



EMPLOYMENT TRIBUNALS

Claimant: Mr R Evans

Respondent: London Borough of Hammersmith and Fulham

Heard at: London Central

On: 8 & 9 July 2020

Before: Employment Judge H Grewal

Representation

Claimant: Mr L Powlesland, Counsel

Respondent: Mr F McCombie, Counsel

JUDGMENT

The judgment of the Tribunal is that:

- 1 The complaint of unfair dismissal is well-founded; and
- 2 The complaint of wrongful dismissal is well-founded.

REASONS

1 in a claim form presented on 19 December 2019 the Claimant complained of unfair dismissal and wrongful dismissal (dismissal without notice).

The Issues

2 The issues that I had to determine were as follows.

Unfair Dismissal

2.1 What was the reason for dismissal? The Respondent's case was that it was related to conduct.

2.2 if it was, whether the dismissal was fair under section 98(4) of the Employment Rights act 1996.

Breach of contract

2.3 Whether the Claimant's conduct on 18 May 2019 amounted to a repudiatory breach of contract.

The Law

3 The onus is on the employer to prove the reason or the principal reason for the dismissal. A reason relating to the conduct of the employee is a potentially fair reason (**Section 98(1) and (2)** of the **Employment Rights Act 1996** ("ERA 1996").

4 Once the employer establishes a potentially fair reason, the Tribunal then has to consider whether dismissal was fair within the meaning of Section 98(4) ERA 1996. **Section 98(4)** provides,

- "... 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."*

5 In determining whether a dismissal related to the conduct of the employee is fair or not, the Tribunal has to ask itself (i) whether the employer believed that the employee was guilty of that misconduct; (ii) whether he had reasonable grounds to sustain that belief and (iii) whether at the stage that he formed that belief on those grounds he had carried out as much investigation as was reasonable in all the circumstances (**British Home Stores Ltd v Burchell [1978] IRLR 379; W Wedel & Co Ltd v Teper [1980] IRLR 96**)

6 In determining the issue of fairness the Tribunal also has to consider whether there were any flaws in the procedures such as to render the dismissal unfair, and, finally, whether dismissal was within the band of reasonable responses open to a reasonable employer in all the circumstances of the case.

7 The case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439**, approved by the Court of Appeal in **Post Office v Foley [2000] IRLR 827** lays down the approach that the Tribunal should adopt when answering the question posed by Section 98(4). It emphasises that in judging the reasonableness of the employer's conduct the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer and that the function of the Tribunal is to determine whether, in

the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

8 The range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person for his employment for a conduct reason – **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**

9 **Paragraph 9** of the **ACAS Code of Practice on Disciplinary and Grievance Procedures (2015)** provides,

“If it decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct ... and its possible consequences to enable the employee to prepare an answer the case at a disciplinary meeting.”

The Evidence

10 The Claimant and Leo Murray gave evidence in support of the claim. The following witnesses gave evidence for the Respondent – Nicky Moodley (Project Manager, Hammersmith Bridge Strengthening and Refurbishment Project), Valerie Simpson (Interim Strategic Lead, Environmental Health and Regulatory Services), Matthew Hooper (Chief Officer, Safer Neighbourhoods & Regulatory Services) and Brahmesh Kainth (Chief Officer for Public Realm, Environment Department). There was also before me a bundle of documents running to a little over 600 pages. Having considered all the oral and documentary evidence, I made the following findings of fact.

Findings of Fact

11 The Claimant commenced employment with the Respondent on 1 November 2004 and worked as a Travel Plan Co-Ordinator in the Transport Policy unit in the Highways and Engineering Division. His role entailed helping all the schools in the borough to prepare school travel plans to minimise the use of cars on the school run, and to walk, cycle or use public transport instead.

12 In respect of notice periods, the Claimant's contract provided,

“Once you have completed 4 years service, the notice period to be given to you by the Council includes one week for each year of service to a maximum of 12 weeks.

The Council reserves the right to summarily dismiss you where the reason for the dismissal is gross misconduct. Where this is applicable you will receive no payment in lieu of notice.”

13 The Claimant lived in South West London. He was a regular user of Hammersmith Bridge.

14 In about 2017 engineering consultants were employed by TFL to inspect and survey Hammersmith Bridge. On 9 or 10 April 2019 they discovered fractures in the bridge pedestals. As a result the Respondent closed the bridge to all traffic (including cyclists). Pedestrians were still permitted to walk across the bridge and cyclists had to dismount and walk with their bicycles across the bridge.

15 After a safety assessment conducted a week or two later, it was deemed safe for cyclists to cycle across the bridge and they were allowed to do so. Heras fencing was installed across the bridge separating the carriageway from the footpaths on either side of the bridge. The expectation was that cyclists would use the carriageway and pedestrians would walk on the footpaths. There were, however, no signs on the approaches to the bridge indicating that that was what people had to do. TFL had previously used marshalls (provided by a security company) to direct and manage movement on the bridge and they continued to do so. They were stationed at either end of the Bridge. Some pedestrians continued to use the carriageway.

16 On 17 April 2019 Hamish Stewart, the co-founder of a group called Car Free Day, sent an email to a number of Hammersmith and Fulham Councillors and employees inviting them to “a walking tour” of Hammersmith Bridge on 18 May to discuss the future of the Bridge. The purpose of the meeting was to discuss potential future options for turning the Bridge into a walking and cycling infrastructure with plants (a garden bridge). The invitation said that children were welcome to join as the bridge, free from traffic, was safe for walkers of all ages. The Claimant also received that email.

17 As the Claimant lived in the areas and was passionate about cutting motor traffic in urban areas, he decided to go the meeting. He told Simon Franklin (his manager), Maryanne Allen and Chris Bainbridge (Head of Transport Policy) that he was going to attend the event and invited them to do so too.

18 Ms Allen shared that information and the invitation from the organisers with Ian Hawthorn (Head of Highways Maintenance and Projects) on 24 April. His response was copied to the Claimant. He said,

“The Bridge is allowed to remain open to cyclists and pedestrians under strict conditions one of which is the management of all movement and that we have access to carry out inspections. Therefore any activity needs to go through the Bridge team and me first.”

19 By about 22 April the Council had established its policy on the future of the Bridge which was to open it as soon as possible to motorised traffic and for officers to work to that end.

20 As Mr Hawthorn had seen a number of emails from officers in Transport Policy about the garden bridge option, once the policy to open the bridge to motorised traffic had been established, he organised a meeting with the officers (which included the Claimant, Ms Allen and Mr Bainbridge) to share that information with them. The meeting took place on 25 April. The Claimant arrived late at the meeting. He was not happy with the Council’s policy and asked how the Council could claim to be a green borough and be opposed to a garden bridge. Mr Hawthorn made it clear that a garden bridge was not an option and that all internal communication referring to it had to stop.

21 On 18 May about 40 to 50 people attended the meeting that had been organised by Car Free Day. The Claimant was one of them. He was not wearing or carrying anything to identify him as a Council employee (he was dressed in his running kit) but a couple of people in the group knew that he was employed by the Council. Some of the group had bicycles and there were a few small children. The group congregated on the Hammersmith side (the north side) of the Bridge shortly before 11 a.m. At about 11, the group, led by Hamish Stewart, started to walk across the Bridge along the carriageway. The TFL marshal might have told the vanguard of the group that they needed to walk on the footways but they ignored her. She did not challenge them or attempt to get them to move. The Claimant was not in the front of the group and he did not hear anyone say that they should not walk on the carriageway. On the bridge the group separated into smaller groups and they walked, stopped, looked around and talked to each other.

22 Mr Moodley was working on the Bridge that day and he saw the group on the carriageway. He approached the TFL marshal and asked her why she had not stopped them walking on to the carriageway. She said that she had told them to walk on the footways, but they had ignored her.

23 Mr Moodley then approached a section of the group on the bridge. He informed them that he was a Council official and showed them his Hammersmith and Fulham ID badge. He told them that the Bridge carriageway was out of bounds for meetings and pedestrians and asked them to leave the bridge. They asked him why they could not remain on the bridge and asked other questions about the bridge, such as, why it was closed and why no works were taking place. He told them that their actions were unacceptable and unsafe as some of the cyclists using the bridge were travelling at high speed. A couple of them of them pointed to the Claimant and said that he was a council officer and asked why he was not asking them to leave.

24 Mr Moodley and the Claimant knew each other from work. Mr Moodley went up to him and asked him to tell the people to move from the bridge carriageway. The Claimant asked him why they could not converge on the bridge and what wrong they were doing. Others joined in and asked similar questions. Mr Moodley became agitated and flustered. He said that he only walked on the carriageway when he was working on the bridge and wearing his high visibility safety vest. He asked the Claimant again to help and the Claimant said that he was not on duty. Others in the group asked him if he was planning to arrest them and what laws they were breaking. Mr Moodley told the Claimant that he was going to call Ian Hawthorne, and the Claimant told him that there was no need to do that. He said that they were decent people and did not break any laws. Mr Moodley called Mr Hawthorne but there was no answer. The Claimant said that he would introduce him to the organiser, who at that stage was near the other end (the southern side) of the bridge. They started to walk towards him but the Claimant got distracted by a rickshaw bicycle that was being displayed.

25 At about the same time Mr Moodley was joined by another TFL marshal and they both tried to get the group off the carriageway onto the footpaths. The group continued to question and challenge them. Mr Moodley and the marshal decided to close the carriageway to riding cyclists as they believed that it was dangerous to allow them to continue to use it when there was a group gathered on the carriageway. The cyclists had to dismount and walk across on the footpaths. At about

the same time the group started to move off the carriageway and onto the footways and walked back across the bridge on the footways. The whole incident lasted no more than 20 minutes. The bridge was closed to riding cyclists for about 45 minutes.

26 Later that day Mr Moodley reported the incident to his manager and they agreed that he needed to inform Mr Hawthorne about it. On the following morning Mr Moodley sent Mr Hawthorne an email which he began by saying, *"I think we need to have a chat with Richard Evans."* He gave an account of the events which was broadly similar to paragraphs 22-25 (above). He thought that the Claimant might have been leading the group. He said that when the Claimant had asked him questions about why they could not be on the bridge he had done so *"sarcastically."* He said that the actions of the Claimant had stressed him out and that he and his friends had tested his patience, the group, consisting of cyclists, pedestrians and children, had created an unsafe situation on the bridge and that the Claimant had *"acted ignorant to the fact that people were not allowed to meet and walk though the middle."* He concluded,

"Richard's actions were not expected from a work colleague. I think as officials from the council we have certain obligations and responsibilities even if we are off duty.

This is particularly the case when we are dealing with a high profile project which is constantly in the public's interest."

27 On 20 May, at the request of Mr Hawthorne, Mr Moodley wrote a statement about the events on 18 May. He described the Claimant as being *"defiant"* and the group being *"difficult"* and the Claimant *"condoning"* their actions.

28 On 20 May the Claimant worked from home. He was asked to attend a meeting with the Head of HR the following day. At the meeting on 21 May, he was given a letter dated 20 May suspending him from work pending a disciplinary investigation. The letter stated,

"Your suspension relates to allegations of professional misconduct and breaching the Council's standards of behaviour set out in the Employee Handbook and the staff code of conduct. The concerns relate to your involvement, and behaviour displayed towards colleagues, during a group event that took place on Hammersmith Bridge on Saturday 19th May 2019."

He was warned that if the matter proceeded to a disciplinary hearing and the allegation against him was substantiated it might be viewed as gross misconduct and could result in his dismissal.

29 The Respondent's Disciplinary Procedure provides that suspension should never be automatic and should only be imposed after careful consideration. It continues,

"it is only necessary where one or more of the following conditions apply:

- 1. Gross misconduct is alleged and it is necessary to remove the employee from the normal workplace because the nature of the allegations poses a risk to people or property and/or*
- 2. The investigation could be hindered by the employee's continued presence at work, and/or because of the nature of the allegation/s, the employee's*

presence in the workplace poses a risk, and/or relationships in the workplace have broken down, and another option, which temporarily transfers the employee with their agreement to a different place of work during the process, is not possible and is not appropriate in the circumstances.”

30 I heard no evidence about the decision to suspend the Claimant and why it was felt that suspension was necessary. The Claimant sent emails between 28 and 30 May asking questions about it.

31 The Respondent did not identify the standards of behaviour which the Claimant was alleged to have breached but it would appear to be those set out under “personal conduct” which relate to relationships with colleagues. These provide, among other things, that employees must,

“Maintain the highest level of courtesy and respect when dealing with colleagues, councilors, resident and other members of the public”

“Always be polite, responsive, helpful, respectful and professional” and

“Avoid any conduct inside or outside of work which may discredit you and/or the Council.”

The Code of Conduct provides, among other things,

“Respecting you colleagues

When dealing with your colleagues ensure that you:

- *Are polite, respectful, helpful and professional.*
- *Work with colleagues in a positive way.*
- *Are supportive and work as a team player.*
- *Treat colleagues with respect.*
- *Are courteous and never rude.”*

32 On 21 May Ian Hawthorn invited the Claimant to an investigatory meeting on 30 May. The Claimant was advised of his right to be accompanied.

33 The Claimant asked for the investigation to be conducted by someone from outside the department who did not know either him or Mr Moodley. His request was granted and on 31 May he was informed that the new Investigating Officer was Valerie Simpson, Strategic Lead for Environmental Health and Regulatory Services and that all his emails had been passed on to her. On 4 June Ms Simpson sent the Claimant an email to introduce herself. She did not answer the questions he had asked about the decision to suspend him. She said that it had not been her decision but that at that stage she saw no reason to lift the suspension.

34 Ms Simpson interviewed the Claimant on 5 June. The Claimant was accompanied by Chris Bainbridge. Ms Simpson explained that her role was primarily to fact find and then make a decision as to whether the matter should proceed to a disciplinary hearing. The Claimant said that his understanding about the restrictions imposed on the bridge was that motor vehicles could not use it but that cyclists and pedestrians

could. The Claimant read out a statement that he had prepared. With reference to the Council's standards of behaviour, he said that he had been courteous with his colleague, was polite, responsive, helpful, respectful and professional and had done nothing whatsoever to discredit himself or the Council. Ms Simpson went through Mr Moodley's statement with the Claimant and asked him questions about it. The Claimant said that he was not wearing anything that would identify him as a Council officer but that two or three people in the group knew that he was a Council officer. He said that they had not realised that they should not be on the bridge and had asked questions and had remained calm. He said that he had never heard any instructions telling them not to go on to the bridge and at the time there were no signs saying that pedestrians could not walk on the carriageway, although there were by the time of the interview. He had not seen the carriageway being closed to cyclists. Ms Simpson put to the Claimant that Mr Moodley had been concerned about the safety of the groups on the bridge, and the Claimant responded that mixing pedestrians and cyclists did not make it unsafe and there were pockets of people and not a big crowd and there was plenty of room for cyclists to get past the people. He did not see any health and safety risks in what he had done. Ms Simpson said that his presence as a known Council officer had aggravated matters and embarrassed the Council, and the Claimant said that most people there did not know that he was a Council officer.

35 Following the interview the Claimant sent Ms Simpson a number of documents. These included statements from two individuals who had been part of the group, who confirmed that the Claimant had been calm and polite, and glowing character references from Simon Franklin, the Claimant's line manager, and Chris Bainbridge, Head of Transport Policy. They thought that he was committed to and very good at his role, and Mr Franklin said that in light of what he knew of the Claimant he found the allegations against him hard to believe.

36 Ms Simpson interviewed Mr Moodley on 6 June 2019. Mr Moodley said that the Claimant had had "*a cynical sarcastic smile*" when he had questioned him about why they could not be on the bridge. He did not want to leave the Bridge and only offered to help him and introduce him to the organiser when he called Mr Hawthorne. He was asked about whether it was clear that pedestrians were not allowed on the carriageway. He said that a notice sent out by someone called Janet would have made that clear. He was asked to provide a copy of it. No such notice was put before the Tribunal. He was asked about signs and he said that a lot of joggers were using the carriageway and signs had been put up the previous week saying that joggers and pedestrians had to keep off the carriageway and that cyclists should use it. He was asked whether the signage on the bridge had made it clear on 18 May that pedestrians should not walk over the bridge and he replied, "*I think it's open to interpretation. We thought so at the time. We employed traffic management and told them what we wanted and they did it.*" He said that the marshalls were not official and were there to advise. He accepted that it was possible that after the first group had ignored the marshall she had given up and had not said anything to the Claimant's group. Ms Simpson said that she thought that it was probable that the Claimant had not heard anyone over the bridge. Mr Moodley said that the Claimant knew that the bridge was closed to have a meeting.

37 On 10 June Mr Hawthorne provided Ms Simpson with a statement and some documents. In his statement he said that he was the Lead Council Officer for Hammersmith Bridge. He set out the background (which appears at paragraphs 14-

16 and 18-20 above). He also said that the event of 18 May had been discussed at a meeting (Cabinet Members Briefing) on 22 April (at which the Claimant had not been present) and it had been agreed that the event could use the approaches to the bridge but that the bridge carriageway remained closed to pedestrians. Chris Bainbridge and Maryann Allen had been present at that meeting. He said that the day before the event the Council had placed large banners on the bridge stating the Council's policy of opening the bridge up to the traffic as soon as possible. He also said,

"It is important to note that there had been issues with cyclists/pedestrian clashes since the closure. The traffic management had been changed to move pedestrians to the footpaths and cyclists to the carriageway keeping both separate and we were advised that the distribution of weight would be better if pedestrians were restricted to the footpath while faster moving cyclists were restricted to the carriageway. The Traffic Marshalls function was to manage the separation. All pedestrians were being moved to use the footpaths either side of the bridge."

He said that he was surprised that the Claimant *"had attended knowing the restrictions in place and the Councils policy on the bridge. The group on the bridge were advocating a completely opposite to the Councils policy no other officer had attended or Administration Councillor."* [sic] He said that the bridge had had to be closed for 45 minutes to prevent clashes between the attendees and the cyclists. He concluded by saying that,

"Nicky Moodley was on the bridge in official capacity he wasn't there to discuss issues and from what Nicky has told me Richard Evans appeared to want him debate or discuss the bridge. This put Nicky Moodley in an impossible position undermining his and the Traffic Marshalls authority, but also the Council policy. Both Nicky Moodley and the Marshall were there on the instructions of the Council to carry out the management of the movement as per the safety conditions. The Council policy was clearly displayed on the bridge and that is the only response Nicky could have given on the day."

38 On 17 June Ms Simpson sent the Claimant the documents that Mr Hawthorne had provided but not his statement.

39 She interviewed the Claimant again on 18 June 2019. The Claimant was accompanied by Mr Bainbridge again. She asked him,

"But what about the point that a Council employee should not be on the Bridge in this way, particularly as you would know the policy?"

The Claimant responded that he was unaware of any policy stating that council employees should not be on the bridge. Ms Simpson went through Mr Hawthorne's statement with the Claimant. She asked the Claimant why he had had a prolonged dialogue with Mr Moodley when he had been aware that the bridge was allowed to remain open subject to strict conditions because he had received Mr Hawthorne's email of 24 July. The Claimant said that he did not have instant recall of that email on 18 May. Mr Bainbridge said that he was not aware of any instruction as to where to walk. The Claimant said that he was there to listen to the proposal and not to take any position.

40 The role of investigating officer, according to the Respondent's disciplinary procedure is to take stock of all the evidence and decide whether the employee has a case to answer in a formal disciplinary hearing.

41 Ms Simpson produced her investigation report on 2 July 2019. She set out that the allegation at the outset of her investigation had been as set out in the suspension letter and that that had related to the Claimant's personal conduct in respect of the behavior that he had displayed toward his colleague. In her report she added a second allegation which she said had come to light in the course of the investigation. The Respondent's procedure provides that during the investigation the employee should be told the nature of the allegation against him. The Claimant was never told of the second allegation and given the opportunity to provide a response to that during the investigation process.

42 The second allegation related to his personal conduct outside work that might have discredited the Council. The particulars of that allegation were that with the Claimant's "*knowledge of the circumstances relating to the repair and safety of the bridge (gained from his position with the Council) he should not have actively participated in a meeting that congregated on the bridge*" on 18 May 2019. It was not explained at any stage in the report precisely what it was that the Claimant knew "about the repair and safety" of the bridge that should have stopped him from attending the meeting. There was no evidence that the defects that had been identified made it dangerous for a group of fifty persons to walk across the bridge. Ms Simpson said in cross-examination that people in the Highways department had said that having gatherings (a static load) on the bridge would make it unsafe because of the fractures in the bridge. There is no reference to any such evidence in her report and no evidence to that effect was ever shared with the Claimant. The first time the Claimant heard any reference to "static load" was at the hearing before me. She also said in cross-examination that that allegation did not include safety issues arising from cyclists and pedestrians mingling on the carriageway. That was not part of her investigation or findings.

43 The structure of the investigation report was to set out in respect of each allegation the evidence for and against the allegation and the key findings and then to make an assessment of whether there was a case to answer at a disciplinary hearing. In respect of the first allegation Ms Simpson set out the accounts given by Mr Moodley and the Claimant and referred to the witness statements produced by the Claimant which she said broadly supported his account of events. She made five key findings in relation to that allegations, the most significant of which were that Mr Moodley had not produced any other witness to the incident who had spoken about the Claimant's conduct and that the Claimant had produced "*three witness statements to support his version of events and references from his line managers that vouched for his general character and in effect said the allegation, if true, would be out of character.*" She found that there was "*limited evidence to support*" that allegation.

44 In respect of the second allegation Ms Simpson largely set out the content of Mr Hawthorne's statement. She made two key findings which were,

“Nicky states that some of the group pointed out Richard as a Council employee. Hence, he believes his presence and behavior appeared to give encouragement to the group and condoned the disruption that occurred.

Richard states he had no Council i.d. although agrees a few people were aware he worked for the Council. He states he has every right to attend such a gathering, which was not illegal, even though he had knowledge of the restrictions on the bridge.”

It is not clear to what restrictions she was referring. The only restrictions of which the Claimant had knowledge was that the bridge was closed to motorised vehicles and only pedestrians and cyclist were allowed to use the bridge. There was no evidence from anyone that he had knowledge of any other restrictions.

45 She said that based on the evidence obtained during the investigation she found that there was evidence to support that allegation. She then set out six points (presumably in support of that conclusion). The first two related to the Claimant knowing that it was the Council’s policy to reopen the bridge to motorised traffic, the implication being that because he knew that he should not have attended a meeting that was looking at other potential options for the bridge. That has nothing to do with the safety of the bridge. The next two related to people in the group knowing that he was a Council officer and that his presence aggravated the situation because people might have given more credence to what he said rather than what Mr Moodley said. The next one related to the Claimant not helping Mr Moodley. That in essence was the substance of the first allegation. Her last point was,

“It would appear that Richard still does not fully grasp the serious nature of the meeting taking place on the bridge.”

Unfortunately, she did not explain why she considered having the meeting on the bridge was such a serious issue. Her conclusion was that the case should go forward to a formal disciplinary hearing.

46 On 8 July 2019 Matthew Hooper wrote to the Claimant to invite him to a disciplinary hearing on 29 July. The allegations against him were the two that had been set out in Ms Simpson’s report. He was advised of his right to be accompanied and was warned that the allegations might constitute gross misconduct and, if substantiated, might lead to summary dismissal. Ms Simpson’s investigation report was enclosed with the letter. Mr Hooper informed him that Ms Simpson would attend the meeting and that she would call Messrs Hawthorne and Moodley as witnesses.

47 On 10 July the Claimant asked HR about the second allegation. He said that he has not had a chance during the investigation to deal with the second allegation which he understood to be that he should not have been on the bridge at all. Mr Draper in HR responded that it was permitted to modify, drop or add allegations during the investigatory process and that his presence on the bridge had been discussed in some detail at the investigatory meetings.

48 The Claimant produced an additional statement for the disciplinary hearing from Moya O’Hara, Director of Urbanwise London. She said that she had worked closely with the Claimant for eleven years on a project supported by the Respondent. She

said that during that time she had been impressed with his commitment to his work, upholding and promoting the Respondent's aim of reducing car journeys to and from school. He had always behaved professionally and was very well thought of by colleagues both inside the Council and from other organisations. She said that she had been present at the meeting on 18 May and that the Claimant had *"behaved thoroughly professionally throughout the meeting, listening to the various discussions that were going on and speaking once to clarify a factual point. He did not give any personal views or opinions throughout the entire meeting."*

49 The Claimant produced a written statement for the disciplinary hearing. He said that after his evidence had *"demolished"* the first allegation against him, the Respondent had produced a second allegation, namely that he should not have been at the meeting on the bridge that day, which he had seen for the first time in Mr Hooper's letter of 9 July inviting him to the disciplinary hearing. He described it as feeling like *"a surprise ambush"* and being *"neither fair nor impartial"*.

50 He said that the allegation was that he should not have been there because he had knowledge of the circumstances relating to the repair and safety of the bridge. He set out what his knowledge was. He said,

"The bridge was fully open to pedestrians and cyclists on 18th May, and remains so to this day, presumably because it has been deemed safe for this purpose by the engineers. I use the bridge every time I cycle to work as do hundreds, perhaps thousands of others on a daily basis.

I had no specialised knowledge of the circumstances relating to the repair and safety of the bridge. I knew indeed that the council's line was to fix it and reopen to motor traffic as soon as possible – this was common knowledge because the council leader had made public statements to that effect which were widely reported in local and London news and published on the council's website.

The invitation to the meeting on the bridge was widely distributed, and I made no secret of my intention to attend; indeed I circulated the invitation to close colleagues including my line manager and the Interim Chief Transport Planner because I thought that they should know about it. I was neither instructed nor advised by anyone not to attend. There was no instruction either generally to all council staff, or to me individually, to discourage or forbid attendance at this meeting.

The purpose of the meeting was to propose the trial of a temporary garden bridge over the summer period while the bridge remains closed to motors. This does not conflict with the council's objective to open the bridge ASAP to motors.

I therefore judged that I could legitimately attend this meeting, in my own time, out of both personal and professional interest, and I decided that I would keep my personal views to myself, which is exactly what I did. Perhaps that judgment was naïve, I put my hands up to that. With hindsight, I regret that I chose to attend the meeting that day, not because I think that I did anything wrong, but because the past two months have been highly stressful, and because many person hours have been consumed, arguably wasted, in progressing this case to its current point."

51 He concluded that he had 15 years' unblemished service, he had always taken great pride and satisfaction from his work and that he hoped that he could return to work the following day.

52 The disciplinary hearing on 29 July lasted four and a half hours. The Claimant was accompanied by Chris Bainbridge. The Claimant was not provided with a note of the hearing after the hearing and there was no note of it in the documents before me. The Respondent said that manuscript notes had been taken by someone from HR but they had never been typed up. The manuscript notes had not been disclosed because they were locked up in a building which the Respondent's employees were not attending because of lockdown. I asked the Respondent to look for the notes in the course of the hearing but was told that they could not be located.

53 In his outcome letter to the Claimant on 16 August Mr Hooper placed great reliance on the evidence of Mr Hawthorne (given at the disciplinary hearing) that on 25 April he had held a briefing for key staff on the restrictions in place on Hammersmith Bridge to reduce the weight on the bridge. Mr Hawthorne had referred to the meeting on 25 April in his statement made during the investigation. What he had said about it was,

"In weeks after the bridge closure a number of emails appeared from officers from Transport Policy talking a garden bridge option. Once the policy had been set I organised a meeting with Transport Policy Officers Chris Bainbridge, Maryann Allen, Hinesh and Richard Evans on the 25th April to go over what was happening on the bridge and to emphasise the Councils Policy [sic] of opening the bridge to motorised traffic.

Richard hadn't been at the meeting at first and was brought into the meeting after it started. I clearly stated Council policy and the safety issues we were working under to allow cyclist and pedestrians over the bridge. Richard was not happy with the policy and kept saying how can we claimed [sic] to be a green borough and be opposed to a garden bridge. I made it clear that not the Council Policy no work should done [sic] on this option and all internal communications referring to the 'garden bridge' needed to stop."

It is clear from that that the focus of the meeting had been to tell the staff concerned about the Council's policy in order to stop the internal communications referring to the garden bridge and not to give the staff a briefing on the restrictions in place to reduce the weight on the bridge.

54 Even if Mr Hawthorne did give the staff a briefing on the restrictions in place to reduce weight, there was no evidence at all about what he said about the restrictions in place. It was not in dispute that there were restrictions in place to reduce the weight of the bridge; the restrictions were that motorised vehicles were not allowed to use the bridge and the use of the bridge was limited to only pedestrians and cyclists. That reduced the weight on the bridge significantly. It was not in dispute that the Claimant was aware of those restrictions. Mr Hooper said in evidence that there had not been any restrictions on the numbers of pedestrians or cyclists using the bridge. If it is the Respondent's case that Mr Hawthorne told the disciplinary hearing that he had given a briefing about some other restrictions, it should have adduced evidence to that effect. There was no such evidence before me. There was no evidence that

Mr Hawthorne had ever told the Claimant that the weight of fifty people on the bridge would pose a safety risk.

55 In his outcome letter (dated 16 August 2019) Mr Hooper said that during the hearing the Claimant had made several references to the fact that the organised gathering had been in support of a “garden bridge” proposal which the Council had publicly opposed. He said that he had clarified on a number of occasions that his focus at the hearing was purely on the safety of the bridge users and not on the purpose of the gathering.

56 Having referred to Mr Hawthorne’s evidence, Mr Hooper continued that the Claimant had not challenged that he had received a full briefing on the safety measures in place. At no stage did he clarify what it was that Mr Hawthorne had told the Claimant about the restrictions or safety measures in place to reduce weight. He said that the Claimant had estimated that there were approximately 50 people on the bridge and Mr Moodley had estimated that there initially 20-30 people on the bridge. He continued,

“There is no doubt that the gathering will have placed a significant amount of additional weight on the bridge. Given the nature of your job and the fact that you were fully aware of the potential risks I consider your active participation in the event to have been a serious misjudgment.”

57 Mr Hooper’s conclusion was that the Claimant had participated in the gathering knowing that an extra 30-50 people on the bridge posed safety risks for those on the bridge. The numbers of pedestrian and cyclists that use the bridge varied at different times of the day and on different days of the week. There was no evidence whatsoever before Mr Hooper, or before me, that because of the structural defects only a limited number of pedestrians and/or cyclists could be on the bridge at any given time and that if the number increased beyond that the safety of those on the bridge would be endangered. There was no evidence that the marshalls counted the numbers entering the bridge and stopped others entering if a certain number had been reached. There was no evidence that Mr Hawthorne, or anyone else, had ever communicated any such information to the Claimant. There was no evidence to support the conclusion that Mr Hooper reached.

58 Mr Hooper said in cross-examination that static weight on the bridge presents a different stress from moving weight. There was no evidence before him to that effect. He also accepted in evidence that he was not saying that the Claimant understood the difference between moving and static weight. That issue was never raised by anyone with the Claimant and he was never given the opportunity to deal with it.

59 He continued that the Claimant’s initial reluctance to assist Mr Moodley and his *becoming* distracted by something else before he did was “*a significant aggravating factor*”. He said that he found it difficult to understand why the Claimant had not provided any warning or advice regarding the safety issues on the bridge before or during the gathering. Again, he did not explain what were the safety issues about which the Claimant should have given any advice or warning.

60 He continued, “*Lastly ... Hammersmith Bridge was closed for 45 minutes as a result of the increased numbers of people on the Bridge... The photograph ... shows a group of people creating an almost complete obstruction of this highway; a*

significant safety risk for both participants and cyclists. Given your role and knowledge of highway safety this is another factor that you should have recognised as unsafe.” This factor had not featured at all in Ms Simpson’s investigation report.

61 He concluded that the Claimant had participated in an event which significantly reduced the safety of all bridge users for an extended period, and that his conduct had mounted to “*gross negligence and a serious lack of professionalism*” and that his actions had “*the potential to damage the reputation of the council*” and his decision was to dismiss him for gross misconduct with effect from 16 August 2019. He was advised of his right to appeal.

62 The Claimant appealed against the decision on 30 September 2019. He appealed on three grounds – (i) the sanction was too severe and the decision was one that no reasonable manager could have reached in all the circumstances; (ii) the findings about the safety of the users of the bridge being endangered were not supported by the evidence; and (iii) failure to follow the disciplinary procedure. In support of the second ground the Claimant said that he knew that because of the structural defects the bridge was closed to motor traffic but remained fully open to pedestrians and cyclists because it was deemed safe for that purpose by the engineers. There was no control of numbers of people on the bridge. He said that if there were any chance that the weight of an additional 50 pedestrians on the bridge might cause it collapse, it would surely have been closed to all users. He did not accept that the group sharing the carriageway with cyclists posed any safety risk.

63 The appeal hearing took place on 17 October 2019. The appeal was heard by Brahmesh Kainth. The Claimant was accompanied by a trade union representative. The Claimant read a witness statement that he had prepared, called one witness, his manager Simon Franklin and submitted three witness statements. Mr Bainbridge was also due to give evidence but was called away urgently on Council business. He submitted a written statement on the following day. Mr Hooper said that he had not upheld the first allegation which related to the Claimant’s behaviour and conduct towards colleagues because he had not found any real evidence in support of it. In respect of the second allegation, he said that the Claimant had been on the bridge as an active participant and was known as a council officer. When Mr Moodley said that the group should leave the bridge, the Claimant had not taken immediate action to assist. People standing on the carriageway which cyclists were allowed to use raised a safety issue. The Claimant repeated the points that he had made in his written grounds of appeal. In closing, he said that he regretted the decision to attend the event on that day. He would not do anything like that again. He had learnt his lesson and wished it had never happened.

64 Mr Kainth sent the Claimant his decision in a letter dated 20 November 2019. He did not uphold the appeal. He did not deal with the issue of the absence of any evidence to support the conclusion that because of the structural defects of the bridge the presence of a group of fifty pedestrians and cyclists on the bridge posed a safety risk and that the Claimant was aware of any such risk. He reiterated what Mr Hooper had said in his outcome letter but failed to identify any evidence that had supported Mr Hooper’s conclusion that the Claimant had participated in the gathering knowing that an extra 30-50 people on the bridge posed safety risks for those on the bridge.

Conclusions

Unfair Dismissal

65 I considered first what the reason for the dismissal was. The principal reason for the dismissal was that the Claimant had participated in a gathering of about fifty persons on the bridge (that fact was not in dispute) and that the Respondent believed that, because of the structural defects of the bridge, the weight of that gathering endangered the safety of those on the bridge and that the Claimant knew that. That was the principal reason for the dismissal which Mr Hooper gave in his outcome letter, and I accept that he believed that. That is a reason relating to conduct.

66 I then considered whether in the circumstances of this case the Respondent acted reasonably in treating that as a sufficient reason for dismissing the Claimant. I was conscious that in determining that question my role was not to determine what I considered to be the right course of action but whether the actions of the Respondent fell within the band of reasonable responses which a reasonable employer might have adopted.

67 The Claimant was suspended on 21 May 2019 because of concerns related to his *“involvement and behavior displayed towards colleagues”* during the event on 18 May 2019. Ms Simpson investigated that allegation. She understood it to relate to the Claimant’s conduct in his interactions with Mr Moodley on the bridge on 18 May. She concluded that there was limited evidence to support that allegation and Mr Hooper did not uphold it.

68 In her investigation report of 2 July 2019 Ms Simpson added a new allegation. The Claimant had not been informed of that allegation during the investigation or been given an opportunity to respond to it. Even if he had been, for the reasons given below, it would have been difficult for him to do so.

69 The new allegation related to conduct outside work that might have discredited the Council and the particulars of it were that with his *“knowledge of the circumstances relating to the repair and safety of the bridge (gained from his position within the Council) he should not have actively participated in a meeting that congregated on the bridge”* on 18 May 2019. It is fundamental in any disciplinary process that the employee knows exactly what misconduct is being alleged against him so that he can properly defend himself.

70 In order for the Claimant to be able to respond to the new allegation, he needed to know what was the basis for saying that a group of fifty persons ambling across the bridge made it unsafe and what knowledge it was alleged that he had of that. Those bare essentials of the allegation were not set out anywhere in Ms Simpson’s investigation report, nor did she set out any evidence that supported that allegation.

71 Ms Simpson said in her report that the Claimant had accepted that he had knowledge of the restrictions on the bridge. The restrictions, of which the Claimant had admitted having knowledge, were those that limited the use of the bridge to cyclists and pedestrians. Having said in her report that there was evidence to support that allegation, Ms Simpson set out six points (see paragraph 45 above). None of those points provided any particulars of, or evidence in support of, the allegation. Not

surprisingly, at the disciplinary hearing the Claimant focused on the six points set out in the investigation report.

72 In dealing with the new allegation, Ms Simpson made no reference in her report to any safety risks being posed by the mingling of the congregation and the cyclists using the bridge. She was clear in her evidence that the new allegation did not include that issue and that that issue was not part of her investigation or findings. Hence, that issue did not form part of the new allegation and there was nothing in the investigation report to indicate to the Claimant that it did.

73 No one at the disciplinary hearing told the Claimant that the allegation against him was that he had participated in a gathering of about fifty people on the bridge knowing that the weight of those individuals on the bridge posed safety risks because of the state of the bridge. There was no evidence that Mr Hawthorne said at the disciplinary hearing that when he told staff about the restrictions in place to reduce the weight on the bridge he had told them that the numbers of pedestrians and cyclists using the bridge was limited. He could not have told them that because the evidence was that there were no such restrictions. There was no evidence that he had said at the briefing that the weight of fifty persons on the bridge at the same time would pose a safety risk. The first time the Claimant knew that that was the allegations against him was when he received the outcome of the disciplinary hearing. He addressed the issue in his appeal, but Mr Kainth did not deal with it.

74 Mr Hooper concluded that the gathering of about fifty persons on the bridge that day posed safety risks because it *“placed a significant amount of additional weight on the bridge”* and that the Claimant knew that. There was no evidence in the disciplinary investigation report or at the disciplinary hearing that because of the structural defects of the bridge, only a limited number of pedestrians and cyclists could be on the bridge at any given time and that if the number increased beyond that the safety of those on the bridge would be endangered. There was no evidence before Mr Hooper that the gathering had posed safety risks because of the additional weight of the group. There were no restrictions on the numbers of cyclists and pedestrians using the bridge. A safety assessment carried out in the latter part of April 2019 had concluded that it was safe for pedestrians and cyclists to use the bridge, and they were permitted to do so. There was no evidence in the investigation report or in the disciplinary hearing that static weight on the bridge placed a different stress from moving weight. In any event, the evidence about the group on 18 May was not that it had stood still en masse at a particular point on the bridge; it had dispersed into smaller groups, and the different groups walked and stopped at different places. Prior to 10 April 2019, large numbers of cars and buses travelled across the bridge every day. A conclusion, without any evidence to support it, that fifty people walking across the bridge together could lead to it collapsing, is unsustainable and one that no reasonable person could have reached.

75 Even if there had been any such safety risk there was no evidence before Mr Hooper that it had been communicated to the Claimant and that he was aware of it. Mr Hooper did not say in his evidence that Mr Hawthorne had said at the disciplinary hearing that he had told the Claimant that a group of fifty persons walking across the bridge posed a safety risk because of the additional weight.

76 I concluded that Mr Hooper had no grounds, let alone reasonable grounds, to sustain his belief that weight of the group of fifty pedestrians on the bridge on 18 May

posed a safety risk and that the Claimant had been part of the group knowing that. At the time he formed that belief, he had not carried out any investigation into what impact, if any, the weight of the group would have had on the bridge. The investigation report did not deal with it, there was no evidence from any structural or health and safety experts on the issue, the Claimant was not given an opportunity to provide his response to it.

77 Mr Hooper's secondary reason for the dismissal was that the Claimant should have realised that pedestrians being on carriageway, which was used by cyclists, created a significant safety risk for both pedestrians and cyclists. Ms Simpson's evidence was clear that that did not form part of the new allegation that she added. It did not feature in her investigation report in respect of that allegation. The Claimant had no way of knowing that it was part of the case and that he needed to deal with it. He did not refer to it in his statement.

78 Furthermore, in relation to that issue Mr Hooper did not make any findings as to whether there were any signs on the bridge to indicate that pedestrians should only use the footways and cyclists the carriageway. The evidence of both the Claimant and Mr Moodley in the course of the investigation was that there were no such signs. There was no evidence that the Claimant had entered the carriageway having been told not to do so. The evidence of both the Claimant and Mr Moodley in the investigation had been that pedestrians and joggers had continued to use the carriageway even after the heras fencing had been constructed.

79 In summary, the Claimant was not given the particulars of the misconduct alleged against him prior to his dismissal, as a result he did not have the opportunity to provide his defence to it, the Respondent took into account a matter which was not part of the allegation, the Respondent did not conduct as much investigation into the allegation as was reasonable and it did not have any grounds on which to form the belief that it did that he was guilty of the misconduct for which he was dismissed. All of that has to be seen in the context of the Claimant being someone who had been employed by the Respondent for 15 years, had never been the subject of any disciplinary action, was a committed employee who was highly thought of by his managers and had told his managers that he attending the event and no one had told him that he should not. In all the circumstances of the case, the Respondent acted unreasonably in dismissing him for the reason as identified in paragraph 65 above.

Wrongful dismissal

80 I have set out my findings of fact of what happened on 18 May 2020 at paragraphs 21 to 25 (above). In essence, on a non-working day the Claimant attended in his personal capacity a "walking tour" of Hammersmith Bridge, the purpose of which was to discuss the potential option for turning the bridge into a garden bridge. A couple of people in the group were aware that the Claimant worked for the Council. Prior to that date pedestrians had used the carriageway, and the Claimant did not hear anyone telling the group that they should not go on the carriageway. Mr Moodley told the Claimant that the group had to leave the carriageway and the Claimant asked him why, because as far as he was aware the group was not doing anything wrong. When Mr Moodley became more agitated and tried calling Mr Hawthorne, the Claimant offered to introduce him to the organiser of the event and they started to make their way towards him but they both got distracted en route. Mr Moodley closed the carriageway to the cyclists for about 45 minutes.

79 I do not consider that the above actions on the part of the Claimant amount to a repudiatory breach of his contract of employment.

Employment Judge - Grewal

Date: 14th Aug 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

14/08/2020

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FOR THE TRIBUNAL OFFICE