



# EMPLOYMENT TRIBUNALS

**Heard at:** Exeter **On:** 22 to 26 November 2021

**Claimant:** Mr Mark Hunt

**Respondent:** Devon and Somerset Fire and Rescue Authority

**Before:** Employment Judge E Fowell

Ms R Clarke

Ms C Lloyd-Jennings

**Representation:**

**Claimant:** Mr J Allsop of counsel, instructed through Direct Public Access

**Respondent:** Ms R White or counsel, instructed by Plymouth City Council

## RESERVED JUDGMENT ON LIABILITY

The unanimous decision of the Tribunal is that:

1. The claimant's dismissal was unfair.
2. The complaint of discrimination on grounds of sex is upheld.
3. The parties will be notified of a date for a remedy hearing.

## REASONS

### Introduction

1. Mr Hunt was a firefighter for 25 years. He was dismissed on 23 November 2018 on grounds of his conduct, conduct which, unusually, concerned events in his

private life. In particular, it concerned his relationship with a former partner, known to us as H. It was clearly a turbulent relationship, with both parties claiming to be the victim of domestic abuse. The police were involved on several occasions and it was Mr Hunt's failure to report their involvement to the Fire Service which formed the basis of the dismissal. Mr Hunt says that he was never actually under investigation by the police and so the obligation to report did not arise.

2. His relationship with H lasted from about September 2013 to October or November 2014, although it was on and off again during 2015 and possibly longer. It is not clear to us what contact, if any, they had after that until 2017, but in April that year a video was uploaded to a YouTube account from an account in Mr Hunt's name (called Justice for All), showing H in bed. She was under a cover, and apparently under the influence of drugs. The caption was "Don't Do Drugs Plymouth Midwife". The sub-heading said "Out of her head on Class A."
3. This came to the attention of some of the midwives at the hospital and news of it reached the Director of Midwifery, Ms Sue Wilkins. She spoke to H about it. H clearly knew who had filmed her and said that it was Mr Hunt, a firefighter. This was not the first time that H's private life had become an issue at work. About two years earlier H had been involved in an argument with another woman while on a night out, a woman said to be in an 'overlapping relationship' with Mr Hunt. The other woman was a student midwife and afterwards it had not been possible for H to supervise this midwife, causing problems with the rota. This time Ms Wilkins took it on herself to report the video incident to the Fire Service. It does not appear to have been any sort of official step on her part. She simply telephoned the Fire Service on 14 July 2017 to tell them about it.
4. At some point the Police were also informed. They viewed the video and came to see Mr Hunt. He agreed to take the videos down – by then it had been uploaded more than once. The officer warned him about harassment but concluded that no offence had been committed.
5. That incident however put in train a disciplinary investigation. H was interviewed and raised numerous other events in the course of her relationship with Mr Hunt, which the Fire Service decided to investigate further. That investigation took a very long time. It was 15 months before the disciplinary hearing, and throughout that period Mr Hunt was suspended. The hearing itself took place over four days, and we were provided with a transcript of it, covering several hundred pages.
6. Mr Hunt says that this was all an intrusion into his private life and vigorously disputes the allegations raised about his behaviour during their relationship. He also says that the decision by the Fire Service to prefer her account was discrimination on grounds of sex. The complaints presented are therefore:
  - a. unfair dismissal under section 98 Employment Rights Act 1996; and

- b. direct discrimination (under section 13 Equality Act 2010) on grounds of sex.
7. The issues to be decided were set out in the Case Management Order on 12 July 2019 and so need not be repeated at the outset. Since then a list of issues has been agreed between the parties refining this further.

**Procedure and evidence**

8. One preliminary issue, not canvassed at the preliminary hearings or in that list of issues, is anonymity. The parties appear to have assumed that they could agree to anonymise individuals, in particular H, although such a course is very much the exception rather than the rule. The other individuals referred to by initials in the evidence were:
- a. H's son, M;
  - b. the student midwife, referred to us as Q;
  - c. a male friend of H's, referred to as K.
9. M is relevant because it is said that on one occasion Mr Hunt hit him. And K was present at an incident at the Union Rooms pub in Plymouth, which resulted in a fight with Mr Hunt and the police being called.
10. The provisions relating to anonymity are set out in the Employment Tribunal Rules of Procedure, at paragraph 50:
- “(1) A tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the convention rights of any person ...
  - (2) In considering whether to make an order under this rule, the tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.
11. Article 10 of the European Convention on Human Rights governs Freedom of Expression. It provides:
- (1) Everyone has the right to freedom of expression. ...
  - (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and

independence of the judiciary.

12. It follows that there is a balance to be struck between the broad right set out at section 1 and the public policy considerations at section 2.
13. It is also relevant to consider Article 8, the right to respect for private and family life:
  1. Everyone has the right to respect for his private and family life, his home and his correspondence.
  2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
14. This too provides for a balance to be struck between the private life of the individual concerned and the public interest in question, which has to be lawful and necessary.
15. The main question here relates to H and her private life. There have been a number of recent cases on this issue, but none dealing with the case of someone who is neither a party to the case or a witness at the hearing. The situation of H is therefore unusual. Normally employers are investigating incidents at work, not in the private lives of their employees. Witnesses are usually employees or former employees, and witnesses do at least have the chance to defend themselves against unfair criticism.
16. It is clear from the background facts already given that H was publicly accused of taking class A drugs, a serious criminal offence. She did not approach the Fire Service to make the allegations against Mr Hunt; they contacted and interviewed her. She would have no particular reason to attend a hearing of this sort to be cross-examined at length about them, and we were not told if she was asked to do so. We too have some criticisms to make of her account. The allegations she made were characterised by the Fire Service as coercive or controlling behaviour on his part, which is essentially the definition of domestic abuse used in the Family Court. Any fact finding hearing into the truth of such allegations in that forum would be held in private. It seems to us in those circumstances that the interference in her private life caused by being publicly identified in this judgment would be very considerable, and would amount to a disproportionate interference. And given that this is essentially a dispute between Mr Hunt and the Fire Service, to anonymise her would not offend against the principle of open justice. She has not sought or risked publicity and neither party wished to identify her.
17. A further consideration is that identifying her would also lead to identifying her son, M, who was a minor at the time, and so a vulnerable witness. The same

considerations apply to him, and with greater force given his age.

18. As to Q and K, they too are not parties or witnesses. They have been brought into these proceedings with no real opportunity to defend themselves from criticism. In the case of Q, the student midwife, it is not in fact necessary to refer to her at all, and the position of K is entirely peripheral, so on further consideration we shall not name them either.
19. Returning to the main issues, in addressing them we heard evidence from Mr Hunt, and on behalf of the Fire Service from:
  - a. Toby Brooms, HR Officer with Devon County Council, who were providing external HR support to the Service at the time, and who carried out the investigation;
  - b. Gerald Taylor, an Area Manager, who was part of the two-person panel who took the decision to dismiss him; and
  - c. Peter Bond, Assistant Chief Fire Officer, who held the appeal.
20. There was also a bundle of about 1000 pages. Having considered this evidence and the submissions on each side, we make the following findings, starting with the complaint of unfair dismissal and the procedure followed.

### **Findings of Fact**

21. The Fire Service has a complaints policy for use by the public or outside bodies to raise concerns about the conduct of firefighters. It provides:

**A complaint is** an expression of dissatisfaction, a negative remark or an expression of negative opinion made about the Service to a member of the Service in a way that requires a response and resolution.

...

The Service will not investigate **police matters** but will refer complaints to the Police. Complaints alleging the **abuse of children, young people or vulnerable adults** will be referred to the Safeguarding Lead in Community Safety for processing and referral to the Local Authority Designated Officer (LADO) for investigation. Complaints against **Members of the Fire and Rescue Authority** will be referred to Risk and Insurance for investigation as part of an insurance claim. Complaints made by members of staff will be dealt with under HR's **grievance procedure** or the '**whistleblowing**' code.

Complaints which relate to **civil matters**, and complaints made about events or actions that are more than **twelve months old**, will not usually be investigated.

All complaints, and actions undertaken as part of a complaints investigation, will be recorded on an ES34 ... [Original emphasis]

22. We note that there is nothing in those terms to indicate that the scope of the policy extends to the private lives of firefighters. The opening line makes clear that it covers complaints about the Fire Service, not the character of individual officers. It also makes clear that acts in the private lives of firefighters which amount to a criminal offence will be referred to the police, and the implication is that acts which do not amount a criminal offence will not be taken further under this policy. The 12 month rule is a further safeguard against stale or irrelevant allegations. Its application to Mr Hunt's private life on this occasion seems wholly inappropriate.
23. The contents of the phone call from Ms Wilkins were recorded on form ES34 as part of this policy. There was no request to take particular action. It was never even made in writing. It was a simple telephone report and the implication is that Ms Wilkins wanted someone to have a word with Mr Hunt to remove the video.
24. Our view therefore is that there is nothing in this policy to justify launching disciplinary action against Mr Hunt over this video, let alone opening the door to further allegations from his former partner. The video itself, as we shall see, was in fact referred to the police – presumably by H – and a decision was taken, having viewed it, that no offence had been committed. That ought therefore to have been an end of the matter. After the police looked into it, Mr Hunt took the video down. This was long before he was suspended. (We also note in passing that complaints to which the policy does apply should be investigated within two weeks.)
25. That view is reinforced by the terms of the disciplinary policy itself. It gives examples of gross misconduct which includes:

Being convicted of, or committing, a criminal offence, which is liable fundamentally to undermine the performance of the contract of employment and/or the relationship between the employer and the employee.
26. It follows that even conviction of a criminal offence is not sufficient for dismissal; it has to be one which bears on his performance or the working relationship, i.e. one that might broadly be termed a relevant conviction.
27. The list also includes:

Breach of trust, eg unauthorised disclosure of confidential information or failure to notify the employer of a criminal conviction, caution or summons.
28. This is supplemented by other provisions in the policy about reporting any involvement with the police. These provide:

**“NOTIFICATION OF CRIMINAL INVESTIGATIONS**

- 5.48 It is the duty of all employees immediately to report to the Chief Fire Officer, via their line managers, if they are:

- advised that they are under investigation for a criminal act (including road traffic offences); or
- arrested in connection with a criminal act; all notified that criminal charges against them are being considered; or
- required, as a result of pleading guilty to an offence, to attend a formal meeting with the police to be cautioned as an alternative to appearing in court. A written report must advise of the nature of the charges/caution or investigation and details of the date, time and venue of any hearing; or
- in receipt of a summons to appear before a court of law for an alleged offence...
- failure to notify the Chief Officer of any of the above may result in disciplinary action being taken against the employee.

...

29. Despite this obligation, there is no statement to the effect that any such failure is itself gross misconduct. As the last words make clear, it *may* result in disciplinary action, and the relevant offence under the policy would still be, as above, failing to notify the employer of a criminal conviction, caution or summons. The definition of misconduct (i.e. not gross misconduct) includes:

Failure to report or record any issue that it is the employee's duty to report or record.

30. This also supports the view that such a failure to report an investigation is not itself grounds for dismissal. The policy also states, in wording taken from the ACAS Code of Practice, that:

5.52 If an employee is charged with or convicted of a criminal offence this is not normally in itself reason for disciplinary action."

31. There was, in our view, an altogether undue weight placed by the respondent on this obligation to report police investigations, and a failure to recognise throughout the process that this was not in itself grounds for dismissal. This approach does not accord with their own policy. The list of misconduct offences does include

"Bringing the Fire Authority into disrepute."

32. Similarly the list of gross misconduct offences includes:

"Bringing the Fire and Rescue Service into *serious* disrepute."

33. Those provisions form the alternative basis for the disciplinary action taken against Mr Hunt, which we will consider further below.

34. The full context therefore that there is an obligation to keep the Fire Service

informed of any such investigation. There is nothing in the policy to indicate that such a failure to report is by itself, deserving of disciplinary action. The intention seems to be to ensure that the Fire Service are not taken by surprise when, in due course, an officer has to appear in court or is convicted or sentenced. It may even be appropriate to suspend them in the run up to such a court appearance.

35. Considerable weight was placed by the Fire Service on the word 'investigation' in this section, to justify the view that any interaction with the police, certainly any interview under caution, was a police investigation, and the failure to declare it was a serious disciplinary offence. Given the above definitions, that is not a permissible view. We note too that there is no obligation on a firefighter to have an enhanced DBS check, so expired offences are not relevant to employment.
36. This aspect of the case is fundamental, and this understanding of the applicable policies is supported by the general legal position regarding offences or other acts by employees outside work, to which we will return after describing what then took place, which we will do so as briefly as possible.

*The investigation*

37. On receipt of the phone call from Ms Wilkins, the Station Manager, Matt Radford had a meeting with H on 27 July at Derriford Hospital and she appears to have been asked about every aspect of her relationship with Mr Hunt. She said that was wanted to be kept out of it and was afraid of his reaction. Nevertheless, she went on to make the following accusations:
  - a. They began the relationship in September 2013, even though she had been warned that he had committed rape in the past, and believed there was a second claim of rape against him.
  - b. On holiday in Egypt in September 2014 he had lifted her off her feet by the throat and held her up against a wall. Soon afterwards they split up.
  - c. Then in October 2014 they saw each other on a night out at the Union Rooms in Plymouth and he slapped her. She was being consoled by a male friend (K) when Mr Hunt came over and beat him up. The police came and he was asked to give a statement.
  - d. The following year in 2015 her garage was 'trashed' and an Easter egg was left on top of the pile of damaged items. She knew it was Mr Hunt immediately, she said. The police were called but there was no fingerprint evidence. (Mr Hunt had told her that he knew how to avoid leaving DNA evidence by covering himself in white spirit).
  - e. A couple of months later, in June 2015, her car caught fire and again the police attended. Mr Hunt then sent her an online picture of Fireman Sam,



which made her suspicious and she wondered how he knew about the fire so quickly.

- f. He had also filmed her during sex without her knowledge because as soon as she realised she made him stop.
  - g. On one occasion, her 15 or 16 year old son was in a room with Mr Hunt and when she came back her son had a bloody nose.
  - h. As to the video, posted more than once, she had heard from the police that he found it very funny when asked to remove them.
38. Since the complaint was raised by Ms Wilkins, she too was interviewed, on 3 August, to obtain more information. There she explained how the video had come to her attention. She passed on what she had been told by H about the video and the relationship generally, adding that H had since carried out a full toxicology screening which was all clear, and had also volunteered for random screening from then on. She added a good deal of adverse material of her own about Mr Hunt, presumably gathered from H, i.e.:
- a. that he had been forcibly evicted from a previous property by the police owned by another partner;
  - b. had been in relationships with two other midwives at the hospital and one of them said he often used to film her without her knowledge; and
  - c. the police had a huge file on him.
39. After these interviews the matter was escalated to Area Manager Nick Manning, who wrote to Mr Hunt suspending him and notifying him of the impending investigation. The charges were as follows:
- 1. We have received a complaint from another employer about your behaviour towards one of their members of staff.
  - 2. That you have failed to notify the DFRS in accordance with our disciplinary procedures that you are or were under investigation by the police.
  - 3. That this behaviour is inappropriate and not in accordance with our Core Values
  - 4. That your actions could bring the Service's reputation into disrepute.
40. We were not in fact shown a document setting out these Core Values but they were discussed at the appeal stage. Mr Hunt was represented by a Mr David Chappell who raised them in the course of his submission for that hearing, in the following terms:

Within the Service Core values in place at the time of Mark's discipline investigation

(App J), under the column for "Honesty, Clarity and Accountability", actions listed as unacceptable are.:

- Disregarding Service policies and procedures
- Being dishonest by saying one thing and doing another
- Allowing situations to continue where there is distrust and a bad atmosphere

41. Once again, we note that these broad provisions are not reflected in the disciplinary policy. The four disciplinary allegations are therefore effectively a repetition of the same point, that he failed to notify the Service that he was under investigation by the police.
42. As already noted, he was suspended for 15 months in total, although the Complaints Policy expects that such matters should be resolved within two weeks. During that period Mr Hunt suffered other distressing personal events, including the death of his father and sister. To make matters worse, historic allegations of child abuse had been raised within his family, going back to his childhood, which were then investigated by the police. As a result, Mr Hunt was reluctant to disclose all of the police records he later obtained to his employer. Whether as a result of the delay or these other events, his mental health suffered during this period. After over a year's suspension, in September 2018, Occupational Health decided that he was not fit to work, although he was fit to attend the forthcoming disciplinary hearing. We should add that Mr Hunt has a history of mental difficulties, including PTSD, and needed more regular breaks at times during this hearing when he became emotional.
43. The Investigating Officer, Mr Brooms, is an HR Adviser with Devon County Council. He had an initial briefing meeting with someone from the HR department on 26 September 2017. He could not remember who exactly he met, whether a Karen Harding or a colleague called Audrey, and there is no record of it. As Karen Harding later wrote to Mr Hunt on 18 October to advise him of Mr Broom's appointment, and was involved in other email communications about his case, it seems to us most likely that she was the person concerned. That is significant as she was later one of the members of the disciplinary panel. Her letter repeated the same allegations set out in the suspension letter, although a further two months had passed by then. By then it had already been decided by Mr Manning that this was a Level 3 allegation, i.e. one that involved potential gross misconduct.
44. Mr Brooms was given a pack with the notes of interviews taken with H and Ms Wilkins. No concerns were raised by anyone involved over the extent of intrusion into Mr Hunt's private life, and Mr Brooms proceeded on the basis that it was open to him to explore all aspect of Mr Hunt's behaviour towards H as a disciplinary matter.

45. They met to discuss the allegations on 27 October 2017. Mr Hunt was accompanied by a trade union representative, Mr Scott Young. He was questioned about the main allegations made by H and gave his response. His position was as follows:
- a. It was a turbulent relationship and she would hit him from time to time, including one occasion when he was driving a car, and in the end he had to drive to a police station and report her.
  - b. He denied any assault on her in Egypt but accepted that there had been a fight at the Union Rooms and that the police had been involved. He said that he was acting in self-defence. At the time, he said, they were still together, but that evening was a retirement dinner for a colleague so there was a large group of firefighters present. Unexpectedly she turned up, with a male and a female friend. When he said hello she was hostile and he later noticed that the male (K) was grinning over at him and had his hands mainly on her bottom. Mr Hunt went over to ask if everything was okay and she said yes. Shortly afterwards K was touching her inappropriately again and he went back, at which point K charged at him, pulled his head down and they started to fight. Other firefighters stepped in to separate them and handed K over to the door staff. The police had been called. They asked him to go home – in fact gave him a dispersal order – and he later went back to the police station to give his account. They took no further action. He named the relevant witnesses.
  - c. As to the garage incident, he said that he simply left an Easter Egg for her on the doorstep. This was after they had split up.
  - d. He did accept that there had been an incident with her son, when he had been accused of hitting him and the police were involved. He went to the police station on that occasion too and was told they were not investigating any further.
  - e. As to the video, Mr Hunt accepted that these had been posted from his account, but suggested that H may have done this using an old phone of his that he had left at her house.
46. As well as exploring all of H's allegations, Mr Brooms went on to ask about any other occasions when Mr Hunt was interviewed by or had contact with the police. That led to a discussion of an incident in 2011 when Mr Hunt had been investigated by the police, reported it at work, was suspended for a time and then returned to work when no further action was taken.
47. Following that interview Mr Brooms conducted further interviews with the two witnesses named, and with H and Ms Wilkins. Suffice to say that the tone of the interview with H, in April 2018, was very much more supportive and concerned

than was the case with Mr Hunt. On a number of occasions Mr Brooms finished her sentences, or summarised her concerns for her, inviting to set out all of the detail at her disposal. A number of surprising inconsistencies emerged. She seemed to have forgotten about the Egypt allegation and asked why Mr Hunt was raising it. When asked about her drug test at Derriford she said that the Occupational Health physician had refused to do it, on the basis that it would look bad on her record to have such a test, so she accepted that advice and told Ms Wilkins, who was happy with that explanation.

48. When asked if she had ever hit him, she said no. When the incident when Mr Hunt was driving was raised, she agreed that it had taken place but that Mr Hunt had been asking her to hit him. That seems to us a surprising state of affairs at any time, let alone while driving. However Mr Brooms summarised the situation for her as one in which Mr Hunt was goading her, which she accepted.
49. By then Mr Hunt had also produced social media records showing that she got in touch with him to tell him about the car fire, in the early morning of 18 June 2015, and she told him it had been done by her son – “of course” - who had done similar things before. Clearly therefore there was no basis for her earlier suggestion that this had been done by Mr Hunt, let alone that he had cleverly avoided leaving fingerprints. The fire brigade had attended, made everything safe, and so his sending a picture of Fireman Sam at the end of a concerned and supportive exchange, was less sinister than first suggested. In short, H knew that Mr Hunt was not responsible for this incident but had accused him anyway. This does not seem to have affected the view taken of the credibility of her account.
50. Mr Hunt also explained in his statement that he had been in touch with H when she said that her garage had been burgled and ransacked, although when he went round he did not see much disarray and he pointed out to a police officer who attended that his own £1200 bike had not been taken (Mr Hunt had left a good deal of his personal property at H's house when he moved out.) His view at the time was that she used to make up stories about burglaries or other setbacks so that he would go round to the house and it would revive the relationship.
51. In addition to the social media posts, Mr Hunt obtained and disclosed the police records relating the video incident (p.126). The main item is a single record from an officer who recorded that she had explained the seriousness of posting

I have spoken to offender and explained the seriousness of posting indecent videos. He has agreed to remove the post and assured that no further videos will be posted.

He stated he had more explicit videos of the AP [accused person] but is aware of the seriousness of posting 'revenge porn'. He also stated that a member of his family got into his linked account and uploaded the video, but admitted he was aware of it and had found it amusing.

He has agreed to remove the video and to ensure no further videos are uploaded. Harassment has been explained to him.

At this time there are no offences”

52. The first point to note here is that there was no ongoing police investigation and no criminal offence had been committed. Secondly however, in contrast to the account given by Mr Hunt in his investigatory interview, he did not believe that H had uploaded it herself. And since he was aware of this uploading at the time, he was also responsible and would have known that it was not fair to blame H.
53. This record is supported by another entry from the police disclosure which Mr Hunt obtained (p.423), where the officer records her actions on 7 July 2017 thus:

“There was no revenge porn. The video viewed by police showed a female who appeared naked under a bed sheet, but remained covered. There was no act being performed, she just appeared to be under the influence of something.”
54. This conversation with the officer appears to have been relayed back to H and formed the basis of her complaint that he laughed about it. Mr Hunt explained this at his disciplinary hearing by saying in effect that it was ironic laughter, reflecting exasperation at the lengths to which she would go to get him into trouble.
55. Mr Brooms was not happy however that only been partial and redacted police records had been provided, despite the apparently final and conclusive nature of these statements. It seems clear that Ms Harding was also involved in collecting evidence against Mr Hunt since she wrote to Devon and Cornwall police on 28 June 18 with a request for disclosure (p.116) of all convictions or cautions against Mr Hunt, and details of any investigations to which he was subject. It is difficult to see any legal justification for such a request, and it was refused. Ms Harding sought to justify it on the basis that Mr Hunt worked with children and vulnerable adults, that they had received a complaint from a senior manager in the NHS, and that the allegation was of a serious nature and was necessary for their internal investigation.
56. Following that refusal Mr Brooms submitted a lengthy Investigation Report, on 3 August 2018, after over a year of suspension. Despite what appear to us to be obvious inconsistencies and implausible aspects to H’s account, it appears to have been preferred to that of Mr Hunt. The position is not clear however. There are, for example, no clear findings about what happened in Egypt, or whether Mr Hunt was responsible for the car fire, or ransacking the garage. The factual conclusions are essentially limited to stating that Mr Hunt uploaded the video, and that he had been or was being investigated by the police over a number of concerns (p.383).
57. That led to the appointment of a disciplinary hearing panel comprising Ms Harding and Mr Gerald Taylor. The allegations for the disciplinary hearing were re-cast substantially from the Investigation Report, although were still far from clear. They

were as follows:

1. That you have acted grossly inappropriately towards H and her son that may be considered controlling, coercive and threatening behaviour.

That you have physically assaulted H, her son and her friend.

That you have disclosed private images, without consent, with the intent to cause H distress.

This allegation is not exhaustive and full details are contained in the disciplinary pack.

2. That you failed to notify DSFRS, in accordance with our Disciplinary procedures, that you were under investigation by the Police.

3. That your behaviour was inappropriate and not in accordance with DSFRS Core Values.

4. That your actions could bring DSFRS in to serious disrepute.

58. Hence, the first and non-exhaustive allegation covered the main factual issues, though by this stage there was no specific mention of strangling or assaulting H in Egypt, of starting the car fire or of ransacking the garage. Even the fight in the Union Rooms is not mentioned specifically, although there is mention of an assault on her friend. The second point concerned failure to notify the Fire Service of police involvement, and the last two presented the same allegations under the guise of bringing the Fire Service into disrepute and breaching core values.
59. As already noted, the hearing took place over four days, and the transcript occupies hundreds of pages. Given our overall view of the inappropriateness of these enquiries we will only attempt a broad outline of events.
60. An early skirmish was over the vagueness of the allegations. Mr Taylor maintained that providing a non-exhaustive list and referring Mr Hunt to the disciplinary pack was sufficient. For our part, it is not clear whether the intention of the hearing was to go into events in Egypt etc, or not, and in fact some entirely points were raised.
61. The main new development at the hearing was the attendance of Mr Hunt's sister, Angela. She had provided a statement to the effect that she was the one who posted the video online. That of course matches the account given to the police officer at the time. However, she had refused to be interviewed about this before the hearing, and so gave her explanation for the first time at the hearing, under questioning from Mr Brooms, who presented the management case.
62. Her account of doing so is convoluted and difficult to follow. It may be that she was nervous under questioning. It may be that she was seeking to take the blame

on behalf of her brother. That is certainly the view that Mr Taylor and Ms Harding came to after hearing from her. Our overall view is that the original record made by the police officer is likely to be correct, i.e. that it was by a family member, i.e. his sister. Her statement or letter explained that she also worked at Derriford hospital and knew H, and was fed up at H's behaviour in continually harassing her brother, even after the relationship ended. The fact is that this video was posted more than once, in April and July 2017, about two years after the end of their relationship. No motive for the timing was ever made clear to us, though it is at least plausible that some event at work between Angela and H was also a factor. Be that as it may, even in the original police record, Mr Hunt accepted that he knew that it had been posted, and by extension he had done nothing to stop it, so he must bear the responsibility too for it happening. We accept the conclusion therefore that it was his fault.

63. A feature of the process was the involvement of Ms Harding. She did not give evidence before us, although she attended the hearing on the second day. Mr Taylor told us repeatedly that he took full responsibility for the decision, but the fact is that it was a shared decision, and was described as such during the hearing, and Ms Harding had been closely involved in commissioning the investigation and attempting to obtain evidence against Mr Hunt. She was the appointed Case Manager. For example (p.90) she emailed Mr Brooms on 4 May 2019 to ask if he was aware that Mr Hunt had uploaded the video whilst on duty, a view she formed from her own enquiries and through IT. She also emailed to note that Mr Hunt had taken part in an event attended by Jeremy Corbyn (reported in the local paper) in his capacity as a trade union official while suspended, and had a beard at the time, in breach of regulations. For the hearing itself, she had prepared her own detailed list of questions for Mr Hunt, which were somewhat accusatory. Then afterwards she drafted and typed up the outcome statement for Mr Taylor. Later still, she was invited to a meeting with Mr Taylor and the appeal manager, Mr Bond, for which she submitted her comments on the appeal case presented, although these emailed comments were not disclosed by the Fire Service.
64. One new issue that arose was from the social media exchanges between him and H was the use of Tramadol, a medication available on prescription but which she was able to obtain for him. Mr Taylor questioned Mr Hunt at length about this, and where H was getting them from. Mr Hunt explained that it was not from Derriford but from a previous hospital in London where she had worked. Considerable doubt was expressed about her working there, and then Mr Taylor wanted to know whether this drug was for use in their sex lives.
65. The hearing was held off site, out of consideration for Mr Hunt. As we have mentioned, his mental health had suffered considerably during the long suspension. It was originally arranged to take place over two days but a third day was added to complete all these enquiries, and then the decision was given on the

final day. Mr Hunt was accompanied by his union representative Mr Young throughout and the outcome was read to them on the final day.

66. As with the Investigation Report, no clear factual findings were made as to who was telling the truth about the underlying events in question. Indeed, the panel appear to have confined themselves to the undisputed or admitted events, and then concluded that they amounted to gross misconduct.
67. The allegation of controlling and coercive behaviour was upheld on narrow grounds. It was not accepted that Mr Hunt ever hit or assaulted H. There was, they held, a fight between Mr Hunt and the man in the Union Rooms, which led to a police investigation in which Mark was a suspect. Although this was a work-related event, attended by numerous firefighters, no findings were made about who was at fault over this incident and a number of witnesses were not spoken to about it. Similarly they concluded that there was “an incident” between Mr Hunt and H’s son, which led to the son having a bloody nose, a police investigation and that Mr Hunt was a suspect. Mr Hunt’s case was of course that this was accidental, and again no conclusion appears to have been reached on that point. Mr Hunt was however found responsible for uploading the video, or at least for lax computer security, which possibly allowed other members of his family to access the video. These incidents were therefore relied on to show the pattern of behaviour.
68. Much greater emphasis was placed at this stage on his failure to disclose his involvement with the police. Adverse inferences were drawn from his failure to disclose his entire police file, and on that basis that he admitted being cautioned before being interviewed. That was considered sufficient to satisfy the second (disclosure) allegation. As before, this was then also categorised as a breach of core values and bringing the Service into disrepute, and so collectively amounted to gross misconduct.
69. Mr Hunt then appealed this decision, with considerable assistance from his union. Mr Chappell took over the reins at this stage and submitted a detailed critique of the decision making process. The main points raised in his submissions (p.214) were as follows:
  - a. Mr Hunt had admitted responsibility for the video, but this was not a criminal act;
  - b. the matter was closed by the police before a complaint was ever received;
  - c. the investigation had ‘strayed unreasonably from the realms of those appropriate to consider for formal discipline’
  - d. there had been a ‘growing quagmire of unsubstantiated allegations’;



- e. none of these concerned his work as a firefighter;
  - f. there were clear indications early on that various allegations were flawed, biased, or simply untrue;
  - g. too much had been read into the original police record which referred to him in passing as an offender;
  - h. wording such as 'non-exhaustive' in the allegations was an example of the unfair and vague allegations which had been raised;
  - i. even if Mr Hunt had failed to disclose the full extent of police involvement, that was not sufficient for a level three investigation, particularly given that even conviction does not mean an automatic dismissal;
  - j. nor was it was sufficient to resort to core values to justify dismissal;
  - k. his state of mind and mental health had not been properly considered; and
  - l. in any event dismissal was not appropriate on any view for someone with almost 25 years' service and no previous discipline sanction.
70. All of these points appear to us to have real force. They were sent to the appeal officer, Mr Bond, an Assistant Chief Fire Officer. He also had a meeting with Mr Taylor and Ms Harding on 15 March 2018, and received her (undisclosed) comments on Mr Chappell's points. That hearing was then conducted as a review rather than a re-hearing, and since the findings of the disciplinary hearing were undisturbed we do not need to explore that process to any great extent. Mr Bond, in his witness statement, described Mr Hunt as contradictory throughout and 'less than honest in his approach to providing us with evidence". That appears to be a reference to failing to provide a full copy of his police records. Mr Bond was very clear that being interviewed under caution should have been reported, and felt that having 25 years' service made no difference in the circumstances. The dismissal was upheld.

## **Conclusions**

### *Unfair Dismissal*

71. The first and main complaint here is of unfair dismissal. This important right is set out in s.94 Employment Rights Act 1996 (ERA), and by s.98, the employer has first to show a fair reason for the dismissal. In this case the reason relied on is conduct, alternatively 'some other substantial reason', although Ms White placed no stress on this alternative; she blamed the breakdown of the relationship of trust and confidence squarely on the conduct of Mr Hunt.
72. If conduct is shown to be the reason then by s.98(4)

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

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case.

73. Clearly, as a large, public-sector organisation, the highest standards of fairness are to be expected here. Indeed, extra stringency is required where the outcome is career-ending and involves allegations of criminal or immoral behaviour: **Turner v West Midland Trains Ltd [2013] IRLR 107**.
74. Before considering the normal approach taken to the question of fairness it is important to consider the scope of 'conduct' under this Act, which is in the context of the employment relationship. As long ago as 1983 the Employment Appeal Tribunal held in **Thomson v Alloa Motor Company Ltd** 1983 IRLR 403, EAT, that 'conduct' within the meaning of S.98(2)(b) ERA means 'actings of such a nature, whether done in the course of employment or outwith it, that reflect in some way upon the employer-employee relationship'. That conforms with the disciplinary policy in this case, which allows for dismissal where such conduct brings the Fire Service into serious disrepute.
75. In **Pay v Lancashire Probation Service** [2004] IRLR 129 the Employment Appeal Tribunal held that when considering 'the circumstances' of the case, under section 98(4), that included human rights considerations under Articles 8 and 10 ECHR, as set out above - in short, respect for Mr Hunt's private and family life. They held that "a person's reasonable expectations as to privacy may be a significant, though not necessarily conclusive, factor."
76. A more similar recent case on the facts is **CJD v Royal Bank of Scotland** 2014 IRLR 25, Ct Sess (Inner House). There, RBS dismissed the claimant after he had a domestic altercation with his girlfriend, another RBS employee, which resulted in him being charged with assault and breach of the peace. The dismissing officer took the view that the claimant should be dismissed because he presented a risk to the employer, its employees and its property. According to the Court however, it was difficult to see how the action of an employee, pushing another person onto a sofa in a domestic situation could be such as to reflect upon the relationship between that employee and his employer. That is very much our view of this case. At least in the above case, the victim was a fellow employee, but even that feature is missing from Mr Hunt's case.
77. When asked about the damage to the Fire Service's reputation, Mr Taylor stressed

that a complaint had been made by the NHS, and so had to be taken seriously. The Fire Service, he said, was “not a biscuit factory.” Its relationship with another emergency service was important. But that complaint was solely about the video being posted online, and had already been dealt with by the police (another emergency service.) It is hard to see how the reputation of the Fire Service was damaged by circumstances outside work which did not amount to a crime.

78. Even though other allegations followed, there was no obligation on the Fire Service to provide a running commentary on them to the NHS, and in fact, as Mr Taylor accepted, no report was ever made to the NHS or even to H or Ms Wilkins about the outcome of the disciplinary process. This was not therefore, in our view conduct which affected the reputation of the Fire Service at all. It was a serious interference with Mr Hunt’s private life, in breach of Article 8, since there was no legitimate public interest to outweigh it. In our view it was not ‘conduct’ within the meaning of the Employment Rights Act, and so the dismissal was unfair on that simple basis.
79. If we are wrong about that, there are a number of serious concerns about the way in which the disciplinary process was handled, as set out in the submissions made by Mr Chappell and quoted above. We endorse them all and so need not repeat them. One point which deserves additional emphasis however is the extraordinary delay, and the equally lengthy suspension. That had a serious and unsurprising effect on Mr Hunt’s mental health.
80. Further, the involvement of Ms Karen Harding, at every stage from investigation to appeal, is concerning. She appears to have had a hand in conducting the investigation, seeking police disclosure, shaping the allegations (which concern stale events from years earlier, in disregard of the complaints policy) writing them up and defending them for the appeal.
81. There was also the disparity in approach taken between him and H. His version of events was treated sceptically from the outset, whereas she was encouraged to enlarge on her allegations without being probed on the obvious inconsistencies.
82. Further, not only were witnesses were not interviewed about the incident in the Union Rooms, H’s son was not interviewed about the allegation of assault on him. He was over 18 at the time of the investigation. He may well have declined to give evidence, but he was not asked, and given the seriousness of the allegation that appears a significant unfairness to Mr Hunt.
83. Overall therefore, and for all these reasons, there were serious failing in the investigation and decision-making process, such as to make this an unfair dismissal, even if the allegations were appropriate for the Fire Service to have investigated. Dismissal was in our view was outside the range of reasonable responses. For completeness, the belief in his guilt was not a reasonable one, and not formed after as much investigation as was reasonable in the

circumstances, but our main view is that these were all events unconnected with his work.

84. Given that wholesale failure, and the numerous other concerns, we feel that this case is appropriate for the maximum 25% uplift for failure to comply with the ACAS Code of Practice. As that Code provides, such concerns could have been resolved informally to begin with. The Code provides for a written disciplinary policy to ensure consistency, but here that policy, and the complaint's policy, were departed from in a wholesale fashion. No attention was paid, for example, to the stated tests for gross misconduct.
85. Given our view that there was no relevant 'conduct' in question for the purposes of the Employment Rights Act, there was no basis to dismiss and so no basis to discount any award of compensation on **Polkey** grounds – i.e. in the basis that a fairer process would still have resulted in dismissal. For the same reason no contributory fault is apparent.
86. For completeness, we cannot see that reliance on 'some other substantial reason' adds anything to the respondent's case, or that any breakdown in the working relationship was down to relevant actions by Mr Hunt.

***Direct discrimination on grounds of sex***

87. Turning to the further allegation of discrimination, the test under section 13 Equality Act is as follows:
  - (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
88. The question here is whether the Fire Service, in dismissing him, treated him *less favourably* than it treated or would have treated someone else in the same circumstances apart from his sex. There is a particular provision at paragraph 136 dealing with the burden of proof:
  - (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
  - (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
89. This was considered most recently by the Court of Appeal in **Efobi v Royal Mail Group** [2021] IRLR 811 which cautioned against an overly legal or technical approach. This is not a case in which that is required. As long established in the case of **Madarrassy v Nomura** [2007] ICR 867, it is not enough a claimant to show that he had a protected characteristic (sex) and was dismissed – to shift the burden, "something more" is required. Here, that 'something more' is evident from the disparity in treatment given to the accounts provided by Mr Hunt and by H.

(The relevant comparator is of course a female firefighter in the same circumstances, but the comparison is still instructive.) There are a number of features to this. Firstly, there was the difference in approach taken in their interviews. Secondly, the failure to explore the obvious inconsistencies or improbably features in her account. But beyond that, the respondent has sought to set this in a setting of domestic abuse from the outset. Even at an early stage the video allegation was said to meet the NHS definition of domestic violence, even though it occurred long after the relationship ended. The disciplinary allegations were then cast in the language of domestic abuse, i.e. of a pattern of controlling or coercive behaviour. Mr Hunt's own claims that he was the victim of domestic abuse from H were effectively ignored, even though she accepted when asked (and only then) that she had been hitting him in the face as he drove a car, and then it was categorized as a situation of him goading her. The context of the relationship, which he had ended, was not considered either. This view taken of matters is not gender-neutral. The normal pattern of domestic abuse cases, though far from all, is of male violence and control against a woman. That, in our view, contributed to the accusatory tone taken towards Mr Hunt throughout, and illustrates that the disparity of treatment reflected those stereotypical assumptions about male and female roles. We therefore accept that Mr Hunt was treated less favourably than a female firefighter in the same circumstances would have been treated, and so the difference in treatment was because of sex.

90. For all the above reasons therefore the claim is upheld.

Employment Judge Fowell

Date 13 December 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON  
07 January 2022 By Mr J McCormick

FOR THE TRIBUNAL OFFICE