimant at Dewsbury fire station. He told him that the allegation related to him being "*found in bed*" on 18 June at Wakefield. Among other things, the claimant stated that "*he felt he was being harassed by Senior Managers and … Ian Stead*" (page 98).

17 On 27 June 2016, Mr Donegan interviewed Ian Stead (pages 59 to 61). In summary, Mr Stead stated that he had gone to Wakefield station on the afternoon in question to return his dress uniform to his locker following a medal presentation ceremony at Ossett. He found the front door locked and the station was quiet. At 2.45pm SC Stead found the claimant lying on his bed with the curtains closed, looking at his phone. They had a brief conversation, among other things about the work which was planned for the afternoon. The claimant did not move from his bed throughout their exchange. Mr Stead considered claimant's actions to be "*disrespectful … he is dismissive and has no respect for rank … In my opinion he has an attitude problem and his behaviour does not align with our core values … We never had words or crossed each other in the past*." Chris Shaw later told Mr Stead that during a changeover of watches and in front of two shifts, the claimant said that if Mr Stead "*had come in an hour later I would have still been in bed*".

18 To verify the claimant's account of work planned for the afternoon of 18 June, Scott Donegan subsequently reviewed the respondent's automatic vehicle location data to track the fire engine the claimant had used on the day in question, accessed its electronic maintenance of competence system and equipment management system to confirm the claimant's crew activity, checked the respondent's Firemap to confirm the fire prevention activity for that day (page 49), and reviewed the relevant ORP handover form completed by the claimant and submitted to his line manager, Nick Watson (page 53).

19 Each fire engine also has a CCTV camera on its dashboard and hard drive digital recorder (known as Silent Witness) in its cab. Scott Donegan concluded that the handover form and the claimant's account to Mr Stead was inconsistent with the other data he had obtained. As a result, on 23 June he obtained authority from an area manager, Nick Smith, to view Silent Witness footage from the day in question and spoke to Allan Darby, the respondent's information management officer (pages 54 and 363). Mr Donegan's stated rationale for the request was "*to confirm the work activities carried out by [the claimant]*" on 18 June. Mr Smith replied: "*please does this discretely* [sic]. *I can't remember the exact policy with regard to the use for disciplines. We may be best relying on witness statements if we can get them*." Mr Donegan stated he hoped that viewing the footage would be "*a last resort*". Mr Donegan did not on the prescribed form give the specific reason for requesting access to the Silent Witness footage, although it states that he should have done so (pages 55 to 56).

20 On 29 June 2016, Mr Donegan viewed the relevant Silent Witness footage. The transcript in the bundle of documents before the Tribunal contained the following remarks made by the claimant (pages 50 to 51):

"(*referring to conversation with Ian Stead) I want to know what it's got to do with him, he's not even here though is he? It's not his fucking station … He's a sad little cunt. We'll just fuck off, drive round for 10 minutes then we'll come back. Go down the cricket club … we'll just stand there at the wall and watch it for 10 minutes, is that all right? …*

Arrive at petrol station

… Still sat in the car, that cunt (referring to member of the public in white car) … oh, yeah, we're dementia friendly now, it's these FP nobbies innit what about being retard friendly as well. Let's have every sticker, every disease on the back of here…unbelievable …

It's bleeding fucking Karachi round here (outside Asian supermarket)."

21 Scott Donegan Donegan also interviewed Chris Shaw on 4 July 2017 (pages 62 to 65). Mr Shaw recalled the following exchange with the claimant in the canteen at Wakefield a day or two after SC Stead's visit. It took place in front of the night shift:

"'*What was that C**T in on Saturday for?'*

CS said 'who'? …

*'That C**T upstairs, who do you think I meant. Your mate Steady … if he had come in an hour later he would have still found him asleep in bed'*"

Mr Shaw further stated that the claimant was "*not respected Firefighters laugh with him and he is also laughed at behind his back*". He reported what the claimant had said to group manager Tim Jones and station manager John Lloyd, who in turn reported the matter to general manager Graham Ambler. During the Tribunal hearing, Chris Jolly gave evidence to the effect that Mr Shaw told him that he had been "*overheard*" discussing the claimant's comments and had been "*forced to make a statement*" (page 405).

22 Scott Donegan thereafter recommended to Graham Ambler and HR manager Christine Cooper that a full investigation by someone more senior should take place as the potential disciplinary award was more serious than previously anticipated. It was not disputed that at the time Mr Donegan was not trained to conduct investigations involving allegations amounting to gross misconduct.

23 On 6 July 2016, general manager Chris Kirby was accordingly asked to conduct a formal investigation into the claimant's conduct and performance. After reviewing the evidence Scott Donegan had obtained, a decision was taken to suspend the claimant from duty on the same day pending investigation into three areas of concern (page 68A):

23.1 breach of the respondent's Dignity and Respect policy and core values, including comments made about Ian Stead (allegation 1),

23.2 a deliberate failure to direct and undertake meaningful work (allegation 2), and

23.3 undertaking stand-down at a time when the claimant would be expected to be working (allegation 3).

Mr Kirby's "note for case" records that, in response to the allegations, the claimant stated that "*Ian Stead had bullied him for 2 years*", "*a close friend had died*" the day before their encounter and he was "*effectively on his lunch hour*" when Mr Stead had found him in the dormitory. The claimant further stated that he "*felt like booking sick and taking [his] last year off on sick leave*" (pages 66 to 67).

24 Chris Kirby interviewed the claimant's crew on the day in question. Neither John Auty nor Craig Pickles were particularly helpful about what was said on the fire engine. Nevertheless, Mr Pickles confirmed that the claimant and Ian Stead had a poor relationship, and Mr Auty said that he saw the claimant with his head in his hands on 19 June, having received news that a close relative was gravely ill (pages 73 to 77). Chris Jolly gave a summary of work that was undertaken that day (page 78). Crew commander Paul Stevens stated that he thought it "*ironic that [the claimant is getting investigated over one of the busiest days I've had here*" (page 90a). Graham Cunliffe did not remember anything that was said on the fire engine, but thought that going out to the cricket club was "*a bit strange*" (pages 91 to 92). Nick Watson confirmed that Ian Stead had asked him to report the fact that he had found the claimant in bed whilst on a day shift, and that there had been an earlier concern raised in February regarding the lack of a handover form. Mr Watson was also aware that the claimant and Ian Stead "*have some issues with one another … I am not sure of the background to this*" (pages 93 to 94).

25 At the claimant's request, Chris Kirby also interviewed Paul Davis, a member of Ossett red watch (pages 96 to 97). Mr Davis explained that he personally had no issue with either the claimant or Ian Stead, but was aware that there was some "*bad blood*" between them. In summary, Mr Stead appeared to hold negative views about the ORP and how much work was done on shifts they covered. The claimant had been accordingly irritated by the dispute over handover paperwork in February 2016.

26 At the claimant's request, Chris Kirby also spoke to crew manager Soren Johnston (pages 102 to 103). Mr Johnston confirmed that he had a poor relationship with Ian Stead while temporarily transferred to Wakefield and that he thought Mr Stead systematically bullied members of Wakefield blue watch because they were new recruits and a young shift.

27 Towards the end of July 2016, the allegations against the claimant were widened to include (page 106):

27.1 the misuse of fire service vehicles and resources (allegation 4), and

27.2 that the claimant had falsified documents relating to work carried out by his crew from 17 to 21 June 2016 (allegation 5).

28 Owing to a clerical error, those further allegations were eventually notified to the claimant in September 2016 (page 115).

29 In the days leading up to his investigatory interview, the claimant sent Chris Kirby a number of emails about his mental health, the behaviour and suspected motivation of Ian Stead, and partly explaining his actions on the day in question (pages 116 to 119). The claimant produced no further evidence in respect of his ill health, but Mr Kirby took into account reports produced by the respondent's area medical adviser (AMA) dated 15 August and 21 September (pages 110 and 114). In summary, the AMA was concerned about the claimant's well-being and advised that the respondent should allow the claimant time before arranging the investigatory interview. The AMA eventually certified the claimant as fit to attend an interview on 12 October 2016, albeit he would be "*anxious*". The claimant confirmed that he was prepared to be interviewed at home as he needed "*to move on*" (page 120). David Williams also attended the interview as the claimant's FBU representative.

30 In evidence, Chris Kirby explained that during the investigatory interview on 12 October, the claimant was clearly agitated. The transcript contained in the bundle supports the view that the claimant was having difficulties organising his thoughts (pages 132 to 152). As a result, Mr Kirby spent a considerable amount of time producing a separate statement to summarise the key points of the interview in respect of each allegation (pages 124 to 131). Mr Kirby eventually met with the claimant four times during the investigation, including on 30 November, 15 December and 5 January 2017, to clarify his statement. Mr Kirby was also aware that the claimant had been further examined by the AMA in December 2016. At the claimant's request, Mr Kirby also clarified how many times the claimant had worked with Chris Shaw (3 occasions) and took a statement from Pat Rivers on 6 January 2017, which he subsequently sent to area manager Jim Butters in readiness for the disciplinary hearing (page 190). Pat Rivers states that at a meeting at the respondent's headquarters Ian Stead had made a glib comment about catching the claimant in bed at work and said something along the lines of, "*I got him*" or "*I nearly had him*".

31 In terms of allegation 1, in summary the claimant stated that he thought Ian Stead hated him and was a bully. He said he very rarely "*went on a bed*", but his back was hurting. "*If any other officer had have come into the room and I was laid own I would have stood up but not for him*." However, if Mr Stead had raised it with him at the time the claimant says that he would have apologised. He did not remember what he had said about Mr Stead on the fire engine. The claimant also thought that the word "*retarded*" was "*not offensive*". He referred to a member of the public as a "*cunt*" because "*it's just my persona, in't*". He made the comment about Karachi because he had seen a white person urinating and was not racist. Regarding the canteen conversation with Chris Shaw, the claimant stated, "*I was probably making comments about Ian Stead saying he'd been a cunt again*" over an unrelated telephone call. The claimant later stated that he would swear at work because "*there's a relaxed atmosphere*".

32 In terms of allegations 2 and 4, the claimant said that he had learned earlier that morning that a close friend had died and therefore went to the cricket club to pay his respects. He also had "*a lot of things going on in [his] mind*". He further confirmed that no work was done once the crew returned to the fire station. In terms of misusing fire service vehicles and resources, the claimant

explained that the fire engine needed fuel and he therefore took the opportunity to visit the cricket club.

33 In terms of allegation 3, the claimant said that he was on his dinner hour when Ian Stead found him in the dormitory. Regarding allegation 5, the claimant initially thought that the ORP form covered 2 tours, and thought that his crew had carried out 8 home fire safety checks in total, but thereafter conceded that only 3 had been completed. The claimant thought that this may have been a genuine error in recording the number of visits.

34 In evidence Chris Kirby explained that, among things, he concluded that the claimant had used abusive language not only as evidenced in the Silent Witness footage but also by Chris Shaw in respect of their subsequent exchange in the canteen in front of others. Mr Kirby was further satisfied that the claimant had deliberately failed to stand up for Ian Stead when he entered the dormitory. He also concluded that the claimant had talked about Mr Stead to Chris Shaw and in front of an audience in a way that in itself could be interpreted as bullying according to the respondent's dignity and respect policy (page 303).

35 Chris Kirby also concluded that the opportunity to deliver more work was clearly there. In his view, if crews have completed their target they consider that there is no requirement to carry out any further activities.

36 Following the investigation, area manager Jim Butters decided that the matter should progress to a disciplinary hearing, which eventually took place on 9 January 2017 (pages 154, and 168 to 189). All the evidence presented at the hearing was sent to the claimant beforehand. David Williams once again accompanied the claimant. Allan Darby, Tim Jones, Chris Shaw, Ian Stead and Nick Watson gave evidence. Chris Kirby presented the respondent's case (pages 155 to 161).

37 By the time of the disciplinary hearing, the claimant was recorded as admitting allegation 1 with mitigation, but denying allegations 2, 3 and 4. In terms of allegation 5, it was recorded: "*This was a mistake, and there is mitigation*" (page 169). During the hearing, the claimant stated that he was suffering from depression, and "*there was a witch hunt out to get him*". He outlined various matters including the continuing ramifications of the industrial action, his relationship with Ian Stead and a number of personal setbacks which had prompted him to seek support from occupational health.

38 Following Chris Kirby's presentation, David Williams thanked him "*for a thorough investigation and pack*". Mr Williams thereafter called a number of the respondent's witnesses to give oral evidence. In summary, Allan Darby said that the respondent had fully complied with the requirement to tell all staff about monitoring and the reason for it. When the claimant stated that he had seen no signs in the fire engine on the day in question, Mr Darby further confirmed that the rollout process for signage in vehicles had begun in April 2016.

39 David Williams also raised with Jim Butters the issue of consistency of treatment. He was aware of a case where a temporary station manager and watch manager had call one of his members "*a tit*". He also had a discussion with Tim Jones about the levels of performance, grievances and transfers at Wakefield, but Mr Jones was able to add little in terms of the claimant's case.

40 Mr Williams also questioned Chris Shaw about the claimant's use of the "c word". Most importantly, Chris Jolly had given a statement to the extent that "*it is normal language for some people and is not always malicious, just bante*r", to which Mr Shaw replied, "*I suppose it could be*". Ian Stead simply denied all that

the claimant's witnesses had accused him of. The claimant stated to Mr Stead: "*The reason we didn't get on is I consider you a bully*." Nick Watson confirmed in evidence the claimant's recollection: "*You attended Leeds, I said to you, why can't he leave me alone? I've had enough of him*."

41 Jim Butters announced his decision following an adjournment. He found allegations 2, 3 and 4 not proven, and accepted allegation 5 had been a mistake therefore would not be taken forward in considering the level of sanction.

42 In terms of allegation 1, in evidence Mr Butters said that he was satisfied that there had been a serious breach of the respondent's dignity and respect policy by the claimant, including in relation to his use of the "c word" in describing Ian Stead, as evidenced by the Silent Witness footage and as subsequently witnessed by Chris Shaw. On both occasions the comments were made in front of watch members whom the claimant managed. The claimant further made offensive comments about the respondent being "*retard friendly*", when passing the Asian supermarket, and towards a member of the public. Mr Butters considered that all these comments were compounded by the fact that the claimant was a watch manager and in a position of great influence.

43 The notes of the meeting show that David Williams then proceeded to read out a written statement in support of the claimant and produced a character reference from John Mann (pages 190 to 192). There was in the bundle a document headed "*Statement in support of [the claimant's] case*" (pages 164 to 167). In evidence, David Williams could not remember producing this document, although it sets out the claimant's case and mitigation. On balance, I find that this was likely to be the document that David Williams read out during the hearing.

44 In summary, in mitigation David Williams asserted that the witness statements obtained on behalf of the claimant suggested a campaign of harassment against the claimant by the respondent's managers, including Ian Stead. The claimant had also sought help from occupational health in July 2014 on the basis that "*he feels he is been treated unfarely due to taking strike action* [sic]" (page 202). Indeed, during the investigation Scott Donegan had advised Nick Watson that the claimant needed support from a welfare officer, which was duly put in place. In terms of the claimant's home life, a number of issues from the beginning of 2016 meant the claimant scored 304 on the Holmes and Rahe stress scale. In evidence, Mr Williams confirmed that a score of over 300 indicated that the individual was "*at risk of illness*". Finally, Mr Williams asked Mr Butters to consider among other things the claimant's long service, hitherto unblemished disciplinary record, and achievements in mentoring young firefighters. The claimant finally apologised "*for the language used and offence caused*", and thanked Chris Kirby "*for a very fair investigation*".

45 Following an adjournment, Jim Butters announced his decision to dismiss the claimant with immediate effect. Mr Butters explained that he had taken into account the claimant's mitigation (including character references) and long service: "*Your relationship with Ian Stead was clearly not good, but I have not heard anything which an excuse the language you used. This is particularly so when I take into account your role in the organisation as Watch Commander. As a Watch Commander I expect you to be setting the correct example.*"

46 In evidence, Jim Butters explained that he did not consider any alternative sanctions when coming to his decision, but simply concluded that the claimant's behaviour amounted to gross misconduct which warranted summary dismissal. By a letter dated 10 January 2017, Mr Butters confirmed his decision to the claimant (page 193). The letter stated that the grounds for dismissal included the

claimant's comments about Ian Stead as well as his comments when passing the Asian superstore and regarding the dementia friendly stickers on his fire engine.

47 Ian Brandwood was appointed to consider the claimant's subsequent appeal. Mr Brandwood describes himself as "*second tier*" in that he reports directly to the chief fire officer.

48 The claimant requested that his appeal be heard on the grounds of the severity of the award and new evidence. The claimant considered that Mr Butter's dismissal letter contained two grounds which were "*never discussed*" at the disciplinary hearing, and gave permission for Mr Brandwood to contact his doctor. Mr Brandwood replied on the basis that it would be difficult for him to obtain a medical report without knowing what evidence the claimant intended to present (page 197).

49 The claimant subsequently produced a report from his interpersonal therapist who confirmed that "*irritability and anger are common symptoms of depression*" (page 196), and supporting statements from two firefighters of South Asian origin, both of which stated among other things that they had never heard the claimant make derogatory remarks on the grounds of race (pages 200 to 201).

50 By a letter dated 13 February 2017, the claimant's GP also confirmed that the claimant had presented to the practice in July 2016 "*with 6 months of poor sleep, waking in the night, thoughts running through his head and lack of interest, and poor concentration*". He was subsequently prescribed antidepressants.

51 The claimant also sent to Ian Brandwood a statement from a Mr Wilson, a former FBU official, dated 20 December 2016. There was no explanation as to why this statement was not produced at the claimant's disciplinary hearing even though it was available. Nevertheless, Mr Brandwood chose to accept it as part of the claimant's appeal. The claimant maintained that there were no warnings about the Silent Witness camera "*on the machines to warn us*". Mr Wilson's recollection is that the equipment was "*not [to be used as] a method of staff monitoring*". In his view, the respondent never sought the FBU's agreement in this respect. He further cited ACAS guidance on the use of CCTV to monitor staff at work. Among other things, the employer should make sure employees are aware of the use of CCTV cameras "*usually … by displaying signs to say where the location of the cameras are*".

52 Mark Hitchcock, the claimant's welfare officer, also gave a statement to David Williams (page 215). Mr Hitchcock confirmed that he saw the claimant on 10 June 2016 and was concerned for his wellbeing and mental state. He had suggested to the claimant that he take a break at one of the Firefighters' Charity centres, but the claimant said that "*he felt best supported by his colleagues whilst he was at work, particularly at the Wakefield station*".

53 Prior to the appeal, Jim Butters emailed Ian Stead and Chris Shaw with the notes of the original hearing (page 413). They agreed to meet on the morning of the appeal hearing. In cross-examination, Mr Butters explained that this was to explain the appeal process to both witnesses to "*put them at their ease*".

54 The appeal hearing eventually took place on 23 February (pages 220 to 261). At the outset, David Williams confirmed the grounds of the claimant's appeal as the severity of the award, defects in procedure and new evidence. When asked to clarify the breaches of procedure, Mr Williams stated that during the investigation Craig Pickles and John Auty's statements were left on a printer

for some time before being collected. Mr Williams conceded that this had not been brought to Jim Butter's attention at the original hearing, and later stated that he did not know how this might have impacted unfairly upon Jim Butters' eventual decision. Mr Williams further stated that two of the witnesses' companions at the hearing tried to "*frustrate the process*" by interrupting. Finally, it was Mr Williams' understanding that the Silent Witness hard drive had been removed 2 days before authorisation was granted and no reason was given for its removal on the electronic form 706.

55 The new evidence comprised Nick Smith's response to Scott Donegan in terms of the reason for the latter's request to view the Silent Witness footage, a response from the Information Commissioner's Office (ICO) on 11 January 2017 to the effect that the respondent had breached the DPA by not informing officers that Silent Witness may be used for training and development needs (pages 437 to 438), the reports from the claimant's welfare officer, GP and interpersonal therapist, and the character references sent to Ian Brandwood previously.

56 In terms of the severity of the sanction, David Williams explained that not enough consideration had been given to the claimant's state of mind. Among other things, the claimant had apologised profusely for his "*unguarded comments*". Mr Williams also cited two previous cases where two officers had been given final written warnings for using the terms "*cheeky cunt*" and "*a bastard chinky*" (the latter referring to a takeaway meal). Finally, Mr Williams considered that summary dismissal of an officer with otherwise unblemished service and 6 months before retirement was not within the range of reasonable responses.

57 There was also a long debate about whether the claimant wanted Ian Stead and Chris Shaw to give evidence. Ian Brandwood stated that it was clear that the relationship between the claimant and Ian Stead had "*broken down*". The claimant said that he had proved that both witnesses were lying. In the event, after a short adjournment, Mr Williams indicated that he did not wish to question those witnesses.

58 The claimant was also asked about the additional comments he had made on the fire engine as he contended that they had not been directly discussed at the original hearing. He claimed that he was venting amongst friends and in what he thought was a "*safe environment*", particularly as he thought that his junior colleagues shared his view of Ian Stead. The claimant also explained the history of his illness, which he described as severe depression. He also considered that if Hilary Steele, a station clerk, had been interviewed by Chris Kirby, "*She would reinforce the fact … that my name has been besmirched by Ian Stead*".

59 During the hearing, Jim Butters conceded that the health aspects of the claimant's mitigation had "*probably been made more strongly*" at the appeal. In terms of the claimant's long service, and the fact that he had "*only 4 months to go*" to retirement, Mr Butters contended that "*you can't have a special account because of the proximity to retire … It did make it a difficult decision for me – it sounds really harsh does this – but it's not relevant, you said that*". The claimant further conceded that he had had "*a better chance today to discuss [the allegations]*". Mr Butters also confirmed to Ian Brandwood that the new evidence he had heard during the appeal would not have affected his original decision to dismiss the claimant.

60 David Williams concluded the hearing by summing up the claimant's case in the following terms:

60.1 Whether summary dismissal for an employee's first offence and only 6 months before their retirement falls within the range of reasonable responses.

60.2 The CCTV and Silent Witness operational policy "*is unclear at best*" and contains no warning that hard drives maybe used in disciplinary proceedings which may lead to dismissal.

60.3 Some of the language the claimant used is commonplace on fire stations.

60.4 The final decision should be made in accordance with equity and the substantial merits of the case, equity referring to natural justice, procedural fairness, the employee's personal circumstances, common sense and common fairness.

61 Regarding the claimant's relationship with Ian Stead, David Williams commented that they had "*had a good opportunity to discuss this*":

61.1 Since 2014 the claimant had made several cries for help, including a visit to occupational health.

61.2 There was evidence that Ian Stead "*had it in for*" and had been derogatory about the claimant.

61.3 Only a few days before the incident, the claimant's welfare officer registered concern for his wellbeing and mental state.

61.4 "*All the comments used during the time recorded on the appliance are abhorrent*", but summary dismissal was a disproportionate response.

61.5 Use of the Silent Witness footage had breached the DPA.

62 The claimant concluded: "*I was in an extremely dark place and there is no excuse for the foul language, the abusive language in any form so I can only apologise for that.*"

63 Finally, Ian Brandwood asked David Williams for further details about the comparison cases he had referred to earlier. Mr Williams also provide details of a relatively recent case in which one firefighter had been compulsory transferred and given an 18-month written warning for fighting, whereas the other firefighter who had goaded the disciplined officer by calling him "*a cunt time and again … received no sanction or award for provocation*". Ian Brandwood reserved his decision on the basis that he needed "*to look at these other cases*" and that the claimant's case was "*complex*".

64 By a letter dated 24 February 2017, Ian Brandwood upheld the decision to dismiss the claimant and also made a file note outlining his reasoning for his conclusions (pages 264 to 266 and 267 to 268). Most importantly:

64.1 Although the claimant cited significant bullying by Ian Stead, it was unacceptable to criticise a more senior manager in front of junior staff in the way that the claimant did. Owing to his comments during the hearing, Mr Brandwood was further unconvinced that the claimant accepted or understood his leadership role. In his view, the claimant length of service in this context counted against him in that he "*should have known better*".

64.2 The language used by the claimant in front of his crew regarding the dementia-friendly stickers was crass at best and objectively offensive. The claimant's comments regarding the Asian supermarket were also inappropriate.

64.3 Although there were procedural irregularities in the obtaining of the Silent Witness footage, those irregularities did not undermine the overall fairness of the

decision to dismiss. In particular, the respondent could not be expected to ignore a serious breach of behavioural standards.

64.4 Mr Brandwood also explained that he found it difficult to attribute the claimant's behaviour to his stated illness. In particular, the claimant had recounted conversations he had had with another firefighter prior to his illness, which showed "*a similar level of inappropriate behaviour*".

64.5 The other disciplinary cases cited by David Williams were significantly different. Two of the three cases did not involve staff in managerial positions or concern their impact on subordinate staff. In the third case, involving a watch manager, they were not comments made in a leadership capacity or the public criticism of more senior staff. In evidence, Mr Brandwood stated that he found it "*difficult to excuse behaviour where a manager describes a senior manager in such disparaging terms to subordinate staff that he is responsible for supervising, leading and motivating ... I had lost all trust and confidence in him to manage effectively within the organisation*."

65 In terms of the alleged procedural errors, Mr Brandwood explained in evidence that the original reason for accessing Silent Witness was to verify work done by the crew. It could have supported the claimant's account. Further the ICO ultimately concluded that use of the footage did not breach the DPA (pages 267a to 267b). Put simply, the ICO determined that the original reason for viewing the footage was legitimate and the respondent could not be expected to ignore such evidence it came across as a result.

66 Mr Brandwood further explained in evidence that the claimant also raised the issue of contradictory witness evidence. Nevertheless, Mr Brandwood chose to prefer the evidence of Chris Shaw over those "*riding the pump*" with the claimant on the basis that the latter directly contradicted what had been recorded by Silent Witness.

67 Mr Brandwood also says that he considered at some length whether demotion would be an appropriate sanction, but considered the claimant's behaviour to be "*so out of line with expectations of staff … that would not be appropriate*". He concluded that the claimant's misconduct was of such a serious nature in that it completely undermined the respondent's policies on diversity, dignity and respect.

The relevant law

68 Section 98 of the Employment Rights Act 1996 (the ERA) states:

> *"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
>
> > *(a) the reason (or, if more than one, the principal reason) for dismissal, and*
> >
> > *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."*

Misconduct is a potentially fair reason for dismissal under section 98(2)(b) of the ERA. The reason for dismissal in any case (as defined in **Abernethy v. Mott, Hay and Anderson 1974 ICR 323 CA)**, is "*a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*".

69 Section 98(4) of the ERA states:

> "…*where the employer has fulfilled the requirements of subsection (1),*

the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case."

70 First, an employer does not have to prove that misconduct actually took place, only that it held a genuine belief that it did so. Secondly, the Tribunal must determine, applying a neutral burden of proof, whether the employer had reasonable grounds for holding that belief and conducted as much investigation into the circumstances as was reasonable. This is the test set out in **British Home Stores Ltd v. Burchell 1980 ICR 303 EAT**.

71 The **Burchell** test is obviously most appropriate if misconduct is only suspected by the employer. However, where any conduct in question has been admitted by the employee, the reasonableness test set out in section 98(4) of the ERA must still be applied and the employer must consider whether that particular conduct warranted dismissal. There may also be special circumstances in which the reasonable employer would be expected to carry out an investigation – for example, if the intention of the employee is in doubt or where new matters come to light.

72 In considering the issue of fairness (that is to say the procedure adopted and the decision to dismiss), Tribunals are also bound to follow the rule that it must not substitute its own view for that of the employer unless the actions of the employer fall outside "*the band of reasonable responses*".

73 In deciding whether the claimant was unfairly dismissed it also is important to remember that the Tribunal's role is confined to reviewing the employer's response during the dismissal process and not to substitute its own view based on the evidence that emerges before it at the hearing.

74 Section 122(2) of the ERA, dealing with the basic award, provides:

"*Where the Tribunal considers that any conduct of the complainant before the dismissal … was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly*."

Section 123(6) of the ERA states:

"*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding*."

75 The Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 (the 1994 Order) states that claims for breach of a contract of employment may be brought before a Tribunal if the claim arises or is outstanding on the termination of an employee's employment. Such claims may be for damages for breach of the contract of employment or for a sum due under such a contract. Under ordinary common law principles as to damages for wrongful dismissal, recoverable loss will be limited to any sums which would have been payable to the employee had their employment been lawfully terminated.

76 An employer will avoid liability in this respect if an employee so fundamentally breaches his contract as to entitle the employer to terminate it without notice. Gross misconduct is an act which fundamentally undermines the employment contract. Furthermore, the conduct must be a deliberate and wilful contradiction of the contractual terms, or otherwise amount to gross negligence. The burden of proof rests on the respondent and the standard of proof is on the balance of probabilities.

Conclusion

77 The claimant and respondent's representative made a number of oral submissions at the end of the hearing. I have considered those submissions with care, and recorded them in my notes of the proceedings, but do not set them out in full. The parties will readily recognise how the Tribunal has dealt with those submissions in its findings and following reasoning.

78 First, the claimant's challenges the fairness of his dismissal on the basis that the respondent failed to adopt a fair procedure when it obtained evidence from Silent Witness in breach of relevant policies. In evidence, the claimant maintained that there were no signs in the fire engine to warn him that he was being recorded. However, in response to the Tribunal's questions he stated that he knew the recording equipment was there as the dashboard camera and "*DVD player*" were both visible within the vehicle, but on the day in question he "*didn't think*". Also, he did not expect the equipment to be used to "*discipline people*".

79 The respondent's operational policy on Silent Witness states that watch commanders must have a good working knowledge of the procedure, including "*operational considerations*" (page 272). Its use is compulsory whenever vehicles fitted with the device are mobile for any reason or whilst performing any other operational duties. It has been used successfully in defending third party claims against the respondent (page 273).

80 "*Operational considerations*" include: "*Crews should be aware that the equipment records both images and sound in the cab. Therefore all communications must be carried out in a professional manner*" (page 275). "*Other benefits*" include identifying individual training/development needs or points of good practice (page 276). Any request for "*legitimate access*" must be made on an electronic form 706 and authorised by an area or senior manager (page 279).

81 As well as the relevant operational policy, the Tribunal was directed to two reports dated February and March 1998, the purpose of which was to gain approval for an extension of and update members on the progress of the Silent Witness camera programme (pages 205 to 208). At that time, the main reason for introducing these cameras was to identify individuals who attacked fire crews. Additional benefits were stated to include the identification of individuals (including arsonists) at fires, debriefing large incidents, and driver training. It was also stated that there "*would be no intention of management to use this footage to discipline firefighters for minor procedural infringements and misdemeanours, in fact the officer in charge has the facility to turn off the camera when not required*."

82 The respondent has since reviewed its CCTV and silent witness operational policy, and maintains that it does not randomly or routinely review footage in an attempt to identify breaches of discipline (pages 439 to 440). Ian Brandwood accepted that Scott Donegan's initial reason for reviewing the footage was not a stated purpose explicitly set out in the relevant policies, but the

respondent's actions taken against the claimant were justified in the circumstances and the stated reason for viewing the footage was legitimate (pages 443 to 445). It is also worth noting that the ICO in its original decision decided that no action should be taken against the respondent in this regard, but it would file the complaint to help the ICO over time build up a picture of the respondent's data protection practices (page 438). During the hearing, there was also much discussion between the parties about a later complaint raised by the FBU with the ICO in August 2017 regarding silent witness hard drives being discovered in unlocked drawer, which is yet to conclude (pages 520 to 522).

83 Ian Brandwood accepted that there were irregularities in the way in which the CCTV footage was obtained, but once viewed the respondent could not be expected to ignore it. Jim Butters explained that the respondent comes across minor misdemeanours whilst viewing footage "*all the time*" which it chooses to ignore. The ICO has since recommended changes to the respondent's policy on the basis that it should be more explicit about its potential uses.

84 The claimant contends that Scott Donegan was not fully trained and competent. If he had been, he would have known that he had no legitimate reason for requesting the footage.

85 However, in cross-examination, Mr Donegan stated that he checked the Silent Witness policy and hoped that he would not need to use the footage, as he was yet to review the respondent's database. Allan Darby further told him that he thought that there was "*no issue*" with obtaining the footage. Mr Donegan also chose not to name names on the request form because he had been told to be discreet. In his view, obtaining the footage was the "*only way I could prove*" what the claimant had said about the crew's activities that afternoon because "*it was not showing in [the respondent's] systems … database could be wrong … witness statements were complimentary [about the claimant] … It could have been no case to answer*."

86 In cross-examination Scott Donegan also explained that the footage had to be removed quickly otherwise it would be taped over. He therefore asked the station commander at Wakefield to send the tape to the respondent's Visual Services (on the basis that there had been a complaint) while he sought authority to view it.

87 In the circumstances, I am satisfied that although the respondent's policy was not at the time as explicit as it could have been, the respondent had a legitimate reason for viewing the CCTV footage. There was a dispute over whether identifying individual training/development needs was commensurate with Scott Donegan's stated reason for requesting the footage. However, the list contained in the policy is not exhaustive. The allegation was that the claimant had failed to direct his crew to undertake meaningful work on the afternoon in question. In evidence, David Williams maintained that there was nothing in the respondent's policy to alert firefighters to that fact that the respondent may "*look through [footage] for conduct*". However, I am satisfied that the respondent did not proactively search Silent Witness for potential misconduct as David Williams suggested.

88 On this basis, I am satisfied that the respondent's response fell within the band of reasonableness in respect of obtaining the Silent Witness footage.

89 Secondly, the claimant argues that the respondent did not undertake a reasonable investigation into the allegations against the claimant. Specifically, it

relied on evidence obtained in breach of the DPA and failed to investigate the claimant's allegations of historic bullying by Ian Stead.

90 Some may describe the claimant as unlucky, in that although Scott Donegan approached his task with a sufficiently open mind, the Silent Witness footage in fact brought more serious matters to light. Nevertheless, ICO guidance anticipates the turn of events as happened in the claimant's case.

91 Most importantly, during his investigation, Chris Kirby obtained advice from Allan Darby in relation to using Silent Witness footage other than for its primary purpose (page 72). Mr Darby quoted the ICO Employment Practices Code:

"*It is likely to be unfair to workers to tell them that the monitoring is undertaken for a particular purpose and then use the information for another purpose they have not been told about unless it is in the worker's interest to do this or the information reveals activity that no employer could reasonably be expected to ignore. The type of activities … might include … gross misconduct* …"

92 On this basis, I am satisfied that the respondent's response fell within the band of reasonableness in respect in relying on (among other things) the Silent Witness footage as evidence in order to discipline the claimant.

93 Turning to the alleged failure to investigate the claimant's claims of bullying by Ian Stead, the Claimant claimed in evidence that Chris Kirby "*did not interview the people I asked him*". Although thanked by the claimant and David Williams for the thoroughness and care taken over his investigation at the time of the disciplinary hearing, by the time of the Tribunal hearing Mr Kirby's impartiality was being questioned. This was largely because a subject access request by the claimant showed that during the investigation Mr Kirby had obtained statistics which showed that the claimant's general performance as a watch commander was good (page 368). In cross-examination, Mr Kirby's explained (and the Tribunal accepts) that he did not include those statistics in his investigation report because he considered this to be general evidence not specific to the allegations he was investigating in respect of work carried out on a particular day.

94 It appears to the Tribunal that the only person identified by the claimant Mr Kirby failed to interview was Hilary Steel, who had told the claimant that Ian Stead always seemed to visit Wakefield when the claimant was on a tour of duty at the station. Chris Kirby explained (and the Tribunal accepts) that he did not follow this up because, as far as he was concerned, Ian Stead had given a legitimate reason for visiting the station.

95 The Tribunal was not persuaded that, in order to fall within the band of reasonable responses, the respondent should have launched a wide-ranging enquiry into the behaviour of Ian Stead. Based on the available evidence, Jim Butters and Ian Brandwood both acknowledged that the relationship between the two was "*clearly not good*" and had broken down. Further, by the time of the appeal, on an objective assessment of Mr Brandwood's note of case, he was further prepared to give the claimant the benefit of the doubt. Although the claimant had cited "*significant bullying by … Ian Stead … Nevertheless I find it difficult to excuse behaviour where a manager describes a senior manager in such disparaging terms to subordinate staff*" (page 267).

96 More generally, I have considered the procedure adopted by the respondent with care. The procedure was by no means perfect.

97 Nevertheless, by the time of the disciplinary hearing the claimant was given sufficient information about the allegations he was facing to enable him to prepare a considered response. Both meetings were lengthy and both decision

makers applied their minds to what the claimant had to say. They explained in correspondence (and were able to clarify in evidence) why they had reached their conclusions. The rules of natural justice were observed. The claimant was provided with a chance to be heard. Further, Ian Brandwood was sufficiently open minded to agree to reserve his decision pending further information about the comparison cases. The Tribunal therefore concludes that, applying the test of fairness in section 98(4) of the ERA, on balance the procedure adopted by the respondent in the claimant's case fell within the range reasonable responses.

98 The next issue is whether the decision to dismiss fell within the range of responses open to a reasonable employer in that line of business of that size and in those circumstances. The claimant first contends that it was unreasonable to treat the allegations as gross misconduct, particularly in view of alleged inconsistencies in the way in which the respondent deals with allegations of misconduct among other officers.

99 The Tribunal's function in circumstances in which the respondent cites mixed reasons for dismissal is to review what the respondent actually thought and consider not whether the claimant's conduct amounted to gross misconduct according to his contract, but whether dismissal was a reasonable response to that which the respondent thought the claimant had done.

100 In evidence, David Williams explained that in his view the original allegation was one of insubordination. The Grey Book states that this should be dealt with as a performance issue. In his view management are reluctant to deal with this sort of behaviour at source but are quick to move to formal disciplinary action. It was generally contended that the claimant's conduct was insufficiently serious.

101 It is of course possible that an employer, having discovered misconduct, may seize upon the chance to discipline an individual who it considers to be a difficult employee. It does not however automatically follow that the principal reason in such a case will be the poor employment relationship rather than the conduct. What matters in such circumstances is whether the employer can show (absent any ill feeling) a potentially fair reason for summary dismissal. I am satisfied on balance that even though there was evidence to suggest that certain of the respondent's managers considered the claimant to be difficult, the respondent has done so in this case.

102 The respondent submits that dismissal was an appropriate and proportionate sanction essentially because, based on what they had found and the claimant's apparent lack of understanding of the consequences of his behaviour, they could no longer trust him as a manager.

103 Put simply, the claimant had been placed in a position of trust as a watch commander with considerable autonomy as to how he did his job. Although the "*trust and confidence*" cited by Ian Brandwood was not the allegation the claimant had to meet, I do not consider this to be material. In the claimant's case it was simply a label attached to the same set of disciplinary allegations.

104 In view of the reasons cited by Ian Brandwood (summarised at paragraph 64 above), the Tribunal is satisfied that it was open to the respondent to reasonably conclude that the claimant's conduct was sufficiently serious to amount to gross misconduct

105 Finally, I considered the issue of inconsistency in the respondent's awards for misconduct. The starting point is that treating employees inconsistently will not be in accordance with the meaning of "*equity*" under section 98(4) of the

ERA. However, first it is important to note that the allegedly similar situations must be truly or sufficiently similar. Secondly, in such cases the decision to dismiss may be successfully challenged only if there was no rational basis for any distinction made by the employer.

106 In evidence, David Williams stated that over 15 years representing members, the respondent's managers display an initial inability or reluctance to deal with insubordinate and inappropriate behaviour, the labels applied to various forms of misconduct, the competence of investigating officers, failure to follow agreed procedures and inconsistencies in the level of awards or sanctions.

107 First, it was Ian Brandwood's unchallenged evidence that he was brought in by the respondent among other things to develop a more consistent approach to disciplinary issues. Historically, there has been a "*laissez-faire*" attitude among some managers. Chris Kirby also explained that the respondent is a large organisation. He will discuss cases with HR to ensure consistency. There is a difference in expectation between managers and staff. Mr Kirby confirmed that he had investigated managers previously, and is also aware that a number of managers have been disciplined and dismissed over the years.

108 The evidence in this respect before the respondent at the time of the claimant's disciplinary and appeal is cited at paragraphs 39, 56 and 63 above. Ian Brandwood's reasons for distinguishing the three cases brought to his attention during the appeal are summarised at paragraph 64.5 above. In the Tribunal's view, although those case involved the use of abusive or racist language, the respondent has provided a rational basis for distinguishing those cases from the claimant's.

109 David William's further evidence in this respect is that the single incidence of a manager calling one of his crew a "*tit*" attracted a six-month final written warning. This suggests that the respondent does treat name calling as a serious matter. However, objectively assessed the language the claimant used cannot be compared, was made in reference to a senior manager in front of subordinate staff on two occasions, and was further compounded by his comments whilst driving past the Asian superstore and use of the word "*retard*" which during the investigation he asserted was not an offensive term.

110 The claimant produced further examples at the Tribunal hearing. A station manager was "*spoken to*" about her behaviour after calling another firefighter of a lower rank a "*wanker*" on Facebook (page 427). In 2014, a crew commander was demoted for posting offensive comments on Facebook, including: "*why is it some Asian twat can chain a dog up and have no responsibility for it. What the fuck! I hate this city! Asians do as they please*." He subsequently apologised, admitted that he had a problem with alcohol and was seeking help in this respect (pages 457 and 474 to 480).

111 Again, the Tribunal considers that these cases are insufficiently similar in that they involved incidents outside work, immediate contrition on the part of the crew commander, and were not compounded by a combination of behaviours as in the claimant's case.

112 Finally, Andrew Imrie gave evidence to the effect that someone employed by the respondent forged his signature on a policy document changing firefighters' entitlement to accrue annual leave whilst off sick. This was explained away by the respondent as "*a clerical error*", but no one was ever disciplined. Without more, the Tribunal is unable to conclude that the way in which the respondent handled this incident in the past mean that the decision to dismiss the

claimant was inequitable.

113 The claimant further contends that the respondent failed to take account of his previous long service and clean disciplinary record, and mitigation put forward during the disciplinary process including his apology, and his explanation of the context in which the comments were made, including his ill health.

114 In response to the Tribunal's questions, the claimant maintained the respondent "*didn't take anything into mitigation*".

115 First, I am satisfied that Jim Butters and Ian Brandwood took into account the claimant's mitigation in this respect (see, for example, paragraphs 45, 59 and 64 above). In cross-examination, Jim Butters confirmed that issues that the claimant had raised were "*not mitigation for the actions that took place*".

116 I have already explained that Mr Brandwood was to a certain extent prepared to give the claimant the benefit of the doubt over the "*significant bullying*" by Ian Stead that he had alleged during his appeal hearing. On balance, I am satisfied that it was open to the respondent to conclude that the issues raised by the claimant did not excuse his behaviour. Similarly, an employee's past record may mean that it would be reasonable for an employer to give the employee the benefit of the doubt in cases where the facts are in dispute. However, in this case the claimant admitted what he had done.

117 On an objective assessment, the claimant offered reasons which the respondent reasonably rejected on the available evidence.

118 The claimant finally submits that the sanction was disproportionate to the findings of misconduct, given the adverse impact on the claimant's pension entitlement. The claimant explained in evidence that although he has been able to draw his full pension he was denied the opportunity to take part of it as an upfront lump sum. David Williams said that, in his view and in all the circumstances, the sanction of dismissal was "*punitive*".

119 Jim Butters conceded that the decision had been difficult for him, but concluded that the claimant's proximity to retirement did not justify special treatment (paragraph 59 above). Viewed objectively, and assessed against the claimant's admitted misconduct, I am not persuaded that Mr Butters' response to this particular issue fell outside the range of reasonableness. In particular, during cross-examination and in response to the Tribunal's questions, the claimant redily admitted that his behaviour had been "*inexcusable*".

120 In reaching this conclusion, I understand the claimant's position that the respondent's decision was harsh. However, the Tribunal must consider whether or not the decision to dismiss was reasonable in all the circumstances, not whether a lesser sanction would otherwise have been appropriate.

121 I therefore conclude that the respondent's decision to dismiss the claimant, and the procedure by which that decision was reached, fell within the band of responses open to a reasonable employer. On that basis I am satisfied that the claimant's claim for unfair dismissal should fail.

122 Further and separately, even if I had been persuaded that the claimant's dismissal was unfair, in terms of adjustments to compensation I would then have considered the question of contributory fault. The application of sections 122 and 123(6) of the ERA to any question of compensation arising from a finding of unfair dismissal requires a Tribunal to address the following.

123 At this stage I also take into account the following evidence that was not before the respondent during the disciplinary process. Nigel Hodson-Walker

confirmed that he and others on blue watch found Ian Stead to be an unpleasant man. Chris Jolly stated that Chris Shaw told him that his exchange in the canteen with the claimant had been taken forward because senior manager overheard him recounting his conversation and that he had not been offended by it. Graham Cunliffe considered that the "Karachi" comments were "*merely an observation about the ethnicity of the area*" and "*was not said in a racist manner*".

124 David Bree thought that Ian Stead held the ORP in contempt and exhibited a specific animosity towards the claimant. He considered that that would have taken its toll over time and of any other watch manager had been involved in the incident in question, the circumstances would be very different.

125 The Tribunal must first identify the conduct which is said to give rise to possible contributory fault and decide whether it is blameworthy. The difficulty for the claimant is (as the respondent submits) that he admitted the conduct for which he was dismissed, but essentially thought at the time that his actions were excusable and that he had been the victim of a "*witch hunt*".

126 On balance, from what I read and heard I am satisfied that the aspects of the claimant's conduct prior to dismissal which operated upon the mind of the respondent (to the extent that it led the respondent to choose to deal with the matter by way of dismissal) are succinctly summed up in Ian Brandwood's conclusions as to the claimant's behaviour cited at paragraph 64 above.

127 I was further not persuaded that the claimant had been unfairly targeted. In particular, following the Tribunal hearing the claimant submitted an email sent by Jim Butters in May 2014 to the effect that he knew the claimant had been elected as a councillor. However, in cross-examination, Jim Butters stated that he had been "*vaguely aware*" that the claimant had been elected, but it was "*not on [his] radar*". There was also no suggestion that Scott Donegan was manipulated by Ian Stead or any other manager into viewing the Silent Witness footage.

128 I then ask for the purposes of section 123(6) of the ERA if the blameworthy conduct which I have identified caused or contributed to the dismissal to any extent. Based on what I heard and read, I am satisfied on balance that the claimant's identified actions caused his dismissal. Both Jim Butters and Ian Brandwood readily identified the allegations the claimant faced as highly serious and, on the face of it, inexcusable. Further and separately, on balance I am satisfied that the claimant's comments about Ian Stead operated on the mind of Ian Brandwood to a sufficient extent that he no longer trusted the claimant.

129 The next question is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. On balance, I consider that the blameworthy conduct that I have identified is inexcusable. It is notable that the claimant described his behaviour as such throughout cross-examination and in response to the Tribunal's questions. Moreover, in response to the Tribunal's questions, Chris Jolly also that what the claimant was alleged to have said in the canteen was not "*banter … in that context*".

130 On that basis I am persuaded that the claimant was entirely to blame for his misfortune. As a result, even if the unfair dismissal complaint had succeeded I would have considered it just and equitable to reduce the claimant's compensatory award by 100%.

131 A separate question arises in respect of section 122(2) where the Tribunal has to ask whether it is just and equitable to reduce the amount of the basic award to <u>any</u> extent. It is very likely, but not inevitable, that what a Tribunal concludes is a just and equitable basis for the reduction of the compensatory

award will also have the same or a similar effect in respect of the basic award, but it does not have to do so. In this case, however, for the same reasons for reducing the compensatory award to nil, I am satisfied on balance that it would have been just and equitable to reduce the claimant's basic award by 100%.

132 In terms of the breach of contract complaint, it is for the respondent to show that the claimant did commit the gross misconduct alleged against him. It is a question for the Tribunal to decide, having weighed all the evidence and on the balance of probabilities.

133 An employer may terminate an employee's contract of employment without notice in circumstances where the employee's conduct amounts to a sufficiently serious breach of a term of the contract of employment such that the conduct amounts to a repudiation of the contract.

134 In the present case, the respondent relies upon conduct they knew about at the date of dismissal. I am already satisfied that it dismissed for that reason. The relevant term is the implied term of mutual trust and confidence. The content of that obligation is that neither the employer nor the employee will "*without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*". I accept that this term formed an implied term of the claimant's contract of employment and it is a fundamental term of the contract. The essential issue is whether the conduct of the claimant, viewed objectively, was sufficiently serious to amount to a breach of that implied term.

135 In assessing the seriousness of any breach, I take into account that the claimant was a manager, given a significant amount of autonomy by the respondent and in a position of trust. As Ian Brandwood stated in evidence the respondent is also a public body subject to national reporting on inclusivity and the diversity of its workforce.

136 I recognise that immediate dismissal is a strong measure in the employment context. However, following a careful consideration of the evidence I determine on balance that the claimant's conduct was such that summary dismissal was appropriate. I rely on my findings relating to my assessment of the claimant's contributory conduct (at paragraphs 124 to 128 above) in this respect.

137 In addition, in evidence Ian Brandwood explained why the claimant's conduct was so serious. The claimant was in a leadership role, and the comments for which he was dismissed were made whilst at work and in front of the crew he was responsible for. The language used to describe a more senior manager, as well as the other comments, was unacceptable. This was more than the actions of someone venting in a safe space.

138 Moreover, the claimant acknowledged in cross-examination that respondent's Dignity at Work policy stresses that managers have a particular responsibility for ensuring that the working environment is free from inappropriate behaviour and managers must lead by example (page 305). Although the claimant claims that he was in a "*dark place*", this was no sudden loss of control but involved two incidents in front of subordinate colleagues.

139 As a consequence, I am satisfied that the claimant's conduct was likely to at least seriously damage his working relationship with the respondent. It follows that the respondent was in law entitled to dismiss the claimant without notice or notice pay, and did so having lost all trust and confidence in him. The complaint of breach of contract therefore fails.

Employment Judge Licorish

Date 13 November 2017