EMPLOYMENT TRIBUNALS

Claimant: **Mr Alan Simmons**

Respondent: **Hampshire Fire and Rescue Service**

Heard at: **Southampton (by CVP)** **On:** **19, 20, 21, 22 July 2021 and in chambers on 29 July 2021**

Before: Employment Judge Street
Ms R Goddard
Mr P Flanagan

Representation
Claimant: Mr Ross, Counsel
Respondent: Ms Gyane, Counsel

JUDGMENT

The Claimant's claim of unfair constructive dismissal succeeds. The claims of automatic unfair dismissal because of protected disclosures and detriment on the grounds of protected disclosures do not succeed and are dismissed.

Remedy is listed for remote hearing on 22 November 2021 and 2 February 2022, starting at 10.00 am.

If both or either dates are not required, the parties are asked to write jointly to vacate those dates as early as possible.

REASONS
For a reserved judgment

1. Evidence

1.1. The Tribunal heard from the Claimant and for the Respondent from Mr Craig Sadler, Watch Manager, Mr Allan Francis, Crew Manager, Mr Bruce Gordon, Station Manager, Mr Brian Neat, Group Manager and Mr Kevin Evenett, Assistant Director of Operations. The Tribunal read the documents in the bundle referred to.

2. Issues

2.1. The claimant claims constructive unfair dismissal, automatic unfair dismissal because of protected disclosures and detriments because of protected disclosures.
2.2. The issues before the Tribunal to decide are as follows.
2.3. The numbering here follows the numbering in the agreed list of issues, for consistency of reference. The issues are italicised to prevent confusion arising because of that.

1. *Time limits*

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction. The claim form is 13/12/19. The ACAS dates are 25/09/19 and 25/10/19.

1.2 Was the detriment complaint made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of
1.2.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
1.2.3 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. ***Constructive unfair dismissal***

2.1 The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence. The breaches were as follows;

2.1.1 Rejecting the claimant's request to reduce his hours in 2012. The Respondent says that this was due to business needs and no discernable benefit to the station

2.1.2 After being told informally that his 2016 request to reduce his hours would be granted, refusing the request. The Respondent agrees there was an informal request to reduce his hours but denies that he was told it would be granted. The request was not granted due to the needs of the station.

2.1.3 Despite completing a successful trial period in September and December 2017, his hours were not reduced. The Respondent says that although the trial was successful, there had been changes to shift patterns of the WDS role and therefore the Trial did not accurately show whether the Claimant could fulfil the 50% RDS role alongside his WDS role.

2.1.4 Being required to relinquish his crew manager position in September 2017. The Respondent says that after the relocation of the Claimant's home, he was unable to provide the required level of managerial support of his subordinates and be an intermediary between his managers and the crew. He was not sufficiently available or sufficiently contactable.

2.1.5 After renewing his request to reduce his hours in March 2019, the Respondent rejected the request, despite having recruited 50% RDS firefighters and advertised to recruit more. The Respondent says that there was not a benefit to the station and the new recruits were able to provide day-cover to ensure that the appliances were effectively crewed and that Claimant was unable to provide sufficient cover due to his WDS role and the relocation of his home.

2.1.6 The request was rejected due to personal reasons involving Mr Sadler, rather than a business case and was pre-determined. The Respondent says it was rejected due to the needs of the fire station.

2.1.7 Rejecting the Claimant's appeal against the rejection of his request. The Respondent says that it was rejected due to the needs of the fire station.

2.1.8 At the meeting of 31 July 2019, the Respondent made clear to the Claimant that he would be dismissed. The Respondent does not accept that it was made clear that he would be dismissed, but says that the Claimant was made aware that if he could not comply with the terms of his contract his contract might be terminated.

(The last of those breaches was said to have been the 'last straw' in a series of breaches, as the concept is recognised in law).

2.2 In respect of bullying, mistreatment, unfair and unreasonable behaviour over a sustained period, in relation to WM Sadler:

2.2.1 That on 11 October 2017, WM Sadler acknowledged everyone aside from the Claimant in the mess room at Havant Fire Station. The Respondent says unintentional and that was explained at the time.

2.2.2 That WM Sadler unfriended him on Facebook around the time of the 3 month trial in 2017 after being connected for several years. The Respondent admits but says not a breach of contract

2.2.3 That WM Sadler told SM Jenkins of Cosham Fire Station that he would leave if the Claimant were to go to Cosham. The Respondent denies that that happened.

2.2.4 That WM Sadler told CM Kavanagh that the Claimant was a snake and not to be trusted. The Respondent denies that that happened or that it is a breach of contract.

2.2.5 That in December 2018 WM Sadler walked straight past the Claimant, ignoring him after the Claimant had answered the Havant Fire Station door to him. The Respondent denies that WM Sadler intentionally ignored him or that there was a breach of contract.

2.2.6 That at / around the beginning of 2019, all fire kit name badges at Waterlooville Fire Station were renewed aside from the Claimant's. The Respondent denies that this was intentional.

2.2.7 That no contact was made between management and the Claimant during his sabbatical. The Respondent denies that on the basis that CM Cole is the point of contact for all absences and he called weekly.

2.2.8 That WM Sadler failed to reply to the Claimant's email of 14 February 2019 or to meet him on his return to work. The Respondent says Station Commander Gordon undertook the meeting himself because of the complexities relating to the Claimant's individual circumstances as to the hours and his residence in Northern Ireland, WM Sadler not having been involved in discussions about availability or contract hours before.

2.2.9 By taking a sabbatical on the day of the Claimant's return to work after his sabbatical, because of his return to work. The Respondent denies this and says this is unconnected.

2.2.10 By the Respondent failing to offer mediation between the Claimant and WM Sadler upon or before the Claimant's return from his sabbatical, notwithstanding it having been deemed necessary by GM Neat.

In relation to SM Gordon, generally negative conduct and a lack of managerial professionalism as set out:

2.2.11 By removing the Claimant's rank in September 2017

2.2.12 By failing to provide minutes of meetings, including that of 26 February 2019 and/or providing inaccurate minutes
2.2.13 By failing to acknowledge e-mail correspondence
2.2.14 By taking an aggressive and unreasonable tone in meetings to discuss the Claimant's contract, in particular on 12 June 2017 and 26 February 2019

2.3 The Tribunal will need to decide:

2.3.1 Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
2.3.2 Whether it had reasonable and proper cause for doing so.

2.4 Did the Claimant resign because of a repudiatory breach?

2.5 Did the Claimant tarry before resigning and affirm the contract? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

2.6 In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act? The Respondent says it was and that it was for some other substantial reason and fair

2.7 Would the Claimant have been fairly dismissed in any event and/or to what extent and when?

3. *Protected disclosure ('whistle blowing')*

3.1 Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

3.1.1 What did the Claimant say or write? When? To whom? The Claimant says he made disclosures on these occasions:

3.1.1.1 On 2 November 2017 to CM Allan Francis that Station Watch Manager Sadler would have to drive dangerously to respond within the requirement to arrive within 4 minutes in order to join the first or second appliance, which would endanger members of the public
The Respondent says that the Claimant attended safe and well visits during periods held out as available, meaning that the visits were outside the timeframe to turn in for a call, as admitted. He alleged that some personnel live further away than some of the visits listed.

3.1.2 Were the disclosures of 'information'?

3.1.3 Did he believe the disclosure of information was made in the public interest? The Claimant considers that members of the public were put at risk. The Respondent denies this on the basis the statement was made to justify receiving a payment in relation to a safe and well visit whilst also being available to turn out for a call

3.1.4 Was that belief reasonable?

3.1.5 Did he believe it tended to show that:
3.1.5.1 the health or safety of any individual had been, was being or was likely to be endangered;

3.1.6 Was that belief reasonable?

3.1.7 If the Claimant made a qualifying disclosure, was a protected disclosure because it was made to the Claimant's employer?

4. *Dismissal (Employment Rights Act s. 103A)*

4.1 Was the making of any proven protected disclosure the principal reason for the repudiatory conduct?

4.2 The questions which the Tribunal will have to address are:

4.2.1 Has the Claimant produced sufficient evidence to raise the question whether the reason for the dismissal was the protected disclosure?
4.2.2 Has the Respondent proved its reason for the dismissal, namely That the Claimant was unable to perform his contractual obligations and had relocated his home to Northern Ireland?
4.2.3 If not, does the Tribunal accept the reason put forward by the Claimant or does it decide that there was a different reason for the dismissal?

5. *Detriment (Employment Rights Act 1996 section 47B)*

5.1 Did the Respondent do the following things:

5.1.1 After the claimant renewed his request to reduce his hours in March 2019, did the Respondent reject the request, despite having recruited 50% RDS firefighters and advertised to recruit more. The Respondent says that there was not a benefit to the station and the new recruits were able to provide day-cover to ensure that the appliances were effectively crewed and the Claimant was unable to provide sufficient cover due to his WDS role and the relocation of his home.

5.1.2 Reject the request due to personal reasons involving Mr Sadler, rather than a business case and was pre-determined. The Respondent says that it was rejected due to the needs of the fire station.

5.1.3 Reject the Claimant's appeal against the rejection of his request. The Respondent says it was rejected due to the needs of the Fire Station.

5.1.4 At the meeting on 31 July 2019, the Respondent made clear to the Claimant that he would be dismissed. The Respondent does not accept that it was made clear he would be dismissed, but says that the Claimant was made aware that if he could not comply with the terms of his contract, his contract might be terminated.

5.2 By doing so, did it subject the Claimant to detriment?

5.3 If so, was it done on the ground that he had made the protected disclosures set out above?

6. *Remedy*

<u>Unfair dismissal</u>

6.1 The Claimant does not wish to be reinstated and/or re-engaged

6.2 What basic award is payable to the Claimant, if any?

6.3 If there is a compensatory award, how much should it be? The Tribunal will decide:

6.3.1 What financial losses has the dismissal caused the Claimant?

6.3.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

6.3.3 If not, for what period of loss should the Claimant be compensated?

6.3.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

6.3.5 If so, should the Claimant's compensation be reduced? By how much?

6.3.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the Respondent or the Claimant unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

6.3.7 If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce his compensatory award? By what proportion?

6.3.8 Does the statutory cap of fifty-two weeks' pay or £86,444 (until April 2020) apply?

Detriment (s. 47B)

6.4 What financial losses has the detrimental treatment caused the Claimant?

6.5 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

6.6 If not, for what period of loss should the Claimant be compensated?

6.7 What injury to feelings has the detrimental treatment caused the Claimant and how much compensation should be awarded for that?

6.8 Has the detrimental treatment caused the Claimant personal injury and how much compensation should be awarded for that?

6.9 Is it just and equitable to award the Claimant other compensation?

6.10 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

6.11 Did the Claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the claimant's compensation? By what proportion?

6.12 Was the protected disclosure made in good faith? If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

3. Findings of Fact

These are the primary findings of fact made by the Tribunal. Where contentious, the reasoning is explained here, but more complex analysis and the resulting further findings are set out in the Reasons. Reference is made to the bundle by page numbers,, to witness statements ("ws") and to the oral evidence. The claimant is referred to as crew manager ("CM") until his demotion and then as firefighter ("FF"). Mr Gordon is referred to as the station manager ("SM") although some documents refer to him instead as the station commander.

Background, contracts, Service Orders

3.1. On 8 January 1992, Mr Simmons commenced employment with the Respondent as a Retained Duty System ("RDS") Fire Fighter. He was based at Waterlooville Fire Station over the period being considered. He was contracted to provide part-time / 75% cover.

3.2. Waterlooville is a retained fire station. It is a two-pump station. There are some 14 or so staff altogether, some, including the managers, on wholetime contracts elsewhere (Gordon). WM Sadler, for example, was on a wholetime contract at Cossham.

3.3. Mr Simmons took on a Wholetime Duty System ("WDS") Fire Fighter role on 5 July 1994, first at Rushmore then at Havant Fire Station. He still works at Havant Fire Station in that capacity.

3.4. For most of his service at Waterlooville, he was a Crew Manager until demoted in September 2017.

3.5. RDS fire fighters provide an emergency response outside their full-time working hours. It was routine for wholetime officers to undertake retained duties in addition to their full-time role.

3.6. CM Simmons' 2012 Crew Manager contract at Waterlooville was a 75% contract to provide Alternate cover for between 83 and 119 hours per week. Alternate cover is "for employees whose primary employment is on a rotational basis, ie shift worker" (62). The contract sets out that it is, "conditional upon you continuing to live or work near enough to your station/stations of posting to respond to emergency calls within a time not exceeding 4 minutes." (60). The requirement was to be available, within that minimum response time, during his agreed hours, in case of an emergency call requiring a response.

3.7. Under "Working Hours" the contract states that, "When booked as available you will be expected to attend all calls." (61)

3.8. The contract further sets out,

> "An appointment as a retained firefighter is made on the basis of the employee's availability at the time of appointment. Should you wish to change your cover, approval must be sought from your Group Manager. Any change in your circumstances not meeting our crewing requirements, may lead to your employment with HFRS being terminated." (62)

3.9. The Policy for the Retained Duty System ("RDS Service Order") supports that on the basis that,

> "On employment, RDS employees will have declared the hours of available over and the periods that they are usually able to provide them. The average cover provided by employees will be monitored over a 17 week reference period…. to ensure that this cover is

maintained. Employees not fulfilling their agreed cover will be subject to management procedures." (272)

3.10. Managers are required when employing staff to take account of the areas that require cover, rather than recruiting up to the Full-Time Equivalent maximum (272).

3.11. Staff are required to complete a change of particulars form for any change of address or availability,

"This must be presented to their line manager to consider whether employment can be continued."

3.12. Attendance at calls was monitored. By paragraph 4.5 of the Policy document,

"Non attendance when shown as available will, in the first instance, require a discussion with the line manager to ascertain the reason and completion of a "Did not Respond" ("DNR") form. Any further non-attendance will require completion of an additional DNR form which is to be forwarded to the service delivery admin support team. A record of discussion is also to be placed on the employee's file. Further non-attendance will be subject to disciplinary /capability procedures. A DNR will remain "live" for a period of 12 months and will be monitored by Station Commanders.

3.13. As a Crew Manager, CM Simmons provided support to management in running the station and tasks might be delegated by the Watch Manager or sometimes the Station Manager. He was required to attend training and to contribute to the training of his team.

3.14. In practice, he was also expected to be involved with community engagement events, which he did during his long years of service.

3.15. In June 2013, a revised contract was agreed, requiring between 70 and 119 hours per week by way of hours of cover (79). The provisions with regard to the requirements of availability within a four-minute response time, the expectation to attend all calls within hours of availability, the definition of alternate cover, the requirement to obtain approval for any change in availability continued to apply (81).

3.16. Three hours training per week was required, with requirements for "make-up" sessions if training was missed for any reason, including if unavailable for training while on emergency calls. The "make-up" obligation does not apply to HFRS wholetime members on a retained contract unless the session missed is required in support of an arranged training session relevant to their retained workplace's specialist equipment or functional role (82). Waterlooville had no specialist equipment.

3.17. The fee for a retained fireman on a 75% contract was £2369 in 2013 per annum. There were fees for turnout, an hourly fee for attendance after the first 75 minutes of a call, and a training fee for the weekly drills (79).

3.18. The basic pay for July 2017 for CM Simmons was £2470 for his full-time duties, £205 as his retainer with payments for two turnouts, two attendances and three drills, totalling £150: £355 for that month's retained firefighter duties (339).

3.19. The salary range advertised in the job details for an 50% On Call Firefighter (Waterlooville) in early 2019 was £1,145 to £2,291 per annum plus the additional call out payments. The advertisement was for a minimum 35 hours per week, with no specified hours required (217).

The Family Friendly Policy

3.20. There is a Family Friendly Policy. The 2018 version has been produced, but it has been in place for some time.

3.21. That sets out the purpose of the policy at paragraph 1.2 (333)

> "The move towards more flexible working arrangements is driven by a number of different factors, including:
>
> > 1.2.1 The need to increase the diversity of the workforce by assisting those who may be disadvantaged in the workplace to enter into working arrangements which suit their needs. For some groups of workers, such as those with family responsibilities or certain disabilities, more flexible working hours provide opportunities for working which are not otherwise available for them.

3.22. It goes on,

> > "1.3 We recognise that our employees are our greatest asset and that each employee has different family commitments and personal aspirations… Effective practices which promote a work-life balance benefit both HRFS and our employees. We also recognise that we have a duty as an employer to discuss workable solutions with employees that meet the needs of both parties, having regard to fairness and consistency in their application."

3.23. The procedure is set in the Appendix, requiring applications to be in writing and not within 12 months of an earlier application and referring to the statutory duty to ensure any application is given serious consideration, (289). A decision on an application under the policy should be made within 3 months.

3.24. A 50% job-share contract had been introduced in 2012, affording flexibility in meeting the needs of those needing adjustments from the 100% and 75% contract requirements. While referred to as a post-share or job-share contract, it did not require actual job share.

The Retained Duty System

3.25. The Retained Duty System is set out in a document in a policy document. PD/7/3/1/5 (272). That sets out that,

"4.6 There is no automatic right for an employee to increase or decrease their cover"

3.26. In respect of training, it says this,

"5.2 RDS employees, including those with a WDS contract, are required to attend their designated station for a weekly 3 hour training period, at a day and time specified by the Officer in Charge, according to local training arrangements. …

5.3 Employees that provide cover at more than one station will attend training nights at their primary station. They will also attend one training night per month at their secondary station. …

5.6 All training night absences other than those detailed in 5.4 (relating to paid absences of 5 per year) will be regarded as the exception rather than the rule and will require the individual to attend another station's drill night to complete the missed training session. This will include periods when an emergency call is received during a training session. This must be completed within 4 weeks of the original absence, and is the individual's responsibility to identify and make arrangements with the relevant station.

5.7 The above (5.6) does not apply to HFRS Wholetime Duty System employees that are also employed as an RDS firefighter that are unable to attend a training session due to carrying out their WDS role, unless the session missed is required in support of an arranged training session relevant to their retained workplaces specialist equipment and/or functional role."

3.27. Those requirements differ from the contract. The Policy requirement is for missed sessions to be made up where missed save where carrying out the wholetime firefighter role, with limited exceptions. The contract does not require wholetime firefighters on retained contracts to make up missed sessions (3.16 above).

2012 Application for Family Friendly Contract Reduction

3.28. 1 May 2012, CM Simmons applied to reduce his hours under the Family Friendly policy to a 50% contract (73). It would have reduced his required availability to a minimum of 35 hours instead of 83 hours. At the time of the change requested, he had two children aged 3 and 1.

3.29. Form FM/1/2 is the one used. That does not invite an explanation of the circumstances prompting the application. Nothing therefore ensures that the reasons and benefit to the applicant is clearly presented to the managers considering it, unless that is covered in a meeting.

3.30. On 3 July 2012, his application to amend his contract to a 50% post-share contract was refused, due to lack of available cover. The application is noted as rejected by the then line manager, WM Hutton, and the reason is noted as simply "low station numbers", with a note to review when personnel numbers were up to strength. There is an added note that Mr Hutton was "unsure when these hours would be given" (74). It is not clear whether Mr Hutton had asked CM Simmons about those hours or not.

3.31. CM Simmons understood from Mr Hutton that the reason for the refusal of the application was the number of crew managers, not the number of personnel overall (see 95).

3.32. Station Manager ("SM") Gordon signing off the refusal saw no benefit to the station in the reduction in hours. SM Gordon agrees that he had not read the Family Friendly policy at that time and the reasoning recorded does not indicate that any consideration was given to the benefit to the applicant. SM Gordon agrees that the only consideration was the immediate needs of the station (oral evidence)

3.33. The form was signed off as refused by the Group Manager on 18 June 2012. CM Simmons had asked Hutton about an outcome on 11 June (72) and again on 29 June, politely, but adding, "If I have not received a reply by the end of July I will assume that this request has been successful and will amend my cover accordingly." WM Hutton replied on 2 July, "I found out just before I went away and was going to tell you Wednesday. But it has been refused." Reasons were requested, but never given (75,77). SM Gordon told us he did not remember if he had replied to the email or whether he had had a meeting with CM Simmons but pointed out that the form itself would have been on CM Simmons' personnel file.

2016 Application for Family Friendly Contract Reduction

2016

3.34. On 7 November 2016, CM Simmons emailed his line manager WM Hutton, asking him to review the possibility of reducing his retained cover to 50% (95). He referred his understanding that it had been refused due to there not being enough Crew Managers at the time. One had left, but two had been appointed.

3.35. In response, Mr Hutton said,

"Regards your request to reduce your cover to 50%. Could you let me have your availability hours that would run with this reduced cover?"

3.36. CM Simmons replied saying there would be no reduction in cover, or that he would probably end up still giving the same amount. It would allow him greater flexibility in his home life.

3.37. On 12 December 2016, CM Simmons and his family moved to Northern Ireland.

3.38. He explains that the idea had been in discussion for some time, but while he had a proposed buyer and a proposed purchase, it looked as if it was falling through. He then on 5 December found it could all go ahead and it did, within the week. Mr Hutton had been aware of the proposal. It was known in the station. CM Simmons showed Mr Sadler a picture of his new house.

3.39. CM Simmons continued with his employments with the Respondent, staying with an uncle during his on-duty hours. No change of address form was submitted.

3.40. SM Gordon who had been copied into the correspondence about the Family Friendly application, emailed on 13 December 2016 to say,

"Hi Alan
I will discuss this with you in person when we next meet." (94)

3.41. By this time, other firefighters had been appointed on the new 50% contract.

3.42. WM Hutton retired in December 2016. Mr Sadler was appointed to replace him.

2017

3.43. In February 2017, SM Gordon wrote to CM Simmons,

"Hi Alan,

I have been made aware that you relocated to Northern Ireland.
I would be grateful if you could provide some detail around the following.

- Your current contract is on an alternate basis providing 70 – 119 hours per week
- You are required to attend all training nights except those where you are on night duty with your WDS watch.

How do you intend to manage your RDS training whilst living in Northern Ireland? " (97)

3.44. CM Simmons provided a full reply on 5 February, explaining his disappointment at not getting an earlier reply to his request for a reduced hours contract. He said he felt it should have been discussed at a meeting. He confirmed that he had moved, reporting that WM Hutton had been aware of that before it took place. He says,

"I was assured at back in November that my request should not present a problem as circumstances at Waterlooville had changed from my previous request 3 years prior….."

3.45. SM Gordon in oral evidence was reluctant to accept that Hutton had given that assurance,

"Have you any evidence to disagree that this was what Hutton told him?"
"Yes, I have because I wasn't present at that conversation.
I can't agree to something I don't know about."

3.46. In that email, CM Simmons acknowledged that with the move,

"A reduction in cover was inevitable and unavoidable, however I did give assurances to WM Hutton that a reduction in cover would enable me to continue at Waterlooville. This would be based on me being available during periods around my full-time contract at Havant."

3.47. In relation to training drills he said,

"I have spoken WM Sadler and he has clearly said that any drills that cannot be completed at Waterlooville will be required to be completed within one month at another retained station. This is not exclusive to me but for anyone unable to make a drill night which is not covered by Leave. I totally support his decision……" (96)

3.48. On 28 February 2017, a meeting took place between SM Gordon and CM Simmons. The notes of the meeting record that CM Simmons agreed he could not maintain his contractual obligation to provide a minimum of 70 hours per week availability on an alternate basis, having moved. He requested the reduction to 50%, a minimum of 35 hours per week.

3.49. SM Gordon commented on the move to Enniskillen, for "what he describes as a better quality of life. From the discussion that we had it is clear to see how happy and content Alan is since this move." (100).

3.50. SM Gordon did not see an immediate way of granting the request for reduced hours, given CM Simmons' current contractual obligations and managerial responsibilities, and his move to Northern Ireland. His reason was that he needed to look to the needs of the station and the community,

"Other officers would like to reduce to 50% cover should Alan reduce his cover and this would place the station at risk of providing a suitable response to the risk within the Waterlooville community and surrounding areas. At present, I cannot see a way of granting this request.

3.51. As CM Simmons put it , the reason given was, "If I give you a reduction in cover, other station personnel would be looking to reduce cover" (110)

3.52. There is no note reflecting discussion of the benefit to C Simmons of the reduced hours contract. Nothing was said either about the need for the 50% contracts to provide day cover. SM Gordon was asked about this,

"You do not say anything in this meeting to the effect that 50% contracts had to be used for day cover only.
"No there is nothing in that meeting, no."
"Do you agree that there is nothing to show you considering the claimant's needs or the Family Friendly Policy when noting down what was said in that meeting?"
Question put a different way
You use the word predicament ("Whilst I understand Alan's predicament…"). You do not mention that he had young children that he wanted to care for. No note or record of his need to take care of the children?
No, because he was in Northern Ireland. He wouldn't have child care needs if he was here and his family was in Northern Ireland….."
"I did not know that at the time that he had two young children.. It was just to assist him with his personal life."

3.53. It is put to him that he is at this stage in the same mindset as in 2012, which is only allowing a reduction in hours if it benefited the station, and not if it was of benefit to the employee, and he agreed.

3.54. SM Gordon also expressed grave concern about the ability to contact CM Simmons when in Northern Ireland, to resolve the kind of issues that arise, saying, "These will be extremely difficult to address whilst in Northern Ireland." He did agree in oral evidence that CM Simmons could be contacted while in Northern Ireland.

3.55. In respect of training sessions, SM Gordon noted that on the current 2-2-4 shift system (at Havant) Alan (Simmons) could only be available for 2 sessions in 8, so he could not adequately support managers or his team.

3.56. Noting a complete failure to respond to calls in January and February SM Gordon offered Simmons a two-month leave of absence. That would enable him to make a decision, on the basis of the new crewing system at Havant, about how he proposed to address meeting his contractual obligation or provide suitable supervisory manager support to his managers and team (101).

3.57. A further meeting took place on 3 May 2017 between CM Simmons and SM Gordon (111). CM Simmons agreed again that he could not maintain the level of availability required under his contract. SM Gordon doubted he could even maintain the level of availability required for a 50% contract.

3.58. CM Simmons had provided a suggestion as to how he could meet his contract terms based on a 50% contract. The notes of the meeting purport to show his proposals, as follows.

12.00 midday on Sunday to 9.00 am Monday,	*21 hours*
18.00 Monday to 9.00 am Tuesday	*15*

1800 Tuesday to 18.00 Wednesday	*15*
9.00 Wednesday to 18.00 Thursday.	*9*
	60 in total

3.59. The proposals are plainly mistranscribed.

3.60. Whatever the original version, there was some daytime cover offered and enough cover to more than meet the minimum requirement.

3.61. CM Simmons offered Site Specific Risk Inspections ("SSRI") completion, Safe and Well visits and Co-Responder as management support but the notes say, "This does little to support the management team.

3.62. There was discussion of the Crew Manager role. CM Simmons felt and still feels he could manage it successfully on the reduced contract and from Northern Ireland. He contends that issues about training could have been resolved. Issues about delegation were not significant – he had not in 27 years been asked to come in at short notice to resolve a problem.

3.63. There is nothing in the notes that point to the need for CM Simmons to be available for day cover as a condition of doing a 50% contract. There was still no discussion of the benefit to CM Simmons of the reduced hours.

3.64. Instead of the 2 – 2 – 4 basis that CM Simmons was working on at Havant, Havant was trialling a new approach to crewing and that was mentioned (111).

3.65. There was a meeting on 12 June 2017, between SM Gordon and CM Simmons in the mess room at Havant, identifiable from FF Simmons request to meet Group Manager ("GM") Neat the following day (118). No minutes have been produced. At that meeting, FF Simmons reports that SM Gordon became annoyed and aggressive, and told him in terms that he would not be continuing at Waterlooville. SM Gordon says he has no memory of that meeting and does not accept the allegations made. The meeting did however disturb CM Simmons to the point where he asked for the meeting with Neat,

> "It is to discuss my position at Waterlooville following a meeting with Stn Manager Gordon yesterday. I am unhappy with the outcome and feel I have been treated unfairly."

3.66. On 24 July 2017, WM Sadler sent out a general email about training ("drill") night attendance, copying in SM Gordon, setting out alternatives where a drill night could not be completed (Sadler para 5 ws, 117). SM Gordon commented to all recipients on the same day, indicating that the work done as make-up work must be meaningful. He did not otherwise dissent from the outline produced, although he now disagrees that it is accurate.

> "Following a brief discussion with Emma following a fire call on Saturday, she informed that other retained stations allow WT firefighters with a retained contract are allowed to do make up drills during the week and not necessarily at another retained station on a week night. I mentioned this

to SM Gordon today and he confirmed that this happens. Firstly apologies to you all as I was not aware that this was an option. After further discussions with SM Gordon the following was agreed: …" (117).

3.67. In summary, a summary WM Sadler agreed in oral evidence, these were the requirements:

- When on duty, retained annual leave or sick, no make-up drill was required
- Wholetime firefighters on a retained contract need only attend 2 drill nights a month, half the standard requirement
- Of those, any missed to be made up at other stations or by meaningful work within four weeks
- Meaningful work could be SSRIs, Safe and Well, FRAT visits, community initiatives, work on station.
- Firefighters should tell management if they needed to do meaningful work instead of drill so it could be arranged.

3.68. Asked specifically about page 117, SM Gordon's interpretation of the email is different.

"They were required to complete 6 out 8 drill nights
The two not required were night duty with whole time shift
They still had to make those other drill nights up
But 50% of those could be done as meaningful work" (oral evidence)

3.69. On 10 August 2017, at CM Simmons request, GM Neat set out his views following the informal meeting between them in response to CM Simmons' email of 13 June (119). GM Neat reiterated his position that day to day decision making lay with the Watch manager and Station Manager.

3.70. In relation to cover, GM Neat accepts that the previous Watch Manager (Hutton) had approved a reduction in CM Simmons contracted hours, as demonstrated by email evidence. That was due to his home residence now being in Northern Ireland. But, he said, the reduction in hours should be for an initial trial period only,

"While I am supportive of your request to reduce your cover, I made clear during the meeting that this should be for an initial trial period of three months to determine if the levels of cover provided are suitable and sufficient to be a contributory member of the Waterlooville team" (119)

3.71. He writes in relation to the Crew Manager role,

"This means supporting the WM in the day to day running of the station, being able to provide managerial support to firefighters on station, in addition to assisting the training and development of firefighters to be as

operationally safe and efficient as possible. I do not believe this is a Role that ends when the contracted hours are completed, but continues as part of being involved in a community fire station.

3.72. CM Simmons was urged to reconsider his role as a Crew Manager,

"On reflection, I remain unclear how you will be able to undertake the full role of a CM due to your current circumstance, and I would suggest that you discuss this matter with your WM and SM with a view to continuation of your RDS contract as a Firefighter."

3.73. With regard to drills, accepting that the critical training elements could be completed within the full-time contract, there remained issues of team familiarity and CM Simmons' commitment to training the team he had responsibility for,

"It is, therefore, my expectation that drill nights should be completed in accordance with your RDS contract and drills that cannot be completed due to your WDS contract should be made up in accordance with the hierarchy of options developed by your WM. I have provided guidance to the management team that make up drills should be the exception and not the rule and that all outstanding drill make ups should be completed as a matter of priority" (119).

3.74. There is no reference in that email to the requirement to provide cover during the day, if working on an 50% RDS contract.

3.75. On 15 August 2017, there was a meeting held to discuss CM Simmons' working arrangements following his move to Northern Ireland. Present were WM Sadler, SM Gordon and CM Simmons. Again, the concerns were about maintaining his contractual obligations and that he could not provide the management support to the team as a Crew Manager. He again agreed that he could not meet the terms of his current 75% contract hence requesting a reduction to 50%.

3.76. The note of that meeting records agreement for the trial of the 50% contract for three months, with CM Simmons to provide details of when he would provide cover. It also records that he would relinquish his Crew Manager role. He was to make up training night absences other than when on WDS duty or on leave (122). It is noted that they were waiting on the outcome of flexible crewing being trialled at Havant.

The 2017 Trial

3.77. CM Simmons began the three month trial on 21 August to consider the effects of a reduction in his hours to a 50% RDS contract alongside the Claimant's 2-2-4 shift pattern under his Havant wholetime contract.

3.78. The short notice of the commencement of the trial meant that he had little room for manoeuvre, given that his flights were booked. However, he

could only attend one drill night per month (127 – spread sheet) and he had booked his flights knowing that.

3.79. On 14 September 2017, he formally relinquished his Crew Manager role, reverting to the position of Fire Fighter. He was reluctant to do so, but did not raise a grievance or complain at the time.

3.80. There was a review meeting with WM Sadler on 25 September 2017 (133). The notes show that FF Simmons was required during the trial to make-up all outstanding drills by 31 December 2017. There was uncertainty about how the leave taken during the trial period was to be treated. There was a lack of clarity about how the hours during the trial would be calculated, whether week by week or average.

3.81. On 11 October 2017, FF Simmons was asked at 9.24 am to provide cover at Waterlooville, there not having been cover from 7.00. He did so, and emailed WM Sadler about it. He said that they could have spoken about this at 7.15 am when they saw each other at Havant; he could have asked for time off from Havant to make sure Waterlooville remained available, but "unfortunately you failed to acknowledge me whatsoever, something that I hope does not continue" (151). WM Sadler responded acknowledging he had missed the crewing exception message, thanking Simmons for responding and apologised if his actions at Havant had been misinterpreted, saying that CM Simmons had been on his phone with his back to him when he entered the room and he had not wanted to interrupt him.

3.82. CM Francis was made the point of contact for the trial from 16 October (149 and 250).

3.83. On 25 October 2017, FF Simmons asked a watch manager at Havant if he could attend a drill night for a make-up he owed at Waterlooville. The response was,

"Hi Simmo,
That's okay with me. BUT whole-time have no requirement to do make up drills and shouldn't really do them." (157)

3.84. On 27 October, a summary of FF Simmons' hours of availability was produced, showing very limited hours for the first three weeks of the trial. Those were dates when FF Simmons had leave booked and flights booked that limited his availability.

3.85. A review meeting took place on 2 November 2017 (163). That included discussion of his availability and of his attendance at training nights.

3.86. He was still asking for clarity about the treatment of hours and leave, although guidance had been provided by SM Gordon to WM Sadler on 28 September 2017. That was that hours were to be assessed over a 17 week period, and leave entitlement was treated positively provided it was taken in accordance with policy. FF Simmons had an annual entitlement of 35 days leave, 5 of those being permitted as drill night leave (137).

3.87. FF Simmons had been required to make up all outstanding drills from the year during this trial period. He asked for this to be clarified given that

while he would do as asked and was making up the drills, he had been told that there was no requirement for wholetime firefighters to do make-up drills. He did not know why he was being asked to do this (163). CM Francis notes that this had been clarified earlier by reference to the Service Order.

3.88. During the meeting, there was discussion of Safe and Well visits carried out by FF Simmons to addresses that were outside the time frame for a call. That was on the basis that he should not hold himself out as available when not within the four-minute response zone. FF Simmons is noted as querying that, on the basis that there are personnel that turn out for Waterlooville that live further away than the addresses at issue (163).

3.89. The final review meeting with CM Francis took place on 3 December 2017 (171) FF Simmons had turned out on emergency calls 100% of the time that he was available. His Safe and Well visits were accepted as covering 6 out of the 8 outstanding make-ups, after discussion.

3.90. In that context, he raised again the question of other officers who lived outside the four-minute response zone,

> "FF Simmons stated that there are individuals responding to Waterlooville who clearly live outside the required response times for emergency calls. He feels that a blind eye approach has been taken with personnel that respond from an address not close enough to the station…He would like to know how the required turn in time can be achieved without putting other road users at risk.
> I explained to FF Simmons that I had spoken with SM Gordon and there have been several trials that had taken place over a period and that some trials were still ongoing. I also said to FF Simmons that we as individuals can't be responsible for the way people drive. We ask that all personnel turning in for a call adhere to all highway code laws (172)."

3.91. One of those living outside the four-minute zone was WM Sadler.

3.92. At some point at around this time, WM Sadler unfriended FF Simmons on Facebook and blocked him.

2018 and the Sabbatical Year

3.93. The trial of 50% cover was held to be a success.

3.94. The ability to provide day cover was not a measure of success of the trial, as SM Gordon agreed. The documents do not refer to that as a possible consideration.

3.95. FF Simmons was hoping that if the trial was successful, that would lead to him being offered the reduced hours contract.

3.96. Throughout 2017 plans had been developing for a change at Havant Fire Station to flexible crewing for WDS firefighters instead of the 2-2-4 shift pattern. That was due to move to a full trial in January 2018.

3.97. That meant that the basis on which the trial for FF Simmons of the 35 hour contract had been carried out was not the basis for his future availability.

3.98. On 2 January 2018, GM Neat met with FF Simmons to review the outcome of the trial. GM Neat expressed himself happy with the outcome of the trial (183)

3.99. They then discussed the new crewing trial, which he anticipated would mean that there would be no return to the 2-2-4 system, so that there were still concerns over how FF Simmons would be able to be a contributing member at Waterlooville. GM Neat continued to express doubts.

3.100. In oral evidence, GM Neat did agree that there was no reason why the reduction to the 50% contract could not continue at that time, but explaining it was not just about the hours, it was also the training nights, the weekly 3- hour drills.

3.101. FF Simmons suggested a period of approved absence, which was agreed, so on 1 March 2018, FF Simmons began a one-year sabbatical. He continued in his full-time role at Havant. There was no guarantee that the reduced contract would be agreed on his return.

3.102. FF Simmons remembers discussion of the difficult relationships at Waterlooville, in particular between him and WM Sadler, and that GM Neat raised the subject, suggesting mediation. GM Neat told us he did not recollect that discussion.

3.103. In notifying WM Sadler, SM Gordon and CM Francis of the decision to grant a sabbatical, GM Neat added, “This will allow me to reflect next January on the impact of the trial at Havant, and will also give FF Simmons the opportunity to reflect on whether he is able, realistically to provide the commitment to HFRS and STn19” (186).

3.104. During the sabbatical, the management at Waterlooville did not contact him.

3.105. On 11 June 2018, CM Cole emailed WM Sadler about FF Simmons (189),

> “As discussed, I attended Havant station on Friday 8 June 2018 for a fire science course, within my course group was FF Simmons whom was polite and expressed an interest as to how we all are and if all ok. And how you are too, to which I replied we are all good thank you. He did say to me that as part of his time off he has to inform the management team at Waterlooville of his welfare every three months and stated to myself that as he has seen me he is fit and all is ok with no issues and asked me to report this back to you as the watch manager.
> If you require any more information please let me know.

3.106. WM Sadler tells us he does not recall the discussion mentioned by CM Cole nor did he see anything odd in the message.

3.107. That message does not suggest that CM Cole was keeping in regular contact with FF Simmons during his sabbatical, weekly or otherwise.

3.108. During the sabbatical, FF Simmons maintained his regular wholetime contract at Havant.
3.109. Flexible crewing was introduced at Havant as planned. That results in irregular, non-guaranteed shift patterns agreed on a 2 – month rolling basis.
3.110. The practice adopted by FF Simmons during his sabbatical was to fly from Ireland just before his day shift and return to Ireland on the morning following his double shift.
3.111. On 19 October 2018, the manager at his full-time place of work at Havant sent details of his shift dates, with the comment that,

"The only opportunity for him to provide retained cover would be the night before and after his day shift as well as between his double shifts." (190)

3.112. FF Simmons had not arranged his shifts during 2018 with a view to his availability to provide retained cover, since he was on his sabbatical. It was his view that the new system would enable him to provide the cover for Waterlooville more easily.
3.113. In December 2018, FF Simmons let WM Sadler in at Havant, but there was no greeting or acknowledgement from WM Sadler. That is agreed – WM Sadler refers to being in a hurry, focused on getting to a meeting. This would have been their first meeting since at least March.

2019 – return from Sabbatical

3.114. On 14 February 2019, FF Simmons emailed WM Sadler, Francis and Cole to notify his intention to return to duty on 1 March.
3.115. There was neither acknowledgement or reply from them.
3.116. WM Sadler responded rather more warmly to another firefighter in April 2020, who emailed about an issue with his pay and contract asking for support:

"I've sent the email my old mate"

3.117. The reply FF Simmons had came from SM Gordon on 18 February 2019, asking,

"Due to the change in circumstances with your WDS contract at Havant Fire Station, I would like to discuss with you the following,

- The address you will be responding from with proof of residence
- How you will provide cover in line with your on call contract and WDS contract
- How you will manage your training night obligations in line with your on call contract (194)

3.118. He proposed a meeting for 26 or 27 February.
3.119. In the meantime, GM Neat was seeking advice from the HR advisors about the dismissal of FF Simmons.
3.120. It was agreed that FF Simmons was not able to carry out his contractual obligation as a retained fire fighter at Waterlooville. The advice HR gave on 20 February was,

> "Our understanding is that Alan is not able to carry out his contractual obligation as a RFF at Waterlooville due to his personal circumstance.
>
> As an alternative, he could remain as RFF at Havant on a zero hour contract (not required to attend drill nights as he is also a regular FF).
>
> If you can confirm that all avenues have been pursued to no avail, is it your intention to dismiss on the grounds ("*rounds*") of him failing to carry out his contractual obligation rather than go down the managing performance route?" (199)

3.121. GM Neat replied,

> "Hi ….
> Yes it is my intention to end his contract rather than pursue the performance route. I have discussed with (my senior officer) and he has agreed" (198).

3.122. Further advice followed as to grounds for dismissal for "some other substantial reason" or by way of a settlement agreement based on payment of twelve weeks' notice. Consultation with HR Business Partners would be necessary.
3.123. Implicit in that is a decision not to reduce FF Simmons contract to a 50% contract.
3.124. GM Neat had previously expressed himself as supportive of Simmons' application. Asked what had changed, in oral evidence, he referred to his conclusion that Simmons would not be able to attend for the required minimum 35 hours or meet the training requirement.
3.125. That conclusion had been based on the availability provided by WM Hodge from Havant, during the period of the sabbatical, referred to above (190, 3.111 above). GM Neat took the view, consistent with Hodge's comment, that that showed the contract hours requirement to be beyond what Simmons could meet.
3.126. He had not shown that document to FF Simmons and agreed in oral evidence that he had not discussed it with him and did not know if either of the other managers had.
3.127. He explained his view; having moved to Northern Ireland, FF Simmons had explicitly said he could not meet the training night requirement and it

was his own belief that given the flexible crewing system at Havant, he could not meet the 35 hour minimum requirement. He added,

> "I saw no other option. We did not deal with zero hours contracts. I could only look at the 100% and the 75% and the 50% introduced against the wishes of the Fire Brigade Union"

3.128. In preparation for his return, FF Simmons visited the mess room and found that the name labels had been replaced, save for his. The new ones were blue. His was white, with no rank. It was an obvious omission. WM Sadler said he was not aware of it. He took responsibility but had delegated the task of replacing the labels to Mr Cole. The new badge for FF Simmons was available, in the envelope where the others had been. The omission was rectified.

3.129. On 26 February 2019, SM Gordon met FF Simmons to discuss his return.

3.130. No minutes of that meeting have been produced.

3.131. FF Simmons was asked to provide evidence of where he would be responding from while on call, for the first time in his career.

3.132. The meeting did not go well. FF Simmons is clear that SM Gordon told him that he would not be returning to Waterlooville, and that the trial had been only to placate him – a word he did not know. He recounts an unpleasant and mocking exchange.

3.133. On 26 February 2019, GM Neat emailed his Are Manager and the HR unit,

> "Rolli, J,
> …. I think we are going to have a meeting to discuss this one. Bruce met with the Firefighter today and it didn't go smoothly, as expected. I am meeting with Bruce tomorrow afternoon to go through the minutes of the meeting, but, if the evidence doesn't present itself to retain him (which it won't be argues *(sic)* it does), I would like to cease his contract, but is that something Jason has to do as I can't sack someone as a GM, only an AM can?" (197)

3.134. When asked about this, he could not recollect why it had been expected that the meeting would not go smoothly.

3.135. On 27 February at 10.26, FF Simmons emailed Bruce Gordon, and Brian GM Neat saying,

> "Hi Bruce,
> ….
> As discussed, could you please inform me in writing as soon as possible if I am being suspended from duty on full pay or if I am officially being dismissed from Waterlooville and your reasons for this." (201/2)

3.136. SM Gordon denied having said at that meeting that FF Simmons would not be returning to Waterlooville, but was unable to explain the context that prompted that follow-up email.

3.137. FF Simmons also immediately, on 27 February at 10.43, asked for a meeting with GM Neat (200),

> "Could I please book a meeting with yourself regarding my return to work interview held yesterday at Havant with Stn Manager Gordon. I am extremely unhappy with the outcome of the meeting."

3.138. Having spoken to GM Neat, SM Gordon replied to FF Simmons, also on 27 February 2019,

> "I have met with GM Neat who will consider the evidence provided following our meeting.
>
> Until such time as a decision is made by the Group Manager you should assume you are an RDS firefighter at Waterlooville as you have advised your management team."

3.139. On 28 February, FF Simmons replied

> "To clarify, does this mean I am back in the run at Waterlooville until further notice?"

3.140. SM Gordon did not reply.

3.141. It remains unclear what evidence SM Gordon was referring to in his email response.

3.142. On 1 March 2019, FF Simmons returned from his sabbatical.

3.143. The requested meeting with GM Neat took place on 7 March 2019 (209).

2019 application for reduced contract

3.144. On 7 March 2019, FF Simmons made a further formal request to amend his hours from part-time 75% to post-share 50%. (203)

3.145. 11 March 2019, GM Neat wrote at length further to the meeting of 7 March. He had required the formal application for the reduced hours contract that Simmons had since made, on the basis that there was none on file, although the request in 2016 had been thoroughly discussed, was the reason for the 2017 trial period and expressly remained outstanding during the 2018 sabbatical.

3.146. GM Neat indicated he would make a decision on the application when it was referred by the Station Manager, and, "I explained that my decision would be based on the current establishment and the needs of the station and that I would not accept an excessive number of personnel on a job share contract."

3.147. He asked for details of how FF Simmons proposed to meet the requirements of the new contract. FF Simmons had explained that with the current Havant arrangements he could spend a week in England and a week in Northern Ireland, which would afford him the necessary availability to meet the demands of a 50% contract.

3.148. He would on that basis be able to meet two training nights in a four-week period and the other two would be covered by "make-up training periods. GM Neat expressed the view that he currently thought that to be an insufficient number of training night attendances and his expectation would be a minimum of 6 training nights in an eight-week period, subject to annual leave. He would give that further thought.

> "You explained that, in effect, the flexible crewing model at Havant fire station… permits you to work for 1 week in the UK following which you return to your home address for 1 week, in Northern Ireland, and that you would be able to provide sufficient availability to meet your contractual requirements during the 1 week that you are in the UK. However, you informed me that you would only be able to attend a maximum of two training nights in a four-week period, with the other two covered by "make up" training periods. I advised you that my current opinion is that this is an insufficient number of training night attendances and my expectation would be in line with other dual contract employees attending a minimum of 6 training nights in an eight-week period, subject to annual leave. I will give this further consideration."

3.149. There was concern about FF Simmons correspondence address: it should be the address from which he would be responding.

3.150. There was reference made to a comparison with David Hodge, who was station manager at Havant but lived in the West of England; the comparison was dismissed as inappropriate.

3.151. FF Simmons raised some of the personal difficulties he was facing at Waterlooville. GM Neate declined to deal with them, saying that he would not react to rumour or hearsay. All employees must behave in accordance with the values of the organisation. Anyone who did not should consider resigning or might face disciplinary proceedings. No other advice was given.

3.152. GM Neate outlined the options for his decision:

- A refusal to approve the reduced contract, which could lead to dismissal for breach of his current contract minimum hours
- An agreement to the amendment, subject to a trial period. If that did not demonstrate the ability to meet the reduced contract terms, it could lead to dismissal.
- He would advise with regard to training obligations, and failure to meet those could lead to dismissal.

3.153. He ended by welcoming FF Simmons back to Waterlooville (209 to 211).

3.154. SM Gordon commented on the request for a change of contract on 19 March,

> "Change in cover not accepted
> Dropping to 50% does not benefit the station. The only basis for employing staff on a 50% contract would be to address the areas of shortfall with regards to operational cover. Therefore, this will be agreed on a day cover basis only. This cannot be guaranteed on an alternate basis." (205)

3.155. FF Simmons had first sought a change to the 50% contract since 2012 and had renewed his application informally in 2016 with WM Hutton. It had been under consideration since. This is the first time that the requirement for day cover had been mentioned, based on the needs of the station.

3.156. FF Simmons wrote back to Neat comment on the email dated 11 March in detail, on 27 March 2019. (212). He thanked Neat for being willing to follow up the possibility of a transfer to Northern Ireland Fire Service on 7th March. He says

> "As you know, I went on a sabbatical, the main reason was to focus on the new shift trial for Havant as it appeared obvious that a 70+ hour contract at Waterlooville alongside the Havant shift pattern would prove difficult. However, if my 50% contract request had been accepted, a sabbatical may never have been needed to have taken place, as 35 hours is achievable with the new shift structure. …Subsequently what happened was I went onto a sabbatical, lost one year of income, to find in my sabbatical absence multiple new entrants were offered and accepted into the service on the contract that I have been requesting for 6 years." (213)

3.157. There was at that time a current advertisement for recruitment of retained personnel at Waterlooville for 35 hour (50%) contracts.

3.158. He says that Waterlooville was struggling with employee retention and crewing, resulting in there being no service at times to the local community, and could not see why a 50% contract would not be a positive thing.

3.159. He asks what the need is for another trial and he refers to comments he says made by SM Gordon's comments at the meeting of 26 February, about the 12 week trial being merely to "placate" him (213)

3.160. He had served at Waterlooville for 25 of his 27 years as a fire fighter, he was disappointed and hurt at the scrutiny and resistance his application had received. He says that requests at other stations are resolved swiftly without the need for Station Manager led meetings.

3.161. GM Neat endorsed the application for reduced hours with a rejection on 18 April 2019,

> "This application has been considered under the Family Friendly Service Policy. The change in contract is not approved in agreement with SM Gordon." (214)

3.162. The reasons are given in detail in the email of the same date (214).

3.163. GM Neat refers to the Family Friendly policy and relies on the meeting of 7 March as meeting the requirement for there to be a meeting about the application.

3.164. Here, he sets out that it is his responsibility to recruit firefighters for the benefit of the station and the local community, considering periods of low cover preventing the appliances from being available.

> "I delegate responsibility for this recruitment to my station managers and on On Call Support Manager. My guidance to my team is to seek 100% contracts, 75% contracts in that order, followed by **consideration** of 50% contracts for Day Cover only."

3.165. He dealt with FF Simmonds comment that 50% contracts had been recruited. One divided time with another station, so was 100%. The others were for day cover. The recent advertisement was not evidence that he was actively seeking 50% contracts. It was a generic HFRS advert with Waterlooville added in.

3.166. It was put to him in oral evidence that,

> "No Firefighter or someone with a full-time job is likely to be able to provide consistent day time cover?"
> "I disagree with that".

adding,

> "My team have been instructed that I am not in favour of recruiting 50% contracts unless there is a clear benefit in the support of providing day cover." (216)

3.167. He had approved SM Gordon's comments that the reduction to 50% did not benefit the station and that a 50% contract would only be agreed on a day cover basis. He was not satisfied with FF Simmons ability to achieve the level of hours required under a 50% contract, taking into account the commitment at his full-time station and the requirements of annual leave.

> "It is the combined issue of WDS crewing, hours of availability compared to station requirements, the impact of your leave entitlement and your non-availability when not in Hampshire that makes your situation, in my opinion, unique." (216)

3.168. He also referred to the uncertainties of travel, citing industrial action at airports, flight delays, ferry delays and reliance on living at a relative's house.

3.169. In relation to his proposal that a further trial would be needed before any contract change could be granted, he said that the purpose had been to measure FF Simmons ability to meet his proposed contracted hours against his previous Wholetime Duty System, linked to the implications of his permanent residence in Northern Ireland. That trial was null and void due to the change in duty system at Station 16 (Havant) (217).

3.170. In relation to training nights, he says,

> "I also confirm that, in accordance with SO/7/3/1/5 Retained Duty System, I expect all dual contract firefighters to attend a minimum of 6 training nights in a rolling 8 week period, including those currently working the ABC3 crewing system at Station 16" (218).

3.171. He concludes,

> "Having given due consideration to your request for a change in contracted hours at Station 19, I am of the opinion that there is not a strong enough case to support a perceived benefit to Station 19 to agree to a change in your contracted hours.

3.172. There is throughout no reference to the potential benefits of a reduced hours contract for FF Simmons or to the merit of retaining an experienced and highly trained firefighter.

3.173. WM Sadler requested a sabbatical, because of his wife's illness with cancer. He went off on 1 April 2019. FF Simmons had not seen him since leaving for his own sabbatical.

3.174. FF Simmons appealed the outcome of his application on 24 April 2019. (222)

3.175. The appeal was to be heard on 31 May. On 29 May 2019, CM Francis sent an email to GM Neat to say that he had difficulty managing FF Simmons because in the three months since 1 March 2019, he had seen him only on one drill night. He was not meeting his 70 hour commitment and did not give proper notice of not attending drill nights (237).

3.176. CM Francis told us in his oral evidence that he was not aware that the appeal was taking place in two days when sending that email. Asked why he had made his report about the difficulties with FF Simmons at that time and to GM Neat not to SM Gordon his line manager, CM Francis said he could not remember. When asked if anyone had suggested that he sent this to GM Neat, he could not remember.

3.177. On 5 June 2019, CM Francis emailed FF Simmons, expressing concern that he had not seen him for a while and also about his contractual obligations since being back at Waterlooville. He asked to meet him so they could discuss his hours of availability, DNRs (failures to respond), 3

since his return, the drill night attendance and the lack of communication with management when he was not attending. He asked for a convenient date for a meeting. Simmons suggested 12 June, and explained his extreme busyness preparing his appeal case while on leave in May. He rebutted the suggestion that he was not in contact – he had had no response to a message on 28 May, was always on the end of a phone and "When you have a year off and no one from the management team at Waterlooville communicates, that is lack of contact." We are told that CM Francis could not do that date and invited another but no email is produced. No meeting took place.

3.178. GM Neat provided a detailed report for the appeal hearing (298).

3.179. He set out the training expectation that he had,

> "I would expect all dual contract employees, including those employed on ABC3 crewing stations, to attend a minimum of six training nights in an eight week rolling pattern. This expectation would remain even for someone on a 50% contract."

3.180. He set out his calculation of how much work FF Simmons would be required to carry out or be available for while on call during the 26 weeks of the year when he proposed to work. That took into account the demands of the wholetime post, which required 149.5 shifts annually, split approximately by 12 duty shifts in any 1 month period. This could be day shifts, (9 hours) night shifts (15 hours) or double shifts (24 hours). He found it to be 139 hours per week, an excessive total and one not allowing sufficient rest. He added that the station requirements meant that the 70 hours required for Waterlooville would have to be during daytime hours.

3.181. He concluded,

> "Based on the above calculations, my view is that it is neither sustainable in terms of meeting his WDS commitments, nor practical in providing cover at times of low crewing for Stn19" (327)

3.182. GM Neat goes on in that report to recommend dismissal for some other substantial reason (328).

3.183. The appeal was dismissed by Mr Evenett on 7 June 2019. Present at the appeal hearing were FF Simmons and his union representative, GM Neat, an HR representative and Mr Evenett himself.

3.184. Mr Evenett gave his reasons as follows in the brief letter giving the outcome,

> "GM Neat identified the cover required at Waterlooville Fire Station which is day cover, Monday to Friday, 09.00 to 18.00. By your own admission you agreed that you could not provide that cover due to you living out of the area. Therefore, your request does not meet the needs of the service." (241)

3.185. No reasons have been issued for the refusal of the appeal save those in quoted in full above from the brief letter issued (241). This is the first reference in the documents to the requirement that the cover needed was daytime, Monday to Friday.
3.186. As FF Simmons says, it was made very clear to him that the failure of his appeal would lead to his dismissal.

Next Steps Meeting 21 July 2019

3.187. On 12 June, FF Simmons asked for a written response and the minutes. Neither were provided. He was told that no formal minutes had been taken.
3.188. On 31 July 2019, a meeting took place to discuss the outcome of his appeal and the next steps regarding his ability to complete his contracted hours (252).
3.189. Although the appeal had been dismissed, there was discussion of whether FF Simmons could meet the requirements of a 50% contract. This is noted, as an example of one of the ways it could be achieved.

> "Flying in from Northern Ireland on Wednesday, on call from 12.00 to 07.00. Then on WDS duty at Havant on Thursday for a 24 hour shift, with a rest period after from 9.00 to 18.00. Back on call from Friday from 18.00. AS said he can be very flexible and can come a day before or stay a day later and the Havant crewing trial gives him the flexibility to do this." (252)

3.190. Under the heading "Next Steps", it is confirmed that,

> "It is still the service's intention (*"attention")* to look at SOSR" (253).

3.191. It is noted that GM Neat would be doing some work around other contracts in the group, including the 75% and 5% contracts. FF Simmons had to commit to and endeavour to meet the terms of his contract. He was to provide a proposal as to his ability to meet the 50% hours. Those tasks were to be completed within two weeks.
3.192. FF Simmons resigned on 16 September 2019 (262). He was faced with dismissal. The meeting had not offered any way forward. The minutes – FF Simmons had refused to attend if the meeting was not minuted – show that it was still the service's attention to look at dismissal for some other substantial reason (252).
3.193. He relied on bullying and mistreatment by managers over seven years, including the unfair and unreasonable application of service policy, the unfair and unreasonable behaviour of management over a sustained period of time and discrimination leading to unfair treatment.
3.194. He referred to contracts for 50% cover being given to people who could not provide day cover on the terms insisted on for him or being allowed to

keep them when circumstances changed and they could not provide that cover.

3.195. He had submitted his proposal, but although far more than two weeks had passed, there had been no report about other contracts in the group.

3.196. The claim was brought on 13 December 2019 and the ACAS dates are 25 September 2019 and 25 October 2019. FF Simmons was aged 45 at the effective date of termination. His date of birth was 18 October 1973. He had completed 27 years of continuous employment.

4. Law

Constructive Dismissal

4.1. An employee has a right not to be unfairly dismissed (section 94 Employment Rights Act 1996 ("ERA 1996").

4.2. A termination of the contract by the employee will constitute a dismissal within section 95(1)(c) of the ERA 1996 if he or she is entitled so to terminate it because of the employer's conduct. That is a constructive dismissal.

4.3. For the employee to be able to claim constructive dismissal, the employee must establish that the following four conditions are met:

i) There must be a breach of contract by the employer.

ii) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving.

iii) The employee must leave in response to the breach and not for some other, unconnected reason.

iv) The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he or she may be deemed to have waived the breach and agreed to the variation of the contract or affirmed it.

4.4. A repudiatory breach of contract is a significant breach, going to the root of the contract (Western Excavating (ECC) Ltd v Sharp [1978] ICR 221). That is to be decided objectively by considering its impact on the contractual relationship of the parties (Millbrook Furnishing Industries Ltd v McIntosh (1981) IRLR 309).

4.5. Employment contracts contain an implied term of mutual trust and confidence. The parties to the contract will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust which should exist between employer and employee (Malik v BBCI SA (in liq) HL [1998] AC 20).

4.6. It is not simply about unreasonableness or unfairness. The question is whether the conduct complained of was likely to destroy or seriously damage

the relationship of trust and confidence. Any breach of the implied term of trust and confidence is in itself a repudiatory breach.

4.7. It also follows that there will be no breach simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach, then the employee's claim will fail (see Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] IRLR 35).

4.8. In Sharfudeen v TJ Morris Ltd (t/a Home Bargains) EAT [2017] 3 WLUK, the Tribunal was found to correctly apply the objective test in finding that although the employee's trust and confidence in his employer had been affected and/or destroyed, the employer had reasonable and proper cause for not appointing him to a new position, notwithstanding that the criteria used were those used for promotions and not designed for lateral transfers.

4.9. it is not necessary in each case to show a subjective intention on the part of the employer to destroy or damage the relationship, a point reaffirmed by the EAT in Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT. As Judge Burke put it:

"The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"

4.10. The Court of Appeal in Lewis v Motorworld Garages Ltd *[1986] ICR 157* held that a course of conduct can cumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal following a "last straw" incident, even though that incident by itself does not amount to a breach of contract. In Omilaju v Waltham Forest London Borough Council *[2005] ICR 481,CA,* it was stated that the last straw does not have to be of the same character as the earlier acts in the series, but it must contribute something to the breach of trust and confidence. The test of whether an act was capable of contributing to a breach of the term was objective and it would be an unusual case in which conduct which was perfectly reasonable and justifiable satisfied the requirement.

4.11. The general principles of contract law applicable to a repudiation of contract are that if one party commits a repudiatory breach of the contract, the other party can choose either to affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he once affirms the contract, his right to accept the repudiation is at an end, but the election to affirm is not required within any specific period.

4.12. Delaying too long or, by conduct, indicating acceptance of the change, can point to affirmation.

4.13. In WE Cox Toner (International) Ltd v Crook, [1981] IRLR 443, it is established that mere delay by itself (unaccompanied by any express or implied

affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation. Simply continued working and the receipt of wages points towards affirmation. Nevertheless, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation. In that case, the Tribunal must examine all relevant evidence to discern whether the employee's continued performance was indeed under protest, (Novakovic v Tesco Stores Ltd EAT 0315/15).

4.14. Conduct consistent only with the continued existence of the contract is affirmation (Cockram v Air Products plc [2014] ICR 1065).

4.15. An employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts, notwithstanding a prior affirmation (Kaur v Leeds Teaching Hospitals NHS Trust, [2019] ICR 1, CA) ("Kaur"). In that case guidance is given on the approach for Tribunals:

i) What is the most recent act (or omission) triggering resignation?
ii) Has he or she affirmed the contract since that date?
iii) If not, was that act or omission itself a repudiatory breach of contract?
iv) If not, was it part of a course of conduct which viewed cumulatively amounts to a repudiatory breach of trust and confidence?
v) Did the employee resign in response – or partly so – to that breach?

4.16. The "final straw" must contribute to the series of earlier acts which cumulatively amount to the breach of the implied term. If it is not capable of doing that, for example if it is entirely innocuous, there Is no need to examine the earlier history to see whether the alleged final straw might in fact have that effect.

4.17. A constructive dismissal is not necessarily an unfair dismissal (Savoia v Chiltern Herb Farms Ltd [1982] IRLR 166). Section 98 of the Employment Rights Act 1996 must then be considered.

4.18. One of the potentially fair reasons for dismissal is "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held" (section 98(1)(b). If the employer shows that the reason behind the constructive dismissal is a potentially fair one, it is up to the Tribunal to determine whether the employer acted reasonably under section 98(4).

4.19. We are referred to Klusova v London Borough of Hounslow [2007] WECA Civ 1127, in which the Court of Appeal held that the Council's genuine but mistaken belief in the unlawfulness of the claimant's continued employment under immigration rules constituted a fair reason for dismissal. The genuineness or otherwise of the employer's relevant belief is a matter of inference from admitted

or established primary fact. The failure to enquire in that case was not evidence of the absence of a genuine belief that continuing the employment was unlawful. A key question therefore will be whether the belief is genuinely and reasonably held and that may involve reasonable further enquiry (Baker v Abellio London Ltd EAT [2018] IRLR 186)

Protected Disclosure

4.20. The provisions relating to protected disclosure are set out at sections 43A to 43K of the ERA 1996.

4.21. By section 43B,

> "In this Part, a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show matters within one or more of the categories set out; those include,
>
> "(b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject… " *and*
> "(d) That the health of safety of any individual has been, is being or is likely to be endangered…."

4.22. By section 43C, a qualifying disclosure is made, where it is made in a manner that accords with sections 43C to 43H, which include where the worker makes the disclosure to his employer.

4.23. A qualifying disclosure will have sufficient factual content and specificity to be capable of pointing to one of the qualifying categories in section 43B (Kilraine v Wandsworth LBC [2018] EWCA IRLR 846). The Tribunal must take into account the context and background. There is no rigid distinction between the provision of information on the one hand and the making of an allegation on the other (Simpson v Cantor Fitzgerald Europe CA [2021] IRLR 238).

4.24. We are referred to Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 where the distinction is drawn between "information" and an "allegation". A letter which contained allegations but no information did not amount to a protected disclosure. There is no rigid dichotomy between the two: a disclosure might provide information and make an allegation at the same time, provided it had sufficient factual content and specificity (Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1432).

4.25. Applying Chesterton Global Ltd v Nurmohamed *[*2017] EWCA Civ 979CA , the tribunal has to ask itself whether the worker believed at the time he was making the disclosure that it was in the public interest and whether the belief was reasonable, without substituting its own view. The reasons for that belief are not critical: what matters is that the subjective belief is

objectively reasonable. Nor does the question of public interest have to be the predominant motive for making the disclosure.

4.26. In assessing what the worker himself believed, his personal circumstances and his professional knowledge are to be taken into account (Korashi v Abertawe Bro Morgannwg University Local Health Board [2010] IRLR 4 EAT).

4.27. In determining whether there is a public interest , all the circumstances are to be considered but four factors may usefully be taken into consideration: the numbers in the group whose interests the disclosure served; the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed; the nature of the wrongdoing disclosed, whether deliberate or inadvertent; and the identity of the alleged wrongdoer, including size and public prominence (Chesterton above).

4.28. We are referred to Parsons v Airplus International Ltd UKEAT/0111/17, in which the Tribunal decided as a fact that the disclosures it was concerned with were made solely as a matter of self-interest, and on the facts not raised as a matter of public interest. The judgment of the Tribunal was upheld

4.29. Guidance is given from Blackbay Ventures Ltd (Chemistree) v Gahir UKEAT/0449/12/JOJ on the steps to be taken by the Tribunal.

1. Each disclosure should be identified by reference to date and content.
2. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be, should be identified.
3. The basis upon which the disclosure is said to be protected and qualifying should be addressed.
4. Each failure or likely failure should be separately identified.
5. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified
6. The Tribunal must then consider whether or not the Claimant had the reasonable belief referred to in section 43B(1) and whether it was made in the public interest.

4.30. As to whether a disclosure is a protected disclosure or not is to be determined objectively (Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA).

Detriment

4.31. By section 47B(1),

"A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by the employer done on the ground that the worker has made a protected disclosure."

4.32. "Worker" has the extended meaning given by section 43K.

4.33. By section 47B(1A),

> "A worker ("W) has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done –
>
> (a) By another worker of W's employer in the course of that other worker's employment, or
> (b) By an agent of W's employer
>
> on the ground that W has made a protected disclosure.

4.34. In such a case, the detriment is treated as done by the employer (section 47B(1B).

4.35. Where the Tribunal finds a protected disclosure and detriment, the question is whether on not the detriment was "on the ground that" the worker has made the protected disclosure. The question there is whether the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. (Fecitt and others and Public Concern at Work v NHS Manchester, [2011] EWCA Civ 1190, [2012] IRLR 64.

Automatic unfair dismissal

4.36. By section 103A, an employee is to be regarded as unfairly dismissed if the reason or principal reason for the dismissal is that the employee made a protected disclosure (Berriman v Delabole Slate Ltd [1985] ICR 546). The employee must produce evidence to suggest that the protected disclosure was the reason or principal reason. The burden is on the Respondent to establish the reason for the dismissal (Kuzel v Roche Products Ltd [2008] ICR 799). If the employer fails to do so, it is open to the employment tribunal to find that the reason is that asserted by the employee, but it is not bound to do so. The identification of the reason or principal reason turns on direct evidence and permissible inferences from it.

4.37. Where breaches of contract are found, it is for the Tribunal then to determine the employer's reason or principal reason for that conduct Salisbury NHS Foundation Trust v Wyeth, [2015] UKEAT/0061/15/JOJ.)

5. Submissions

5.1. We had the benefit of written submissions from both parties and are grateful to the representatives for providing them and foregoing the opportunity for oral submissions.

6. **Reasons**

Issues

6.1. The List of Issues was not wholly agreed by the start of the hearing. They had been identified to an extent at the Case Management Hearing, but there had then been further and better particulars. A redrafted list was circulated by the Judge and the parties given opportunities to comment, the final list being agreed by the afternoon of the third day, corrections after the inclusion of the issues from the further particulars and the Respondent's position on them being primarily minor in nature.

Video Hearing

6.2. The hearing was by video hearing, VHS, and was difficult. There were frequent difficulties in connecting, once for 96 minutes including the pre-hearing attempts. Technology failures led to repeated interruptions lasting between 10 and 50 minutes. The delays led to judgment on the merits of the claim being reserved, and submissions having to be taken in writing with no opportunity for oral submissions. The parties are thanked for their patience.

Late Disclosure

6.3. We had been provided with data provided by SM Hodge as to FF Simmons availability for retained duty hours during his sabbatical from Waterlooville, while he was still working full-time at Havant (190). SM Gordon told us in oral evidence that that document had not been discussed with FF Simmons. He did not say that he had discussed the question of FF Simmons availability with him. To our surprise, he later told us that during FF Simmons' sabbatical, he had done some work on that data and had shown his spreadsheet to FF Simmons as the basis for discussion of his availability at the meeting of 26 February. He had been expressly asked what evidence he had sent to GM Neat after the meeting. He did not mention a spreadsheet. That document is not mentioned in his witness statement, is not referred to elsewhere and had not been disclosed. A document was offered later that day with an application for it to be admitted. Mr Ross objected. The Tribunal declined to admit the document. It was the fourth and final day of the oral hearing, when time had already overrun substantially – sadly primarily due to technical difficulties, but the listing had always been tight. It was not reasonable to submit a document at that late stage. It should have been disclosed properly. To admit it plainly risked a failure to conclude the oral evidence that day and going part- heard. Those considerations outweighed any merit in admitting it.

Oral Evidence

6.4. There were repeated instances when we found the Respondent's witnesses to be evasive or disingenuous.

6.5. We understand that individuals may have difficulty remembering past events, and here the evidence focused on matters now two clear years or more ago. Even so, the things that the Respondent's witnesses could not remember was striking.

6.6. SM Gordon said something to lead FF Simmons to write to ask whether he was being dismissed or suspended in February 2019. It is odd that he should have no recollection of what took place at that meeting to prompt the enquiry.

6.7. No minutes are produced.

6.8. SM Gordon reported that meeting to GM Neat immediately, leading to Neat's comment to HR,

> "It didn't go smoothly, as expected. I am meeting with Bruce tomorrow afternoon to go through the minutes of the meeting, but if the evidence doesn't present itself to retain him (which it won't be argues it does), I would like to cease his contract…."

6.9. That tells us that minutes were expected and, we conclude, taken – that is more probable than that SM Gordon attended a meeting a day after his discussion with Simmons without them, and without being told to produce them.

6.10. The absence of minutes raises a question about why they have not been disclosed.

6.11. SM Gordon was not copied in to the exchanges about dismissal between GM Neat and HR (199). Those enquiries started before his meeting with FF Simmons on 26 February 2019. The enquiries made by GM Neat about dismissal do however provide a context for FF Simmons' complaint that SM Gordon told him on 26 February 2019 that he would not be returning to Waterlooville. He must have said that or something like it, for FF Simmons to have written as he did to ask whether he had been dismissed or suspended. We infer that SM Gordon was aware that dismissal was the expected outcome.

6.12. There was another meeting in June 2017, again with SM Gordon, again without minutes being produced. After that one, FF Simmons asked for a meeting with GM Neat because he felt unfairly treated.

6.13. Again, SM Gordon told us he did not remember what had been said.

6.14. These are not routine matters. Both meetings caused FF Simmons enough concern to pursue the matter. There was the long-running issue of the 50% contract, the move to Northern Ireland and in the background dismissal being actively considered. It is odd that SM Gordon should have no recollection of what took place.

6.15. We did not have full and frank evidence about those matters from SM Gordon.

6.16. CM Francis did not remember why he sent an email expressing concern about FF Simmons' performance to GM Neat, two days before the appeal hearing, instead of to his line manager, or whether he was prompted to do that. This is a very hierarchical organisation, and his action was out of the ordinary. That too was not a full and frank response.

6.17. GM Neat wrote, in February 2019, to HR proposing to seek further advice, given that, as expected, the meeting between SM Gordon and FF Simmons on 26 February had not gone well. He was asked about that,

"You say, "We need to have a meeting. Bruce met with the FF today and it didn't go smoothly as expected.
Why do you say that?"
"I am sorry Sir, I can't recollect that."

6.18. That comes across as courteous, but disingenuous and unhelpful. What to do about FF Simmons had been for GM Neat the subject of ample reflection and discussion, over the past year. This was not a random comment. It is reasonable to expect some attempt to answer the question.

6.19. We are troubled by Mr Evenett's evidence. He conducted the appeal. He is an experienced manager. This was clearly a crucial meeting for this firefighter. The recommendation from GM Neat was for dismissal if the appeal failed: FF Simmons' future hung on the outcome.

6.20. There are no minutes of that meeting.

6.21. Nobody has been able to offer an explanation as to why. In our judgment, the meeting would not have proceeded without a minute taker. Neither the union representative nor the management would have normally agreed to proceed with this appeal without a minute taker.

6.22. Asked about this, Mr Evenett's answers were unhelpful,

"I cannot answer it.
Normally there are minutes. On this occasion it does not appear to have happened.
I don't know why."

6.23. That is not the professional response of a senior officer in respect of his conduct of an appeal hearing. It is a normal part of that role to ensure that minutes are taken and if they were not, he should have known why not.

6.24. Pressed on this, his only suggestion was that maybe they had agreed to dispense with a minute taker. That is more than surprising. It would be outside our experience for either the union or managers to dispense with minutes at a meeting of such importance. This is the final appeal that will determine whether FF Simmons, with close to 30 years' service, remains in employment. Everyone knew that. It was wrong to proceed without a minute-taker.

6.25. The suggestion is contradicted by the fact that Simmons wrote to ask for the minutes. Mr Evenett did not respond to the request for a copy of the minutes by reminding Simmons that there had been agreement that there would be no minutes; nor did HR.

6.26. We are satisfied that there was no agreement to dispense with them and the absence of minutes is unexplained. We do not think it is accidental or insignificant.

6.27. The difficulty is that Mr Evenett's evidence as to what took place at the meeting, is directly at odds with the approach FF Simmons had taken earlier and later.

6.28. The degree of conflict is not apparent from the letter dismissing the appeal or the witness statement. But when fleshed out in oral evidence, Mr Evenett relied on FF Simmons' complete inflexibility over arrangements to meet the hours required.

6.29. He was taken to what is noted from the Next Steps meeting,

> "Flying in from Northern Ireland on Wednesday, on call from 12.00 to 07.00. Then on WDS duty at Havant on Thursday for a 24 hour shift, with a rest period after from 9.00 to 18.00. Back on call from Friday from 18.00. AS said he can be very flexible and can come a day before or stay a day later and the Havant crewing trial gives him the flexibility to do this." (252)

6.30. Mr Evenett expressed surprise,

> "I was surprised he said that because that is the opposite of what he told me in the appeal hearing."

6.31. Both before and after the appeal hearing , FF Simmons was offering a degree of flexibility in providing hours to meet the 35 hour contract. Mr Evenett reported that he was wholly inflexible. Given the conflict, if that is said to be the way Simmons conducted himself, we would look to the minutes or to the reasoned explanation for the decision to find support for that account. They are not there.

6.32. GM Neat had already accepted in oral evidence that FF Simmons was willing to be flexible:

> "…. he has said he would leave Ireland earlier and return later…"

6.33. Given all of that, we cannot accept Mr Evenett's account that FF Simmons was being wholly inflexible.

6.34. There were also difficulties over the Respondent's witnesses accounts in relation to the protected disclosure relied on.

6.35. WM Sadler didn't remember any discussion about the fact that he lived outside the required range. SM Gordon told us he had approved it, that WM Sadler had asked him and he agreed to relax the restriction. Again, it seems very unlikely that WM Sadler would forget such a discussion if it took place.

6.36. No formal record of that approval has been produced. From that we infer that approval was given – if at all - informally and we don't know when.

Procedures

6.37. There are a number of pointers to the way that practices were often less formal than the policy documents suggest. The absence of a formal approval for WM Sadler to live outside the four-minute response zone is one. That WM Hutton did not require a formal application for a reduced hours contract on the right form from CM Simmons in 2016 is another. That application proceeded as far as the conclusion of the three month trial without a formal application being required. FF Simmons told us of other stations offering 50% contracts to staff without a formal application, a statement not contradicted.

6.38. Against that, FF Simmons was faced with insistence on procedural steps. While there was no formal outcome to his application in 2016, accepted informally and acted on to the extent of a trial being carried out, he was then required to submit an application formally in 2019, as if he had not gone on a year's sabbatical for both sides to consider how realistic his application was. The Family Friendly policy requires an outcome to an application within three months. By requiring a fresh application, that requirement appeared to be met. That was not however the whole picture: an application had been accepted in 2016, which remained unresolved throughout 2017 and was still outstanding during and after the sabbatical in 2018/19.

Working Relationships at Station 19

6.39. WM Sadler did not discuss the sabbatical with FF Simmons either before or after he took it.

6.40. He agrees he did not contact Simmons during it.

6.41. He agrees he did not greet FF Simmons when they coincided at Havant in December 2018, their first meeting for many months.

6.42. He did not respond to FF Simmons' email reporting that he was returning from his sabbatical.

6.43. He told us he did not remember if he saw Simmons on his return from the sabbatical on 1 March 2019 before taking his own sabbatical on 1 April 2017, only agreeing it is possible that he did not.

6.44. He did not arrange to meet FF Simmons on his return. It would be normal conduct for a manager to do that, if only to make the returning employee welcome, to ask after his well-being, to know of any changes in his circumstances, to introduce changes made during his absence, including changes in personnel.

6.45. This is a small community, and while retained firefighters are based at home, primarily coming in for training or to meet emergency calls, such a lack of contact is unexpected.

6.46. FF Simmons says that the last conversation he had with SM Sadler was in October 2017 and that is not denied.

6.47. WM Sadler had line management responsibility for FF Simmons, and this conduct is not appropriate for a line manager. Put bluntly, you cannot ignore someone you line manage.

6.48. On learning that FF Simmons was taking a sabbatical, we would expect a line manager to make contact, for example, saying perhaps that we will be in touch, let me know if I can help, ask about plans, about expectations from being away and coming back, saying don't hesitate to get in touch if needed, as to whom to contact while absent, as to what contact if any was expected or simply who to approach to find out what expectations were. That would be the normal approach. Silence is not what we would expect.

6.49. We did not hear, for example, that given that FF Simmons was still working at Havant, that his managers were able to keep in touch with him informally, that individuals still saw him from time to time. That is, apart from the email from Cole which is oddly phrased as a report and lacks a note of genuine concern or interest (189, para 3.107 above). That email itself fails to support WM Sadler's assertion that Cole was keeping in touch with FF Simmons on a regular basis.

6.50. SM Gordon took a similar course. He says nothing about being in touch with FF Simmons during the sabbatical. He chose not to respond when Simmons asked him if he was dismissed or suspended in February 2019 – that is not a question that can simply be ignored. He chose not to respond to Simmons' request to know about the basis for staff living outside the four-minute zone.

6.51. GM Neat made a decision during the sabbatical that dismissal was the appropriate outcome. That was based, he says, on the information from SM Hodge, suggesting that, on the hours worked during the sabbatical, FF Simmons would not be able to be available sufficiently to meet the requirements of a 50% contract. He did not disclose that information to FF Simmons or discuss it with him, settling on dismissal before Simmons' return from leave.

6.52. We have very different notes being struck in communications between FF Simmonds and other stations ("Hi Simmo," para 3.85 above), between other officers at Waterlooville ("I've sent the email my old mate", para 3.118 above) and the formal style that characterises communication between the managers at Waterlooville and FF Simmons. Alone, that might simply reflect the nature of the exchanges; given the context outlined above, it supports a conclusion that relationships between FF Simmons and the local management were difficult.

6.53. We have a number of complaints of malicious gossip or statements made to FF Simmons. Some are second-hand. If those were made, they speak of an unhappy, antagonistic atmosphere. We have for example, no reason to doubt that WM Sadler had serious personal reasons for taking a

sabbatical, but we can accept that FF Simmons was told that Sadler was avoiding him.

6.54. We see FF Simmons raising the question of difficult working relationships with GM Neat, who declined to deal with it (210). While GM Neat himself reports no recollection of suggesting mediation, in January 2018, we prefer FF Simmons clear recollection that he did.

6.55. Altogether, the evidence points to antagonism to FF Simmons at Waterlooville and that that motivated the managers there in their conduct towards him.

6.56. What is also clear is that that predates the claimed protected disclosure in November and December 2017. FF Simmons complains of Sadler's conduct towards him in October 2017. He attributes his demotion, effective in September 2017, as attributable to SM Gordon, referring to unfair and bullying conduct. He complains of SM Gordon's conduct towards him in June 2017, after which he asked for a meeting with GM Neat. He tells us that SM Hutton warned him in February 2017 at his retirement party, in words on the lines of, "They've got me out, you will be next."

Respondent's approach to the Family Friendly policy and the 50% contract

6.57. FF Simmons made applications in 2016 and 2019 for the 50% job-share contract introduced in 2012, which fell to be considered under the Family Friendly policy. That requires a balance between the needs of the station and community and the needs of the individual. The officers took the approach throughout that the issue related to the needs of the station and the community. FF Simmons' personal circumstances were not considered.

6.58. SM Gordon told us that he did not consider FF Simmons personal circumstances and did not know at the time that he had two young children. It was the benefit to the station and the community that counted.

6.59. GM Neat relied on the meeting of 7 March 2019 as satisfying the policy requirement of a meeting to discuss an application for a reduced hours contract. The detailed account of that meeting set out in the letter of 11 March 2019 does not refer to FF Simmons' personal circumstances. His report to the appeals officer does not address the benefits to FF Simmons of a reduced hours contract.

6.60. GM Neat gave guidance to his managers on recruitment that the 50% contract had to be for day-time cover only. That is not recorded in the policy documents we have seen. That guidance itself undermines the intended flexibility of the Family Friendly Policy. In oral evidence, he qualified it,

> "My expectation from the outset was that the 50% should be focused at day cover unless there was a reason to accept an individual who was not providing day cover"

6.61. We accept that he applied that guidance himself. He mentioned a couple of officers who had been given 50% retained contracts as wholetime

officers contrary, in his view, to that guidance. He secured their transfer to 75% contracts.

6.62. The requirement for day-time cover was not mentioned initially. It is first mentioned in 2019. We have seen detailed discussions about FF Simmons' ability to meet the contract terms before that that do not refer to the need to provide day-time cover, day time cover over weekdays (as per the appeal outcome) or even some day-time cover.

6.63. The management were entitled to consider contemporary circumstances. The 2019 application had to be considered against 2019 circumstances. What we have not learned is that circumstances changed as between 2018, when GM Neat , having earlier agreed that a reduction had been approved by SM Hutton, expressed himself sympathetic to a reduction in contract hours and satisfied with the trial conducted in the latter end of 2017, and circumstances in 2019 when the inability to provide day-time cover became decisive. What changed was the crewing arrangement at Havant.

6.64. A lot of wholetime firefighters are on retained contracts. That is something that the policies and procedures reflect and plan for. It is an efficient system that ensures trained and experienced staff are available to undertake emergency duties. Those officers would not be offering day-time only work. The crewing arrangement at Havant must be taken as compatible with that system.

6.65. It is also clear that there would be a relatively small pool of people willing and able to undertake perform the duties of these on-call contracts for the pay involved on the basis of availability from Monday to Friday 9.00 to 18.00 as Mr Evenett identified as required in the appeal outcome.

6.66. FF Simmons was able to produce the names of a number of others on 50% contracts. Some of those were distinguished by the Respondent on the basis of special circumstances, some on the basis that the contracts had been inappropriately agreed and that those officers had since been asked to go to 75% contracts, but it remains the case that this fairly new contract was being increasingly used, and not just for day-time cover. Waterlooville was advertising for 50% contract cover.

6.67. There was local discretion. Approaches across the stations differed, with some granting those contracts more readily and with more informality and flexibility than FF Simmons met with.

6.68. GM Neat agreed that those on 50% contracts were not providing day-time cover,

"I could not track everyone's cover, but those providing 50% cover were generally providing cover in the evenings. So that did not provide an added benefit to the station. I accept he was able to cover some daytime." (oral evidence).

6.69. We are not satisfied that others on 50% contracts were able and required to provide day-time cover or more day-time cover than FF Simmons

could offer. We are not satisfied that any others faced a requirement for the retained contract hours to be even primarily during the day and on weekdays. We have not had that evidence.

6.70. There is another central element lacking from the Respondent's consideration of this 50% application. That is the cover that was being lost if FF Simmons was dismissed or resigned. We have heard that what Waterlooville needed was day-time cover, but at some point the cover he had been providing and that would be lost had to be factored in. While he had not been able to meet the 75% contract commitment since December 2016, he had, save for his omissions in the first couple of months and during the periods of authorised leave, been providing cover since then.

6.71. This was not a recruitment. We were told that it was reasonable to consider the recruitment policy, as outlined by GM Neat in the appeal report (322) but to do so in a situation about retention is lose part of the picture. By retaining Simmons on a reduced hours contract, they would have retained the services of a highly trained and experienced officer, and that is not mentioned as a consideration. It does not for example figure in GM Neat's report for the appeal.

Availability

6.72. FF Simmons availability has been a key issue of concern in considering the 50% contract. GM Neat and SM Gordon considered his availability based on the evidence of his working pattern while on sabbatical from his retained contract. The simple point that he makes, that he did not need to make his arrangements around his retained contract while on sabbatical from it, was dismissed.

6.73. This was put to SM Gordon,

> "What he was doing while on sabbatical, was unlikely to be indicative of what he would or could do when he returned from sabbatical."
> "I disagree."
> "He had no reason to be in the UK when not doing any retained work?"
> "I agree."

6.74. We do not understand those answers. We have also not had satisfactory reasons as to why the document at page 190 from SM Hodge and his comments that the retained cover would have to be fitted in between the wholetime hours, without regard to the scope for an extension of FF Smmons' stay in England, was preferred to FF Simmons' various explanations of how his contract could be met.

6.75. In his report for the appeal, GM Neat had addressed in some detail the question of the hours over which FF Simmons could be available around his WDS Havant contract. The hours look unachievable – 139 hours per week - save that in that calculation he did not factor in the 35 day leave entitlement which has the effect of removing 35 x 24 hours from the required cover

(annual leave had been a factor in GM Neat's consideration earlier (215)). That makes a very significant difference to the hours required from FF Simmons while providing cover around his work at Havant.

6.76. The minimum requirement to be met over 26 weeks of the year would be 35 x 2 x 26, that is, 1820 hours, or 70 per week, if FF Simmons had been strict about doing one week on and one week off. That is on top of his full-time hours. It is for the majority of the time on-call time rather than active service, but even so the working hours are intense.

6.77. While 70 hours a week sounds heavy in addition to the full-time role, that is what retained firefighters on 75% contracts committed to as a minimum, including those on wholetime contracts. The difference is that FF Simmons proposed to work his full-time shifts over the same weeks, albeit with some flexibility.

6.78. Annual leave has to come out of that. That is 35 days of 24 hours per year, 840 hours. Rounding up, the on-call hours for FF Simmons if he chose to work only 26 weeks out of 52 would be below 40; alternatively he might take his leave in blocks and still, when working, be doing no more in retained cover than he had been contracted to do throughout.

6.79. A distinction has been drawn by GM Neat and Mr Evenett between the 2 – 2 – 4 system and the new Havant flexible crewing system, both saying FF Simmons could not meet their requirements under the new system. Given that other officers were able to meet their requirements while working the flexible crewing system, that is a difficult starting point. CM Francis in his complaint to GM Neat on 29 May 2019 did not complain that FF Simmons could not meet the 50% 35 hour minimum while crewing on the flexible system at Havant. He complained that he was not managing his 70- hour contractual requirement.

6.80. FF Simmons explained in his oral evidence how it would work, having working the flexible crewing system for a year already,

> "(Shifts) not laid down. Blank month. You put in the blank shifts. So long as you say what you want, and it is enough, I could easily build my 35 to 70 hours, around Havant or build Havant around Waterlooville. Two months in advance. Not guaranteed but flexibility to move shifts around. You get what you ask for in general. Much easier than the 2 2 4 system."

6.81. The Respondent has not shown that the reduced hours contract was not achievable or being achieved, in terms of hours of availability.

Training Requirements

6.82. There is considerable confusion over what the requirement was for RDS firefighters to attend training drills at their Retained Duty Service site.

6.83. The 2013 contract requires attendance at training for 3 hours per week but with no requirement for wholetime firefighters on retained contracts to do

make-up sessions if they missed those drills, unless the training was relevant to the station specialist equipment or functional role.

6.84. The Retained Duty Service Order requires attendance at training for 3 hours per week, and does not exempt wholetime firefighters from doing sessions to make-up training missed, unless missed while carrying out wholetime roles. That is a higher requirement than in the contract.

6.85. It has not been argued that the Retained Service Order is contractual and there is no evidence on which we can conclude that it is.

6.86. WM Sadler agreed this summary of his guidance to officers (117) issued in July 2017 prompted by a discussion with another station manager and based on discussion with SM Gordon.

- Wholetime firefighters on a retained contract need only attend 2 drill nights a month, half the standard requirement
- Of those, any missed to be made up at other stations or by meaningful work within four weeks
- When on duty, retained annual leave or sick, no make-up drill was required
- Meaningful work could be SSRIs, Safe and Well, FRAT visits, community initiatives, work on station.
- Firefighters should tell management if they needed to do meaningful work instead of drill so it could be arranged.

6.87. That is different from either the service order or the contract.

6.88. WM Sadler was clear about this – asked to reiterate the requirements, he said,

> "If wholetime, 2 per month, and if he missed any while on wholetime duty, he did not have to make them up, same for annual leave or sick leave, otherwise he has to make up two a month if he misses that."

6.89. SM Gordon disagreed. His summary was,

> "They were required to complete 6 out 8 drill nights.
> The two not required were when on night duty with whole time shift.
> They still had to make those other drill nights up if they missed them – (the 6)
> But 50% of those could be done as meaningful work."

6.90. Other station managers took a different view of the obligations – on asking to do a make-up session at another station, the officer there told FF Simmons that wholetime officers did not have to do make-ups and should not really do them (157). That is consistent with the contract.

6.91. GM Neat has this summary in the report for the appeal hearing (326),

> "I would expect all dual contract employees including those on ABC3 crewing stations to attend a minimum of six training nights in an eight week rolling pattern. This expectation would remain even for someone on a 50% contract. ….
> I am of the opinion that repeated "Make up" training sessions is not acceptable".

6.92. SM Gordon had been a source for and had not dissented from WM Sadler's guidance issued in July 2017. His version outlined at the hearing seems now to reflect his understanding of GM Neat's position and to be applied with hindsight.

6.93. One of the reasons for not allowing a reduction in the contract is that Mr Simmons could not attend the number of Monday night drills required. This was Mr Neat's explanation of his approaches to HR before the end of FF Simmons sabbatical:

> "I had an intention in my mind at the time that he was unable to meet the training night requirements as already agreed by Alan Simmons – he had agreed he could not meet the requirements for training night attendance, so that coupled with my belief that he could not meet the 35 hour requirement because of the flexible crewing at Havant I saw no other option. We did not deal with zero hours contracts. I could only look at the 100% and 75% and the 50% introduced against the wish of the FBU."

6.94. He was asked further about that,

> "It is inaccurate to say that Mr Simmons could not meet the training night requirement. He could not meet what you said was the requirement which was different."
> "I disagree with that."

6.95. GM Neat had recorded in his email of 11 March 2019 that FF Simmons had said he would be able to attend a maximum of two training nights in a four-week period, with the other two covered by make-up training,

> "I advised you that this is an insufficient number of training night attendances and my expectation would be in line with other dual contract employees attending a minimum of 6 training nights in an eight-week period, subject to annual leave."

6.96. He was asked for the source of the requirement for attendance at 6 out of 8 drill nights and said,

> "I and other General Managers applied the policy. It was custom and practice that all dual contract employees made up the drill nights. We

were ignorant of the content of the contracts. We applied the policy. It became custom and practice. All other dual contract employees made up their drill nights."

6.97. Given that the requirement was not known to or applied by WM Sadler, SM Gordon, SM Cole or another manager referred to as Emma, it clearly was not custom and practice. No documentary guidance for managers based on it has been produced.

6.98. We conclude that the training attendance requirement was confused and little understood. The contract sets no minimum level of attendances and no requirement for wholetime officers to make up training drills. The Service Order sets a higher requirement. Judging from WM Sadler's summary, which at the time was also SM Gordon's, the Service Order was not applied locally, or, from the evidence, elsewhere. The expectations of GM Neat are different again, require more frequent attendances. We do not have evidence that GM Neat's stipulated level of training was one applied to other retained duty officers, even at Waterlooville, given that it exceeded what his own officers understood to be required. We do not have evidence, other than his assertion, that it was applied elsewhere.

6.99. We bear in mind that there were training requirements for wholetime officers at their wholetime base, and no doubt practice in respect of those officers on retained contracts reflected that. The Retained Duty training requirement for those maintaining their skills at the wholetime base would have been related to team-building, as GM Neat pointed out.

6.100. FF Simmons had offered two training night attendances and two make-up drills doing meaningful work per month. He had questioned the requirement to do make-up drills, without refusing to do them. From the start of 2019, GM Neat had decided that that was not enough.

6.101. It was GM Neat's version of the requirements that Mr Evenett accepted.

Addressing the issues

6.102. In his closing submission, Mr Ross highlighted the items in the list of issues which the Tribunal should particularly address. It was a helpful submission. We address all the issues but pay attention in particular to those identified. They are shown in bold.

7. Constructive unfair dismissal

7.1 The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence. The breaches were as follows;

7.1.1 Rejecting the claimant's request to reduce his hours in 2012. The Respondent says that this was due to business needs and no discernable benefit to the station.

We have no evidence that calls into question the reasons given for that decision. The difference between what FF Simmons was told – that it was a crew manager shortage – and what the record shows – that it was low station numbers - does not point to an attempt to mislead him or point to a real inconsistency: the recorded reasons are given in the briefest summary only.

7.1.2 After being told informally that his 2016 request to reduce his hours would be granted, refusing the request. The Respondent agrees there was an informal request to reduce his hours but denies that he was told it would be granted. The request was not granted due to the needs of the station.

This request was never refused. An informal application had been accepted in late 2016 and led to the trial period in late 2017. The trial period was successful. Faced with continuing reluctance to grant the reduction in hours, FF Simmons requested and was granted a sabbatical, on the basis that both sides would consider the position (3.105 above). On his return, he was required to make a formal application for a reduction in his contract (3.146 above).

7.1.3 Despite completing a successful trial period in September and December 2017, his hours were not reduced. The Respondent says that although the trial was successful, there had been changes to shift patterns of the WDS role and therefore the trial did not accurately show whether the Claimant could fulfil the 50% RDS role alongside his WDS role.

It was a reasonable expectation from GM Neat's email of August 2017 (para 3.70 above) that a successful outcome to the trial might lead to a reduction in contract hours. GM Neat had accepted that SM Hutton had indicated that the application could be approved. He encouraged FF Simmons to agree to relinquish the Crew Manager role. He proposed the trial period and agreed on its conclusion that it had been successful. At that point, FF Simmons must have felt that everything was in place for a reduced hours contract – why encourage him to relinquish his status if it made no difference? Instead, there were continuing concerns and the sabbatical was agreed, giving time for the new arrangements at Havant to be tested out and for both sides to reflect.

7.1.4 Being required to relinquish his crew manager position in September 2017. The Respondent says that after the relocation of the Claimant's home, he was unable to provide the required

level of managerial support of his subordinates and be an intermediary between his managers and the crew. He was not sufficiently available or sufficiently contactable.

Willingly or not, FF Simmons submitted to this change at the time. He had by this time moved to Northern Ireland and was in a position where he could not fulfil his contract. He was not being penalised for that failure; no disciplinary action was ever taken against him. His request for a reduced hours contract was under active consideration. In that context, this was not of itself a breach of contract. It was based on legitimate concerns in relation to his role. It is odd that these concerns had not been applied in respect of the station master role at Havant, but he raised no grievance in respect of it.

7.1.5 After renewing his request to reduce his hours in March 2019, the Respondent rejected the request, despite having recruited 50% RDS firefighters and advertised to recruit more. The Respondent says that there was not a benefit to the station and the new recruits were able to provide day-cover to ensure that the appliances were effectively crewed and that Claimant was unable to provide sufficient cover due to his WDS role and the relocation of his home.

We take this together with the following:

7.1.6 The request was rejected due to personal reasons involving Mr Sadler, rather than a business case and was pre-determined. The Respondent says it was rejected due to the needs of the fire station.

We accept that there had been recruitment of firefighters on 50% contracts and that there was a current advertisement to recruit to that contract. We do not accept GM Neat's account that the advertisement was a national, advertisement, generic, so not reflecting Waterlooville needs: it named Waterlooville.
The Respondent has not established that the new recruits provided more day-to-day cover than FF Simmons could have done.
The refusal is expressed to be based on doubt about FF Simmons ability to be available, potential delays arising from disruption to travel from Northern Ireland, the uncertainty arising from FF Simmons reliance on a relative's house as his home base for Waterlooville, his non-availability when in Northern Ireland, an inability to meet training attendance requirements and the impact of his entitlement to annual leave.
We have no evidence of any of these causing an issue in relation to the full-time post at Havant. There has been no suggestion that they arose as problems. We don't know whether enquiry was made. That would have resolved the

concerns about travel and residence. SM Hodge had the opportunity to mention any difficulties arising when responding to GM Neat's request for information about the pattern of work in October 2018. He did not.

It is not clear what issue could arise in respect of periods in Northern Ireland, if FF Simmons, now a firefighter with no management responsibilities, not a crew manager, was not on call when based there. SM Hodge managed a managerial role at Havant while living in the West Country. We do not understand the basis on which it is said that a firefighter needs to be more readily accessible when off duty than a station manager and we accept his evidence that he had never been called in when off duty as a Crew Manager.

Availability and training are more obvious concerns.

Having required the completion of a trial while Havant were working on a 2 – 2 – 4 system, it was unreasonable to decide that FF Simmons could not provide cover on the basis of the flexible crewing system without at least exploring it further. It was unfair not to discuss the basis for that with him – relying on SM Hodge's comments without giving him the opportunity to address them. It was unreasonable to assume that the time FF Simmons spent in England while on sabbatical was a fair basis for assessing his availability after the sabbatical ended. The insistence that he could not provide the cover needed when FF Simmons, having used the new system for more than a year, was clear that he could is puzzling.

There was the emphasis, new in 2019, on day-time cover, eventually, and as the only reason given for dismissing the appeal, for day-time cover on weekdays.

It is for the managers to decide the needs of the business. It is likely to be the case that those willing to work for a low retainer will be working during normal working hours, making day-time on-call cover difficult to recruit. It is reasonable to address that as a priority on recruitment.

The reference to the recruitment policy was justified to us on the basis that there had to be criteria in place. However, assessing the situation in relation to GM Neat's guidance on recruitment has its pitfalls. There has been at no stage any reference to the effect of the loss to the station of the cover FF Simmons had been providing, for many years. Granting a reduction in hours would have the benefit of retaining at least half of the cover he had been providing as well as retaining a highly trained and experienced officer. Some of the hours he had been providing were no doubt day-time hours and he is clear that he could have provided some day-time hours around his full-time contract. It is not clear why that was not considered. That is not relevant to recruitment but to ignore it in considering a request for a reduction in hours of a long-standing employee is not rational.

It matters too because in the report for the appeal, GM Neat identified as the qualifying reason in the Family Friendly policy from the list of 8 derived from the legislation, “Insufficient work during the periods that the employee proposes to work” (327). Since FF Simmons had been providing cover, including since moving to Northern Ireland, we would need some evidence that the cover he provided was no longer required. That has not been presented.

Missing too from the reasoning is any consideration of the Family Friendly policy in terms of the purpose of that policy, that is, to assist employees to achieve a better work-life balance. Given that that policy exists and enjoins managers to discuss workable solutions that meet the needs of workers and management, there is no justification for failing to make any assessment of FF Simmons’ personal circumstances. GM Gordon was unaware of them and only attached weight to the needs of the service and the community. GM Neat did not explore them or reflect the Family Friendly policy in his reasoning. They are not mentioned in his notes of the meeting of 7 March 2019 or in the reasons given for refusing the reduction in contract hours or in his report for the appeal. They are not referred to in the outcome to the appeal.

While employers are not required to grant requests for flexible working, no reasonable employer would fail to make the relevant assessment of the employee’s personal circumstances or to consider the merits of the application from the employee’s point of view.

The difficulty with the requirement in respect of training attendance is that the requirement itself is unclear and GM Neat’s interpretation of it goes beyond the contract, beyond the Policy and beyond the guidance issued by WM Sadler having discussed it with SM Gordon. FF Simmons had expressed himself willing to do more than his contract required. He cannot be taken to have affirmed the contract in respect of make-up drills given the lack of consistency over what the requirement was. The requirement imposed by GM Neat and impliedly by Mr Evenett was in any case about attendances at a rate unsupported by contract or policy, rather than the make-up drills.

7.1.7 Rejecting the Claimant’s appeal against the rejection of his request. The Respondent says that it was rejected due to the needs of the fire station.

The reason given for rejecting the appeal was explained as due to FF Simmons’ inflexibility and his inability to offer cover from Monday to Friday during the day.

We have explained the reason why we have difficulty with the reference to inflexibility as an explanation, directly contradicting the evidence that FF Simmons had been willing to be flexible,

and reiterating that at the meeting of 31 July 2019. In our judgment, it is more likely that FF Simmons expressed, as he did elsewhere, a willingness to be flexible and gave illustrations of how it would work with the Havant contract he was now familiar with.

Mr Evenett writes that the station need was for day-time cover, and FF Simmons could not provide day-time cover, Monday to Friday, 9.00 to 18.00. The stipulation that all cover hours under the 50% contract were to be between 08.00 and 18.00 appears for the first time in the report for the appeal hearing from GM Neat. Earlier reasons had emphasised the overall number of hours having regard to the crewing pattern at Havant. The reference to weekday hours appears for the first time in the email giving the outcome of the appeal.

In his report GM Neat had addressed in some detail the question of the hours over which FF Simmons could be available around his WDS Havant contract. The hours look unachievable – 139 hours per week - save that GM Neat did not here factor in the 35 day leave entitlement. As explained above, removing annual leave impacts significantly. The calculations presented are misleading.

While 70 hours a week sounds heavy in addition to the full-time role, that is of course exactly what all retained firefighters on 75% contracts did as a minimum, while acknowledging that FF Simmons was also seeking to condense his full time hours.

While there has been discussion of a number of the other 50% firefighters, the Respondent has not shown that any were recruited or would be recruited only on the basis of Monday to Friday daytime hours, as specified for FF Simmons, or even that they were required to provide day time cover or predominantly day time cover in reducing their contract hours. In fact, it has been acknowledged that others were providing mainly evening hours. We bear in mind that those contracts were granted while FF Simmons was seeking his reduction in hours.

On GM Neat's oral evidence, day-time cover only was not an absolute rule:

"My expectation from the outset was that the 50% should be focused at day cover unless there was a reason to accept an individual who was not providing day cover"

Retention of an experienced and highly trained officer, formerly a Crew Manager, would appear to qualify as an exception worth considering.

7.1.8 At the meeting of 31 July 2019, the Respondent made clear to the Claimant that he would be dismissed. The

Respondent does not accept that it was made clear that he would be dismissed, but says that the Claimant was made aware that if he could not comply with the terms of his contract his contract might be terminated.

We know, though FF Simmons did not, that GM Neat had expressed a clear intention to dismiss him before the end of the sabbatical. We are satisfied that that lay behind SM Gordon's conduct at the meeting in February 2019 when he must have told FF Simmons that he was not returning to Waterlooville (3.137 above) In GM Neat's email after the meeting with FF Simmons of 7 March 2019, he outlined the options: each of the three mentions potential dismissal. The report for the Appeal hearing had made it clear that if the appeal was not successful, the recommendation was to move to dismissal (328). FF Simmons was in a position where he could not fulfil his contract. That had been the case since late 2016, but at this stage it was very clear, and as he said, made very clear to him, that dismissal was the direction of travel.

6.103. We conclude that GM Neat had decided before the end of the sabbatical to refuse the amendment to his contract and to secure the dismissal of FF Simmons. That was without further discussion with him, having previously encouraged him to think that the amendment would be further considered, given that the trial had been a success. It was reflected in the conduct towards him of his managers, including that of SM Gordon, in telling him he wouldn't be coming back to Waterlooville. The basis for rejecting the amendment sought was not fairly discussed with him. When FF Simmons made the 2019 application, Waterlooville was recruiting for more 50% contracts. The Family Friendly policy was not applied when the application was considered. The training attendance requirement imposed was neither contractual, nor that required by the policy but a higher standard that is not shown to have been applied to others at Waterlooville or elsewhere. The merit of retaining him, even on reduced hours, was not considered. The amendment to the contract was finally refused on the basis that the requirement for cover was for day-time and weekday cover only, without taking into account the cover he had been providing and that the station would lose. It was not a condition of the 50% contract itself to provide day-time cover. Other firefighters were recruited on that contract who were not required to offer more day-time cover than FF Simmons. Others were not required to offer hours only during days, much less weekday days, the criterion applied at the appeal hearing. Once the amendment to the contract was refused, the express intention was dismissal. That was made plain to him.

6.104. Cumulatively, that was not a fair approach to the application. The Respondent had known since November or December 2016 that FF Simmons could not fulfil his contract. That had long been accepted and not

made the basis of disciplinary action. The employment could have continued on the basis of reduced hours. The issues that needed to be resolved were the willingness to consider the application fully, and the need to match the hours of availability to the needs of the station with regard to cover and training, taking into account the risk of losing FF Simmons altogether. .

6.105. Starting from 2018 and throughout 2019, the Respondent took an unreasonable and unfair approach to this application, settling on dismissal as the right course before the end of the sabbatical, imposing unfair requirements and disregarding the purpose of the Family Friendly policy.

6.106. Refusing this application in the way it was done made dismissal highly likely. Such a dismissal would have been unfair. That is because it was unnecessary if the employment could have continued on the basis of reduced hours, and the application for a reduced hours contract was not properly and fairly considered but dealt with by way of a series of steps each unfair in themselves.

6.107. In our judgment, there was a series of breaches of the implied term of mutual trust and confidence on which FF Simmons expressly relied on resigning. The Respondent did not have reasonable and proper cause for its conduct. The Respondent did not finalise the consideration of the 2016 application but decided on dismissal before inviting the 2019 application. Consideration of that application was not based on proper enquiry, a fair approach or a genuine belief in the reasons advanced for rejecting it.

6.108. There was no affirmation. The appeal was refused on 7 June. There was then the invitation to the Next Steps meeting. That was held on 31 July. The Next Steps meeting held out some prospect of further consideration, in that FF Simmons was to present his proposals and management were to produce some work around other contracts. A two week period was allocated for those actions. FF Simmons provided his proposal. GM Neat did not produce the report proposed. An exploration of the current 75% and 50% contracts might have provided a basis for some reconsideration of the approach taken for FF Simmons' application. He was entitled to wait as long as he did in the hope that the steps agreed on would be taken. The attitude at the Next Steps meeting was for him the last straw, save that he waited for the proposed later report. He cannot be taken as affirming his contract while waiting.

6.109. In our judgment, this was an unfair constructive dismissal, FF Simmons resigned in response to repeated breaches of the implied term of trust and confidence, there was no affirmation.

6.110. It was not a fair dismissal. It could not be a fair dismissal in the absence of fair and proper consideration of the application for a reduced hours contract.

6.111. The claim was brought on time.

6.112. Having so found, and having found antipathy towards FF Simmons from the management team at Waterlooville, we do not need to go through more specifically than we already have the issues raised in the further and

better particulars in relation to WM Sadler and SM Gordon's conduct, at 2.2 of the Issues above.

6.113. We have not had final submissions from the Respondent on the application of Polkey and leave that to the Remedy hearing.

6.114. The Respondent's conduct raises the question as to why that was the direction taken throughout and in particular from late 2018.

6.115. FF Simmons asserts that the principal reason for the constructive unfair dismissal is his protected disclosure.

The Protected Disclosure

3.1 Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996?

6.116. The protected disclosure relied on is FF Simmons statement to CM Francis during the review of his trial period in December 2017. It is about staff living outside the four-minute response zone.

6.117. FF Simmons had been doing Safe and Wells. He was entitled to do Safe and Wells while on duty. He was entitled to do them to count towards the make-ups for missed training, at the same time as claiming fees for being on call, provided he was working inside the four-minute zone. He was being challenged because he was doing Safe and Wells from outside the four-minute zone. In response, he raised the fact that officers were living outside the 4 minute zone. The addresses concerned were some 7 or 8 minutes or more away from the station, in light traffic conditions.

6.118. He raised this in November but it is in the December meeting that the notes show FF Simmons making the point more widely, and in terms of public risk.

6.119. The notes taken show this,

> "FF Simmons stated that there are individuals responding to Waterlooville who clearly live outside the required response times for emergency calls. He feels that a blind eye approach has been taken with personnel that respond from an address not close enough to the station…He would like to know how the required turn-in time can be achieved without putting other road users at risk." (178)

6.120. The point being made was that to reach the station from those addresses would either take too long or require driving at excessive speeds.

6.121. One of those living outside the four-minute turn-in time was WM Sadler.

6.122. We accept this was a protected disclosure. It raises factual matters, it has a genuine public interest having regard to the size and role of the Fire Service and its public prominence. This is a major public body, very much in the public eye. The safety of the way that emergency response teams do their work is objectively of public interest. That a firefighter might have to or

be tempted to drive too fast in an urban area in order to get to the fire station in time might well endanger the health and safety of members of the public, and of the firefighter.

6.123. This is not just a personal matter for FF Simmons although he did first raise it when he was criticised for claiming fees for being on duty while actually outside the 4 minute zone. We accept that he had a genuine and reasonable belief that the issue raised was in the public interest and that that was itself an objectively reasonable belief. He would be well aware of the public scrutiny of the Fire Service and of public concern over emergency vehicles being driven in a dangerous way.

6.124. The disclosure was to his employer.

6.125. This was a qualifying disclosure.

The Protected Disclosure as an operative cause

6.126. WM Sadler was CM Francis' line manager. He directly delegated this role, reviewing the trial, to CM Francis. It is reasonable to infer that Francis kept him informed, in particular since this issue related to Sadler's own address and working arrangements. That may have been informally, but in any case, the review notes must have been copied to WM Sadler. We are satisfied that WM Sadler knew of the question being raised about where he lived and whether it met the formal requirements of his role. Given that SM Gordon was closely involved over the trial and the question of the reduced hours contract, he too was being kept informed and agreed he was aware of the issue being raised, although he did not respond to FF Simmons as requested.

6.127. It is agreed that FF Simmons was unfriended and blocked by WM Sadler. We don't know when. FF Simmons says that WM Sadler unfriended him on Facebook as a result his protected disclosure. It is possible that it was at around this time and a connection would be easy to infer. We do not have evidence that links the two events more directly than that.

6.128. Facebook friends are a very personal matter. We have no evidence that Facebook was used in a professional or work-related context. WM Sadler is free to choose who he permits to have access to his Facebook pages; that is a personal decision.

6.129. There were other sources of friction at this time. FF Simmons gives instances when WM Sadler refused payment for work FF Simmons felt entitled to claim for. He describes an incident in October 2017, when Sadler greeted all his colleagues but openly ignored him which, he says, led colleagues to comment, "That was awkward" and "It was pretty obvious he didn't want to talk to you." He himself had also reported to CM Francis the way that WM Sadler logged off his retained post before starting his full-time post at Cossham, with no gap between them, when Simmons was being asked to allow an hour in between. He also pointed out that another colleague was being allowed to do one Safe and Well visit plus some administration in lieu of attendance at training, where he had to do three Safe and Well visits.

6.130. He may well have been right that he was being treated unreasonably and less favourably than others. The picture overall does not show that the protected disclosure was the basis for that. There appears to have been no action taken on the protected disclosure and no weight attached to it. SM Gordon seems to have shrugged it off. WM Sadler denied any discussion ever over where he lived. It will not have helped ease office relationships, but we cannot single this incident out over and above other sources of tension.

6.131. The protected disclosure is not mentioned in the letter of resignation to HR of 16 September 2019. That letter refers to the unfair and unreasonable application of the service policy, the demotion from crew manager, the unfair and unreasonable behaviour of management over a sustained period time and discrimination (262). This protected disclosure is not referred to even obliquely; it was simply part of the general background.

6.132. In addition to that letter, FF Simmons had annotated the notes from the Next Steps meeting of 31 July and included notification of his resignation in it (261). The protected disclosure is not mentioned. The tensions between him and WM Sadler and SM Gordon are mentioned, together with the failure to acknowledge or address them, but there is no reference to the protected disclosure.

6.133. What stands out instead is the move to Northern Ireland. It was agreed that FF Simmons had a better quality of life there, but there was no willingness to support him in making the move work in terms of his continued employment.

6.134. That is where we get irrational comments such as that he could not be contacted, or that he would not be available when not on on -call duties. His response to that was that he had never ever as a crew manger been required to come in at short notice, much less as a firefighter. The one occasion that we know of should not have happened – both Sadler and Cole left without it being established that there was cover to keep an appliance manned, and after the crew exception report had been sent. On that occasion, FF Simmons stepped in. Being in Northern Ireland did not preclude him being available when required under his contract.

6.135. We do not understand the distinction drawn between his circumstances and those of SM Hodge, who did not live locally: if a station manager did not need to live locally, it is not clear why a firefighter should have to.

6.136. We do not understand why, if his travel disruption was a genuine concern, enquiries were not made of his wholetime line manager at Havant after a year of attending from Northern Ireland as to whether it was unworkable. That would have been a rational starting point for enquiry.

6.137. The 2017 trial was to consider his application for a reduced hours contract. It was successful, but then treated as irrelevant (“null and void” as GM Neat said) because of the change of crewing arrangements at Havant. A further trial could have been undertaken but that wasn’t offered. It is not clear why the new crewing arrangement was seen as creating such a difficulty.

6.138. We are satisfied that there could be and was informality over arrangements if the managers so decided but a formal application was

required in 2019, when the informal 2016 application had been accepted but never resolved. FF Simmons had to press for email to be used for official communications, rather than documents being posted only to his local address. He was still asking for that on 31 July 2019. That was a reasonable request.

6.139. HR had advised that all options should be considered before settling on dismissal for some other substantial reason. One option was to offer a reduced hours contract, in order to retain an experienced officer. Waterlooville was, at the time, advertising for reduced hours contract officers. Other wholetime officers had 50% contracts at Waterlooville, recently granted.

6.140. In the end, the reasons relied on for not reducing the contract hours were a training attendance requirement and a requirement that the cover provided was during the day, on weekdays. The training attendance requirement was beyond the level required by the contract or the Service Order, or that which had been applied locally. We know other officers had been appointed on 50% contracts. We do not have evidence that they had been expected to meet either of those requirements. It is, in our judgment, unlikely that they were recruited to provide day-time cover, while working wholetime elsewhere and that is confirmed by GM Neat's evidence.

6.141. The effect of the loss of cover that Simmons had been providing and could still provide was not factored in, or the disadvantage of losing an experienced and highly trained officer.

6.142. The Family Friendly policy was not applied: at no stage were FF Simmons' personal circumstances explored or considered.

6.143. In our judgment, the management at Waterlooville and the officers dealing with the reduced hours application did not want FF Simmons as a retained firefighter once he had moved to Northern Ireland. They took strong exception to that. Repeatedly, consistently, it is his move and wish to concentrate his working hours that lies behind the reasons given for not granting the reduced hours contract. That accords with the decision to dismiss being made before the end of the sabbatical, and without exploring in any genuine way the scope for FF Simmons to perform his contracts under the new crewing system at Havant.

6.144. The move to Northern Ireland in 2016 put him in a position where he could not meet the terms of his contract, and was reliant on a favourable outcome to the application for reduced hours. Management reluctance led to consideration of the application extending through 2017, with it unresolved even on completion of a successful trial. FF Simmons went on a year's sabbatical from March 2017 for both sides to reflect on the merits and workability of a reduced hours contract. GM Neat settled that dismissal was his intended outcome before the sabbatical ended.

6.145. That decision was fuelled by knowledge of the difficulties in the personal relationships at Waterlooville. GM Neat was on notice of those from at least the summer of 2017 and had failed to address them.

6.146. Contributing to those difficulties would have been FF Simmons raising the question of where SM Sadler lived, in December 2017 but so too would have been the other times, including the occasions before the autumn of 2017, when he raised matters that challenged his managers.

6.147. We have found that the approach to the application for a reduced hours contract did repeatedly breach the implied term of trust and confidence. The reason for that was not the protected disclosure but the move to Northern Ireland, coupled with the personal antagonism that existed between him and his managers and that had been developing since before 2017.

6.148. The protected disclosure was not the principal reason for the repudiatory conduct by the Respondent. It was not the principal reason for this unfair constructive dismissal.

6.149. The detriment pleaded is the repudiatory conduct on the basis of which we have found unfair constructive dismissal. We do not find that that conduct was on the ground of the protected disclosure. The issue is then whether the protected disclosure materially influenced the employer's treatment of FF Simmons.

6.150. The primary reason for the Respondent's conduct was, in our judgment, that he had moved to Northern Ireland. A contributing reason was the antipathy to FF Simmons amongst his managers. The protected disclosure contributed to that, but it was but one strand in the overall situation, which began well before the disclosure. There were many contributing incidents. There is little or no evidence of this particular challenge having been given any weight or prompted any action at the time nor was it in FF Sadler's mind as a factor when he resigned. The protected disclosure played at best a trivial part. The tone is set much earlier, in the failure to address the family friendly application in 2016 and in the approach SM Gordon took in February 2017 in in his email asking FF Simmons how he proposed to meet his contract.

6.151. The Respondent did not subject the Claimant to the detriments identified on the ground that he had made a protected disclosure.

6.152. In conclusion, the Claimant succeeds in his claim of unfair constructive dismissal. The claims based on protected disclosure fail and are dismissed.

Employment Judge Street

Date 19 August 2021

Judgment and Reasons sent to the Parties: 22 September 2021

FOR THE TRIBUNAL OFFICE