EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr. Lloyd Davies	v	**Staffordshire Fire & Rescue Service**

Heard at: **Birmingham via CVP** **On:** **28, 29 30 June 2022 & 25 & 26 October 2022 & in chambers on 17 & 18 November 2022**

Before: **Employment Judge Wedderspoon**

Members : **Ms. S. Campbell**

Dr. G. Hammersley

Representation:

Claimant: **Miss. Snocken, Counsel**

Respondents: **Mr. Wallace, Counsel**

JUDGMENT

1. The claim of unfair dismissal is not well founded and is dismissed.
2. The claim for part time workers discrimination is not well founded and is dismissed.

REASONS

3. By claim form dated 19 February 2021 the claimant brought complaints of unfair dismissal and part time workers discrimination.

Claims and Issues

4. The agreed list of issues for determination by the Tribunal are as follows :-

Unfair Dismissal -section 98 and 111 of the Employment Rights Act 1996
(1)It is admitted that the claimant was dismissed;
(2)What was the principal reason for the claimant's dismissal and was it potentially fair reason falling within section 98 (2) or section 98 (1)(b) of the ERA 1996;
(3)In the circumstances (including the size and administrative resources of the employer's undertaking) did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the claimant in accordance with equity and the substantial merits of the case?
(a)Did the respondent believe the claimant guilty of misconduct;

(b)Did the respondent have in mind reasonable grounds upon which to sustain that belief;
(c)At the stage at which that belief was formed on those grounds had it carried out as much investigation into the matter as was reasonable in all the circumstances?
(d)In particular the claimant alleges that the following make the dismissal unfair;
(i)sanction of dismissal falling outside the band of reasonable responses;
(ii)inconsistency of treatment;
(iii)dismissal being a pre-determined outcome;
(iv)a fair process not being followed;
(v)failing to properly or adequately consider or act upon the claimant's concerns and grievance raised during the disciplinary process;
(vi)failing to conduct a sufficient or appropriate investigation;
(vii)insufficient basis for findings made at both disciplinary and appeal stage and/or unreasonable conclusions being reached;
(viii)taking into account irrelevant information;
(ix)failing to take sufficiently into account all relevant information;
(x)failing to adequately take into account matters of mitigation and/or claimant's long service;
(xi)unreasonable to have found gross misconduct rather than misconduct at disciplinary stage and that it still justified dismissal albeit on notice at the appeal stage;
(xii)insufficient warning and/or indication that such behaviour would be regarded as misconduct justifying dismissal.
(4)If the claimant was unfairly dismissed should there be any reduction in compensation due to
(a)Polkey;
(b)Contributory conduct (under section 122(2) and s.123(6) ERA 1996).

<u>Less Favourable Treatment of Part time Worker per the Part time Workers (Prevention of Less favourable Treatment) Regulations 2000 (PTW 2000) regulations 5 and 8</u>

(5)The following treatment is admitted :
(a)the respondent subjected the claimant to a disciplinary process, including suspension, investigation and disciplinary hearing;
(b)the respondent dismissed the claimant.
(6)If so did such treatment amount to a detriment
(7)Are the following comparable full time workers ?
(a)CM Darren Jones
(b)CM Jaswender Sokhal
(c)WM Thomas Harrison
(8)If so was the claimant treated less favourably by reason of the above treatment than the comparable full-time worker(s) were?
(9)Was such treatment on the ground that the claimant was a part time worker?
(10)Was such treatment justified on objective grounds? The respondent relies upon the legitimate aim of the need to uphold the respondent's values by ensuring that employees in positions of management responsibility set an example to other members of staff by demonstrating appropriate behaviours and challenging inappropriate behaviours
(a)Is the objective sufficiently important to justify limiting a fundamental right;
(b)Is the measure rationally connected to the objective

(c)Are the means chosen no more than is reasonably necessary to accomplish the objective; and
(d)Is the impact of the rights infringement disproportionate to the likely benefit of the impugned measure?

The hearing

5. The Tribunal was provided with a 571 page bundle. The Tribunal requested that the parties provide an agreed list of issues before hearing the evidence. The respondent relied upon the evidence of Dermot Hogan, Group Manager and Head of the Protect and Prevent Department (investigator); Howard Watts, Director of Prevent and Protect (dismissing officer); and Rob Barber, Deputy Chief Fire Officer (appeal officer). The claimant relied upon his own evidence and the evidence of Andrew Fox Hewitt, part time fire fighter with the respondent; Craig Proffitt, part time fire fighter and Robert Moss, FBU representative.

6. The case went part heard because the time estimate was far too short. The case was re-listed for a further two days to complete evidence and submissions. During deliberations on the second day of the part heard case, the Tribunal requested the parties to provide further submissions on the issue of inconsistent treatment. It was too late to conclude deliberations and deliberations took place on 17 November 2022.

7. Prior to hearing the evidence, the Tribunal read all of the witness statements and documents referred to therein.

Facts

8. The claimant was employed by the respondent as a retained crew manager (CM) and firefighter at Newcastle Community Fire Station in Newcastle under Lyme having been a retained firefighter since May 2008 and a crew manager since 2011 (temporary) and on a substantive basis from 1 November 2017. He worked part-time performing a mixture of weekly drill obligations and on-call duties. He was dismissed with effect on 30 September 2020. He remains in employment in a management position with the Post Office. In the context of his management position with the respondent, the claimant was required to implement the respondent's policies.

9. During the claimant's twelve years of service with the respondent, he received one informal warning for an unrelated matter which expired on 17 October 2019. He received regular appraisals and no concerns were raised with him about his conduct.

10. Pursuant to the claimant's conditions, at paragraph 2.17, all employees had direct responsibility to ensure that harassment and bullying of colleagues or members of the public in any form did not occur. In respect of conduct it was stated that employees were expected to maintain a high standard of conduct and discipline both in and out of work and must take care to uphold the good reputation and prestige of SFRS. The paragraph also stated that failure to maintain these standards of behaviour may result in action being taken under the disciplinary or performance and capability procedure as appropriate. Standards of conduct for employees were laid down in the code of conduct,

leadership message cultural framework and discipline procedure as appropriate (page 85). The claimant as an experienced firefighter and manager understood the appropriate standards of behaviour and that homophobic comments were unacceptable and in breach of the respondent's high standards of conduct. By reason of the claimant's managerial position the claimant was aware that he should "call out" unacceptable conduct.

11. The respondent had a Social Media Policy (pages 120). It described social media as "*online interaction and creation of content allowing users to share opinions and information. Social media encompasses many variations of online media, including blogs and micro-blogs (twitter), facebook, video and image sharing sites such as snapchat..*" Although not expressly referred to, the Tribunal finds (and in fact the parties agreed) WhatsApp messaging is covered by the policy.

12. A private WhatsApp group was formed consisting of the orange watch team for mostly social purposes and the membership also consisted of former firefighters namely civilians. Over lock down the purpose of the WhatsApp group evolved so that it was used significantly for work matters including the scheduling of shifts.

13. In respect of personal/professional accounts the respondent's social media policy deals with this at paragraph 4 of page 122 which stated *"it is important that staff do not feel like they are being told what they can do in their own time but equally its important to have guidelines as to what may impact on the reputation of the service. This is especially important for those who have personal/professional accounts where a combination of personal and work related content is shared…If you identify yourself as an employee volunteer or can be associated with SFRS either through workplace information or by uploading images of yourself in uniform you must ensure that personal published information does not bring SFRS into disrepute or cause distress or offence to any individual. The account holder should be aware that by association any inappropriate use of social media could compromise the organisation eg its reputation, effectiveness or security and bring the service into disrepute and cause distress or offence. ..Do not comment in a personal capacity on organisational matters. Under no circumstances should offensive comments be made about the service, members or colleagues on social networking sites. This may amount to cyber bullying or defamation. "*

14. The Tribunal found it should have been clear to the claimant as a manager cognisant of the conduct expected of him and others that offensive comments on the WhatsApp messaging service about the service, or members or colleagues were unacceptable.

15. The respondent's disciplinary, policy and procedure included examples of gross misconduct as unlawful discrimination or harassment, a serious breach of service rules/procedures and a serious breach of trust and confidence. The claimant was familiar with this policy.

16. On 24 April 2020 a bullying and harassment complaint was brought by Jake Humphreys against the claimant (along with others on orange watch). The

claimant was interviewed by Mr.Watts on 10 June 2020 (page 172-182) about the complaint as well as crewing policy, uniform policy and risk assessments. He was not asked about WhatsApp messages or shown any. The claimant raised a concern about the process; he felt it should not have been dealt with via the formal disciplinary rote rather than focusing on development and guidance to ensure that such behaviour did not occur again. From 11 June 2020 the claimant was absent from work due to stress.

17. On 17 July 2020 the claimant received a letter from the respondent which informed him that the bullying and harassment case was concluded and it was found there was no case to answer (see page 266). Mr. Weaver also informed the claimant that other areas of concern had been explored in the course of their meeting and information had been provided to GM Dermot Hogan.

18. An investigation report was produced on 26 June 2020 (page 214). The respondent determined that there was subtle bullying culture led by the claimant and Mr. Fox Hewitt. It also concluded that the rostering system employed due to COVID 19 was questionable and potentially unfair; there was overwhelming and clear evidence that the Watch Management team was unwilling to follow direction from the service in respect of the COVID 19 rostering system and challenging the management and leadership of the station and that the claimant and Mr. Fox Hewitt showed an adversarial attitude to the service.

19. On 26 June 2020 the claimant was informed by telephone he was suspended along with other colleagues (all four from orange watch and who were not full time). Ian Housely telephoned the claimant on 26 June 2020 because the claimant had child care issues and was unable to attend the station. Mr. Housely informed the claimant he was to be suspended pending a disciplinary investigation. He was informed that *"we have received evidence that your leadership style has not been in keeping with the cultural framework which may breach trust and confidence" and "new evidence had come to light."* A suspension letter dated 26 June 2020 (page 236) was received about 2 weeks containing only one allegation *"we have received evidence that your leadership style has not been in keeping with the cultural framework which may breach trust and confidence.* It further stated *"Your suspension from work is not intended as a punishment nor does it imply guilt or blame."*

20. On 26 June 2020 Dermot Hogan was requested by H.R. to undertake a disciplinary investigation into three allegations (1) the claimant being aware of content posted in a WhatsApp group which might be deemed inappropriate, offensive and against the respondent's cultural framework. It was targeted at colleagues and managers within the respondent. The claimant had not addressed or challenged this behaviour (2) the claimant had not been open and honest in response to questioning during the interview on 10 June 2020 (3) the claimant had taken part in a co-ordinated and deliberate series of actions alongside other members of orange watch to prevent or delay the implementation of the respondent's policies. The claimant was not made aware of all three reasons at the time of his suspension.

21. The bullying and harassment report was actually finalised on 7 July 2020 p.244 by Mr. Weaver. The respondent was concerned about the content of messages in the orange watch WhatsApp group, screenshots of which had been provided by Jake Humphreys in the course of the bullying and harassment investigation. There is a dispute of evidence as to when the WhatsApp messages were provided by Jake Humphreys. The claimant made a great deal in his evidence about when the WhatsApp messages became available and why he was not asked about them in the first investigation. The Tribunal finds on the balance of probabilities the WhatsApp messages were received sometime after 10 June 2020 when the claimant was interviewed. The Tribunal finds (and the claimant agreed) the respondent was entitled to investigate the WhatsApp messages and the Tribunal finds the respondent was so entitled once it formed the view they were of significance.

22. The claimant's evidence was that the complaint against him was brought maliciously and the respondent failed to look into this (pursuant to its own Bullying and Harassment Policy section 10) or in fact failed to consider the ongoing relationship between the claimant and the complainant; he stated this led him to believe the dismissal decision against him was predetermined. The Tribunal did not accept this. The Tribunal found it was reasonable for the employer to fully investigate its concerns about the WhatsApp messages before embarking on any management of the relationships in the workplace. Further the finding of the report was that there was some "subtle" bullying; therefore the Tribunal does not conclude on the information available to it that the complaint was malicious and baseless or on this that the dismissal was predetermined.

23. The claimant was invited to an investigatory meeting by letter dated 23 July 2020. It did not include specific allegations. On 23 July 2020 Mr. Hogan met with the claimant and his trade union representative. At the commencement of the meeting Mr. Hogan the claimant was informed again that the allegation he was being investigated for was *"we have received evidence that your leadership style has not been in keeping with the cultural framework which may breach trust and confidence."*. Mr. Hogan investigated all four individuals who were suspended. He did not share the contents of the other individuals' investigations with the claimant or others.

24. The claimant took a defiant stance in respect of the messages. He stated that the Watch WhatsApp group contained all members of Orange Watch and several former members of Orange Watch. He stated that the WhatsApp messages should not have been obtained by the respondent in the first place and could not be used as part of the disciplinary process as the group was private and not work-related. The claimant accepted that it was used as a tool for sharing information related to work. The claimant was asked about his non challenge of certain comments. The claimant refused to answer any questions about the content of the messages and said that the WhatsApp messages were flippant and made in a private encrypted WhatsApp group; further the claimant relied in his evidence upon paragraph 5.5 of the social media policy which states that he does not need to get involved or respond (p.124). The Tribunal noted that the WhatsApp group consisted of serving and non-serving officers; it

had evolved into a professional/work media site so that paragraph 5 at page 124 did not appear to the Tribunal to be applicable in these circumstances. The claimant stated in his evidence that the respondent should have been mindful of the pandemic which would have caused anxiety to the team. Watt's evidence in cross examination is that this was taken into account.

25. The claimant accepted that he had seen the WhatsApp messages but that the messages were in private time and in respect of the reference made by Adam Parry to fudge packers the claimant said "it was just a phrase" and "if I heard it here I'd tell them don't" and said it was a "flippant comment." The claimant agreed that the comments were inappropriate and could be viewed as offensive. He disputed there was a co-ordinated approach to submit grievances. In respect of the change to reduce the maximum crewing number to 5 on all appliances and rostered the on call numbers to six, Mr. Hogan found that the claimant was an active participant in the conversation and the tone and content of the conversation is promoting and advocating to not implement the change and to co-ordinate a set of individual responses and grievances to delay or prevent the implementation. The claimant stated that the comments may have been due to frustrations relating to ongoing concerns of the watch.

26. The claimant was asked about the crewing arrangements. He said he had relied an email about rostering 5 people due to covid. Historically has rostered 9. The claimant and Andy Hewitt, claimant and Darren Jones agreed a way forward and Andy Bourne agreed it. He admitted that he did not roster down as instructed (p.269-270).

27. Mr. Hogan considered WhatsApp messages at pages 500 to 524 and the notes of Mr. Weaver's interview with the claimant on 10 June 2020 as part of the bullying and harassment investigation.

28. The relevant passages of the WhatsApp messages are as follows

Andy Hewitt
Don't shoot the messenger with immediate effect the service have said we (Newcastle orange) are only allowed to roster to 5 and turn out with 5. Burslem are allowed 7 and Hanley 6.
..Lloyd and Daz will tell you I have sent an email with a number of points questions and challenges in it as this is to be frank totally out of order. The rest will have to be you lot as I'm up to here with it, burslem and Hanley take the piss and get away with it. I'm done.

Butt
Fair enough mate. Understandable with these stupid fuckers in charge

Claimant
Not to seem like the troublemaker here, but I don't think we should be adhering to this until we've at least had some sort of rationale as to the reason behind this. And where do we stand from a union point of view. Surely this is a change of policy and has there been any consultation between the brigade and the union, and then between the union and its members

Andy Hewitt
Fill yer boots

Claimant
I'll email him when next down there. Its already a shit situation with people losing money on there primary jobs but we are still providing our cover and putting extra on the maximize availability and this is the thanks you get. I understand social contact needs to be minimal but it does feel like a kick in the balls

Butt
Sorry but is 5 for the future as well not just for social distancing

Claimant
I wouldn't be surprised if it gets in it would be permanent hence why we should battle this as much as we can

Proff
Can they legally do this without consultant ? Surely not???

Claimant
Never known a place like it. But we need start firing off some individual grievances to find out what they're playing at. Can't we start by putting in an official disagreement?

Adam Parry
Cunts fucking useless bunch of over payed fudge packers

Claimant
So use your words and put that into so.ething a bit more official. I will be next time I'm down there

Adam Parry
Oh I will be mate

Andy Hewitt
The decision was made by Ian Howsley

Claimant
But surely you can't just make a decision like that?!

Proff
Like I said though Andy, can they legally do it?

Andy Hewitt
You can until challenged

Andy Hewitt
…ive already asked rich Williams have Stffordshire Fbu been consulted (which is a statutory requirement) and has he agreed to it. Waiting for an answer..

Claimant
There is a document that came out when all this rostering started (not sure if it was with the gold plated Roy daniels pay deal) that said Newcastle would be rostered at 9 and it also stated our ratio of pay. Need to dig that out

Andy Hewitt
Ultimately it is for the grievance procedure to inform the employer we are not happy. I intend to about their lack of openness, transparency and honesty (know where have we heard those key words of yes the cultural framework) when making this decision and the decision remove the welfare unit.

Claimant
So if a grievances challenges a change of policy am I right in saying the status quo remains until the grievance is heard and resolved

Andy Hewitt
Yes that's correct
Claimant
So lets get the grievances in and see what happens

Proff
..the number of rostered personnel who are not required to remain available says in the policy 6

Claimant
Boom
Go on doom boy

Andy Hewitt
A couple need to run that argument and quote policy but z couple need to state we had our rostering numbers protected from organisational change which is 9. They can try and argue otherwise but tacit agreement is evident by way of established custom and practice without challenge therefore now notorious within the contract

Butt
Right I'm happy to fire in obviously. Can I go with using words from the cultural framework against them? And I promise not to use the words mother fucker

Andy Hewitt
Yes you can say that as staff you put a lot of time and effort into setting out why the welfare vehicle would be effective, efficient and value for money based at Newcastle and submitted a business case. However the vehicle was removed without justification but the watch were told the rostering numbers would not be detrimented. This goes against being transparent, open and honest and doing the right thing…I'm going to tell them I want the hearing conducted within 7 days….I don't want to come into unnecessary contact with any of them

Butt

Can I send it from personal email as not got works on my phone

Andy Hewitt
Yes just ask that a response is sent electronically to both your personal email address and your work email address

Claimant
Shall we asked the question “is this a temporary measure due to the covid outbreak” before we start firing in. Or do we just get out head down and go for it??

Andy Hewitt
I think we all need to complain about the substantive issue..Put a complaint in Jake to Andy Bourne, others are having their say, it’s bloody ridiculous..I suggest you write to the SM

Jas Blue Watch
OK mate. I don’t mean to make trouble.Just keep you informed if something comes out. I will always try to look after our FBU members and then maybe the others

29. Mr. Hogan also considered comments of Mark Walchester (contained in his email on 12 August 2020 page 294) about the use of kit bags. Mr. Hogan also became aware that Brian Moss, Watch Manager had communicated with the claimant and Mr. Fox Hewitt crewing arrangements at Newcastle Fire Station during the COVID 19 pandemic. The crewing arrangements involved restricted crewing numbers in response to Government guidance on social distancing to limit the spread of COVID 19 and protect both staff and in public. Mr. Hogan spoke to him on 31 July 2020; Mr. Moss confirmed he told the claimant and Mr. Fox Hewitt there was to be no change to the rostering of 9.

30. Mr. Hogan produced an investigation report dated 19 August 2020 at pages 296-310. In his report he stated the claimant had not challenged in line with the expectation of his role as a crew manager offensive (and a homophobic) comments. He suggested that this might be considered conduct which contravenes the cultural message and framework and the values of the service and could be considered a breach of trust and confidence. The claimant’s team took 35 days to implement the policy change directed by the service as a mitigating action in light of the pandemic. He described the whatsapp messages as demonstrating a co-ordinated and adversarial approach to challenging the changes implemented and is reflected in the emails and grievances subsequently submitted. The actions of the claimant were not in keeping with the cultural framework and services values.

31. Mr. Hogan did review the appropriateness of the suspension of the claimant but did not make any contemporaneous record of this.

32. On 13 August 2020 page 329 the claimant raised a number of concerns about the harassment and bullying investigation. Gemma Derrick informed the claimant that as his concerns were about the disciplinary process, he should

raise them in the appeals procedure contained in the disciplinary procedure (p.328).

33. On 28 August 2020 the claimant was invited to a disciplinary hearing. The invitation included three specific allegations page 311. These were :-
(1)You were aware of content posted in the whatsapp group which may deem to be inappropriate, offensive and against the cultural framework. It is targeted at colleagues and managers within the service. You did not address or challenge this behaviour in line with the expectations of your role as a member of the service management;
(2)You have not been open and honest in response to questioning during interview which may fall short of the expectation within the cultural framework and individual responsibility to cooperate with an investigation conducted by the service. This brings into question the trust and confidence between you and the service;
(3)You have taken part in a coordinated and deliberate services of actions alongside other members of orange watch to prevent or delay the implementation of a reasonable change of policy.
What they were going to consider p.312

34. The claimant placed significance in his evidence on the fact that the allegations changed from those in his suspension letter. The Tribunal determined that this was not of great significance because in the course of a disciplinary investigation, allegations can be fine tuned once all the information has been received and analysed. By the time of the disciplinary hearing the claimant was aware of the allegations and produced a substantial statement of case in his defence; he was not disadvantaged.

35. The claimant received the investigation pack and requested copies of transcripts of interviews conducted with other members of the relevant WhatsApp group. The respondent refused the claimant's request on the basis that the interviews related only to themselves and were confidential (page 333). The claimant felt that this was unreasonable because the evidence may have been helpful to his case and he has the right to call witnesses at the appeal stage. The Tribunal found it is not necessarily unreasonable for an employer not to share witness statements; it depends upon the context and what is being investigated. The Tribunal noted that the respondent was investigating the claimant's own conduct in the WhatsApp messaging; the WhatsApp exchanges were there to see; so that a reasonable employer could decide not to share others' statements which concern their own conduct as opposed to the claimants.

36. On 8 September 2020 page 314-322 the claimant raised a formal grievance. He did not consider that suspension was necessary; there was a delay in sending the suspension letter; the provision of the WhatsApp messages; the change of allegations in the hearing stages; lack of clarity of policies. The policy permits a lodging of a grievance to postpone the disciplinary process if appropriate. This was considered by the head of HR at page 336 Ms. Coombe on 12 September 2020. She informed the claimant at page 337 that she had considered all issues and determined that the claimant could raise his concerns via the disciplinary

hearing process. The claimant alleged in his evidence that the raising of a grievance was held against him by the Force at page 433 when the respondent stated *"You have constantly tried to justify why you should not be subject to this discipline action, including challenging the integrity of fire service and police staff."* The Tribunal found that the respondent did take into account that the claimant complained about the process he was subject to and that he did contend in his statement of case that he should not be disciplined as a lack of contrition. Much of the claimant's grievance concerned the disciplinary process so that an employer could reasonably choose not to pause the disciplinary process and advise the claimant could raise points in the disciplinary process.

37. On 28 September 2020 the disciplinary hearing took place chaired by Howard Watts with Sarah Baddeley, HR representative (Steph Cooper as noted taker) and the claimant attended with his trade union representative Mr. Moss (pages 410 to 426). The claimant prepared a statement of case page 342 to 408 (67 page document) and went through this at the hearing. The claimant alleged p.346 messages were part of a private group and not covered under the social medial policy. On reflection the claimant said that the WhatsApp messages could be viewed as work related due to the fact work matters were discussed within the chat. The claimant also relied upon section 5.5 of the social media policy *"You're not obliged to get involved/respond"* there was no obligation or any expectation that he would respond or challenge any comments. The Tribunal have dealt with this issue above. He also stated that Darren Jones and CM Sokhal had been interviewed and given no case to answer and Thomas Harrison had not been interviewed. Further he stated that the appropriate route for individuals to raise concerns within the service and he did not feel people being encouraged to use the appropriate avenue was inappropriate. Over 12 pages he set out his concerns about the procedure adopted and alleged he had been discriminated as a part time worker.

38. In the course of the disciplinary hearing the claimant did not give a clear and unconditional apology but maintained that the WhatsApp group was a private group and was reluctant to accept he should have challenged the homophobic comment. He stated that the guidance was unclear. At page 411 he stated *"it was friends talking about all sorts of stuff really but if its now seen as an extension of work in the future then so be it and I can only apologise for not challenging the comments at the time. It just wasn't seen as work and if it has been in work I would have challenged and if it gets said in future then it will be challenged."* The claimant stated *"I have tepidly challenged it but maybe I should have been more blatant."* (p.412). He accepted the fudge packer comment was shocking.

39. The claimant did not accept that there was a coordinated and deliberate action to prevent or delay the implementation of a policy. At page 414 the claimant accepted that it transpired that *"we are doing it a little bit wrong but there was no financial gain and soon as clarification came out we put it right."* It was put to the claimant that there was an exhibition of insubordination; he was not expected to be part of it as a leader and looked almost like a ring leader of the watch to resist change of policy. The claimant said the policy had been implemented. The claimant added that he (page 419) held his hands up about

allegation 1 but allegation 3 wasn't intentional. The claimant stated that he would argue that suspension was not necessary and he raised that he was part time and there was different treatment with full timers. At the end of the hearing Mr. Hogan informed the claimant he would consider whether on the balance of probabilities the allegations are founded; whether such conduct amounts to misconduct or gross misconduct or whether such conduct amounts to a breach of trust and confidence. The claimant was given an opportunity to add any further comments. The claimant stated in the future he would challenge the content of the WhatsApp messages.

40. On 30 September 2020 the disciplinary hearing was re-convened and respondent informed the claimant he was summarily dismissed (p.423 -425). Mr. Watts upheld allegations 1 and 3 but dismissed allegation 2. His reasoning was that the claimant had reluctantly accepted that it was inappropriate not to challenge the messaging in respect of "cunts fucking useless bunch of overpayed fudge packers". Mr. Watts did not accept the claimant's explanation that it was a private chat and nothing to do with work or it was not directly stated in the social media policy he should challenge this. Mr. Watts said that he believed the claimant had ignored the very clear guidance namely that the policy said never to be defamatory and that "you should assume that you will be held legally accountable for anything said online in the same way you would if you wrote it in physical print or said it publicly." Mr. Watts stated the fact that you are not discussing something face to face will not affect how offensive, unsuitable or unfair your comments could be interpreted. He did not consider that the claimant required guidance to know the comment about fudge packers was totally inappropriate and offensive and that it should have been immediately challenged.

41. In respect of allegation 3, Mr. Watts found *"so lets get the grievances in and see what happens..not to seen like a troublemaker..hence why we should battle this as much as we can..never known a place like it. But we need start firing off some individual grievances to find out what they're playing at..so use your words and put that into something a bit more official.."* Mr. Watts stated that grievances have a place and are an important process for the organisation but in successfully managing grievances managers have a key role resolving workplace disputes. Your behaviour demonstrates that you have not done this. He stated "you are discussing a change in policy which is reasonable and lawful, and not only demonstrating a serious failure to follow instructions, but directly and indirectly encouraging others to participate in insubordination." He further stated "as a manager in the fire service you carry a responsibility to constantly demonstrate appropriate behaviours and challenge inappropriate behaviours. You have a responsibility to lead people and implement service policy. I believe this amounts to serious breakdown of trust and confidence in you, and serious level of insubordination." He further stated that the claimant focused on perceived errors and grievances, challenged the integrity of FRS and police staff. The claimant had offered a little reflection and ownership which provides no confidence that you grasp the severity of his inaction or demonstrate any ability to challenge behaviour of this nature on the future. He took into account the claimant's service. He considered moving the claimant to another team but this was not viable within the claimant's contract and he did not believe it would change the claimant's behaviour. He further considered demoting the claimant but considered the claimant had demonstrated a

negative influence within the team and believe it would create an untenable situation for both the claimant and other crew members. He concluded that the claimant's employment was no longer tenable within the organisation and based on evidence of inappropriate and offensive language and serious insubordination he was ending the claimant's employment summarily.

42. By letter dated 9 October 2020 the claimant's dismissal was confirmed in writing (page 428). In the letter Mr. Watts stated in respect of allegation 1 " *I do believe that as a member of the Watch Management team and an administrator in the group you have a highly influential role within the group. I am not satisfied with your explanation for not challenging these comments and believe by not challenging them, you encouraged or condoned them. This is completely unacceptable."* In respect of the third allegation he stated *"As a leader I would expect your interaction to be professional at all times and a positive perception of the service to be portrayed to the watch. I do not deem that language such as "so lets get the grievances in and see what happens.", "not to seem like a troublemaker", "hence why we should battle this as much as we can" "never known a place like it" and "need to start firing off some individual grievances to find out what they're playing at" reflects the expectations which form part of your managerial role.* The claimant accepted he would have an influential position with the watch members. Mr. Watts further stated that *"I would also expect as a manager in the Fire Service that you carry a responsibility to constantly demonstrate appropriate behaviours and challenge inappropriate behaviours. I believe that this is in direct contradiction to the role which the service employs you in as a manager which leads to a breakdown of trust and confidence."* He repeated comments made on 30 September in respect of demotion and moving the claimant to a different team and determined to dismiss the claimant summarily.

43. On 12 October 2020 the claimant appealed the dismissal decision. He provided a detailed document of 18 pages at p.435-451. His main points were that there was a defect in the procedure; the issue was not proven on the balance of probabilities; the penalty was too severe and new evidence has come to light. He believed that his dismissal was predetermined. He stated that *"on reflection I can see why the service would now feel the need to question my role as a crew manager.*."

44. The claimant's evidence to the Tribunal is that he was treated inconsistently with others and this was unfair and/or discriminatory by reason of his part time status. CM Darren Jones was full time and retained and he received no case to answer. CM Jaswender Sokhal was full time and it was determined there was no case to answer. WM Thomas Harrison was full time and retained received no case to answer and was promoted. Fire Fighter Craig Profitt was retained (he received a 12 month informal note for file for improper language on WhatsApp). His evidence to the Tribunal is that his comments (the claimant was not involved) included describing a group of staff as spunkers or a bunch of housleys. He felt that the disciplinary process was a witch hunt. Richard Butterton was retained and received a 12 month final written warning for two allegations faced by the claimant and another allegation of posting offensive material. Adam Parry was retained who made the comment "cunts fucking useless bunch of overpaid fudge packers" received an 18 month final written

warning. WM Fox Hewitt faced similar allegations to the claimant but was initially subject to a double demotion but this was revoked on appeal and he was given a 12 month written warning and formal personal improvement plan. His appeal was held externally.

45. For his part time discrimination case the claimant compared himself to CM Darren Jones, CM Jaswender Sokhal and WM Thomas Harrison. Mr. Hogan's evidence is that there was insufficient evidence to suggest Crew Manager Darren Jones was aware of the content of the Orange Watch WhatsApp group conversation and there was no evidence that he had responded or contributed to it. In respect of CM Sokhal there was evidence that he had posted comments in the WhatsApp group chat which could cause minor offence and he was subject to management discussion. Mr. Hogan's evidence was that Thomas Harrison holds a management position elsewhere within the respondent's service, his role on orange watch is a firefighter only. Mr. Sokhal holds a management position on another watch and his inclusion in the orange watch whatsapp group was in his capacity as FBU representative only. Unlike the claimant neither Mr. Harrison nor Mr. Sokhal were part of the management team at the time of the WhatsApp group conversation.
46. The Tribunal determined that Mr. Jones was carrying out similar work to the claimant on orange watch. The difference between Mr. Jones and the claimant was that the respondent considered that Mr. Jones did not see the most egregious comments in the WhatsApp messaging. A detailed analysis of the exchange indicates that the respondent was wrong in this conclusion; Mr. Jones must have seen the comment. However, the investigation conducted by Mr. Watts in reaching this conclusion was to consider who immediately and before the message participated; that was an error. The Tribunal having heard the evidence of Mr. Watts found him to be credible and he had made a genuine mistake; that was the good fortune for Mr. Parry.
47. Mr. Sokhal and Mr. Harrison were part time employees on this watch at the material time and the Tribunal concludes were not actual comparators.
48. Mr. Andrew Fox Hewitt informed the Tribunal that he was a full time fire fighter in Cheshire Fire and Rescue and part time on call in Staffordshire Fire and Rescue where he is employed as a watch manager. He was initially demoted two ranks to a firefighter and subject to a final written warning for 18 months (p.428-430). On appeal he requested an external appeal manager who found the service policy was ambiguous (p.486-490). On appeal his demotion was revoked and the written warning was reduced to 12 months. His evidence was that the claimant was treated differently because he was a part time employee and during his own hearing he was coerced into agreeing the claimant was difficult. The Tribunal noted that Mr. Hewitt's appeal was heard by someone external to the respondent and therefore it was unrealistic to compare the sanction he received on appeal to the claimant's. Furthermore Mr. Watts made a distinction between the claimant and Mr. Hewitt in that Mr. Hewitt denied seeing the comment; and he concluded that Mr. Hewitt did not participate or respond unlike the claimant. His evidence was that the fact the claimant was a part time firefighter had nothing whatsoever to do with the sanction he received. The Tribunal found this was credible; the service was very upset at the conduct of the claimant which they viewed had failed to call out criticism of senior management and sought to stir up trouble. Furthermore Mr. Fox Hewitt was extremely remorseful. The Tribunal determined that he was not an actual comparator.

49. On 4 November 2020 an appeal meeting took place and Rob Barber, Deputy Chief Fire Officer chaired the hearing page 455 to 465 supported by Ms. Derrick, HR. Ross Moss, trade union representative accompanied the claimant. The claimant raised concerns that the bullying and harassment investigation expanded during the course of the investigation. Ms. Derrick responded that evidence obtained in the course of the investigation meant that it was necessary to expand the investigation but the claimant was aware of the disciplinary allegations at the start of the disciplinary. In respect of the claimant's concerns that he had been suspended, Ms. Derrick said that this was consistent with other employees who were being investigated. In respect of the allegation of coordinated and deliberate series of actions to delay the implementation of policy the claimant stated that those messages were not discussed at the disciplinary hearing. Ms. Derrick stated that the claimant had an opportunity to respond to the allegations at the disciplinary hearing and Mr. Hogan determined on reviewing the messages that the claimant had coordinated this action. Mr. Barber on reviewing the messages agreed. The claimant also stated inadequate weight had been placed on his service. Mr. Barber noted the claimant's clean record but the respondent took a zero approach to the use of offensive and inappropriate language; he took account of the homophobic comment. Mr. Barber was not satisfied that the claimant was genuinely remorseful; the claimant had stated "the behaviours will now be gone I will be fine for weeks months". Mr. Barber found this response inadequate and expected the claimant to express an intention he would never behave in this way again. Under cross examination Mr. Barber stated that he was not persuaded the claimant's behaviours would change based on that reflection. The Tribunal found that the claimant had apologised but he did not accept that the words were offensive. At the Tribunal hearing the claimant did tend to be defiant; he had apologised on the one hand and continued to raise a defence that he had done nothing wrong or nothing worse than anyone else. His reflection on his conduct was not persuasive.
50. The outcome of the appeal was sent page 466 -7 dated 6 November 2020. The claimant was informed that his summary dismissal for gross misconduct was substituted with a decision to dismiss with notice. The claimant's dismissal was with 12 weeks' pay in lieu of notice. Mr. Barber considered taking into account the claimant's long service summary dismissal was too harsh. His evidence was that there was a need to shed the toxic culture in a robust manner in light of two reports into the service's culture. His evidence to the Tribunal is that the claimant's part time status had no bearing on the decision to partially uphold his appeal.
51. The evidence of Mr. Moss, FBU representative, was that the claimant was dismissed for encouraging others to lodge grievances which is not an offence at all.

The Law

42. In an unfair dismissal complaint the respondent must establish it dismissed for an admissible reason. Misconduct is a potentially admissible reason pursuant to section 98 of the Employment Rights Act 1996. If the respondent fails to persuade the tribunal

that it had a genuine belief in the claimant's misconduct and that it dismissed him for that reason, the dismissal will be unfair. In conduct cases when considering the question of reasonableness the Tribunal is required to have regard to the test outlined in **British Home Stores v Burchell (1980) ICR 303.** The three elements of the test are :

(a)Did the employer have a genuine belief that the employee was guilty of misconduct?
(b)Did the employer have reasonable grounds for that belief?
(c)Did the employer carry out a reasonable investigation in all the circumstances?

52. The case of **Sainsbury's Supermarkets Limited v Hill (2003) ICR 111** establishes that the band of reasonable responses applies to all 3 stages above and in considering sanction the Tribunal should focus on whether the sanction of dismissal fell within the band of reasonable responses. The Tribunal may not substitute its own view for that of the employer as made clear in the case of **London Ambulance Service NHS Trust v Small (2009) EWCA Civ 220.** The appropriate standard of proof for those at the employer who reached the decision was whether on the balance of probabilities they believed that the misconduct was committed by the claimant. They did not need to determine or establish that the misconduct was committed beyond all reasonable doubt.
53. In considering the investigation undertaken the relevant question for the Tribunal is whether it was an investigation that fell within the range of reasonable responses that a reasonable employer might have adopted. Where the tribunal is considering fairness, it is important that it looks at the process followed as a whole including the appeal. The Tribunal is also required to have regard to the ACAS code of practice on disciplinary and grievance procedures.

54. The ACAS Guidance on disciplinary proceedings suggests the following factors may be relevant when determining what if any disciplinary penalty to impose; whether the employer's rules indicate the likely penalty; the employee's disciplinary record, work record, experience and length of service; whether there are special mitigating circumstances which might make it appropriate to adjust the severity of the penalty and whether the proposed penalty is reasonable in all the circumstances.

55. The issue of procedural irregularities was considered by the Court of Appeal in the case of **Taylor v OCS Group (2006) EWCA Civ 702** which involved a claimant who was dismissed for misconduct. The tribunal found that the disciplinary process was fundamentally flawed because during the disciplinary hearing the claimant had been unable to understand the proceedings (the claimant was profoundly and pre-lingually deaf). Whilst the principal point on appeal was that tribunals in considering whether an appeal process cured the earlier defects should not ask whether the appeal was a review or a re-hearing the Court of Appeal went on to explain that in cases where there are procedural irregularities procedural fairness should not be considered separately from other issues. The Tribunal should consider the procedural issues together with the reason for the dismissal as the two impact upon each other and the tribunal's task is to decide whether in all the circumstances the employer acted reasonably in treating the reason as sufficient reason to dismiss. The Court of

Appeal explained that in cases where the misconduct that founds the reason for dismissal is serious a tribunal might decide (after considering equity and the substantial merits of the case) that notwithstanding some procedural imperfections the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct is of less serious nature so that the decision to dismiss was nearer to the borderline, a tribunal might well conclude that a procedural deficiency had such an impact that the employer did not act reasonably in dismissing paragraph 48. This approach was re-iterate in the case of **NHS 24 v Pillar UKEATS/005/16** in which it was explained that the danger of treating procedural unfairness separately is that it can result in a failure to assess the gravity of the procedural defect. If there is no real relationship between an unfair step in the procedure and the ultimate outcome the impact of that procedural defect may well be far less than where an absence of any proper procedure led to substantive unfairness.."

56. Consistency of treatment – An employer should consider each disciplinary case on its own merits. In the case of **Hadjioannus v Coral Casinos (1981) IRLR 352** the Eat held that the evidence of inconsistency is relevant in a limited range of circumstances namely (i)it may be evidence as to how an employee has been led to believe that certain categories of conduct will be viewed by his employer; (ii)it may suggest that the purported reason for the dismissal advanced by the employer is not the real or genuine (iii)it may support an argument that the sanction of dismissal was unreasonable. However inconsistent treatment should only be relied upon where the cases are "truly parallel" or "similar or sufficiently similar" because the emphasis should be on the employee's case. Tribunals should be cautious in finding dismissal to have been on grounds of inconsistent treatment.

Contributory Fault

57. Pursuant to section 123 (6) of the Employment Rights Act 1996 the Employment Tribunal may reduce the compensatory award where it considers it to be just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action by the employer. The starting point is to consider whether the claimant had been guilty of "blameworthy conduct" (**Nelson v BBC (No. 2)).** The next stage is to consider whether the blameworthy conduct contributed to or caused the dismissal. If so the Tribunal should consider to what extent the blameworthy conduct contributed to or caused the dismissal and apply the appropriate deduction to compensation.

Polkey

58. The Tribunal has a discretion to make a reduction to the compensatory award to reflect the percentage chance that the claimant would have been dismissed fairly in any event (**Polkey v AE Dayton Services Limited 1987 IRLR 50**). The deduction can take the form of a finding that the individual would have been dismissed fairly after a further period of employment (a period in which a fair procedure would have been completed). In the case of **Andrews v Software 2000 Limited 2007 IRLR 568** set out principles to be applied conducting this assessment. Having considered the evidence the Tribunal may determine that

(i)if fair procedures had been complied with the employer has satisfied it, the onus being firmly on the employer, that on the balance of probabilities the dismissal would have occurred when it did in any event; (ii)that there was a chance of dismissal but less than 50% in which case compensation should be reduced accordingly (iii)the employment would have continued but only for a limited fixed period or (iv) employment would have continued indefinitely.

Part time worker discrimination

59. A part-time worker has the right not to be treated by his employer less favourably than a comparable full -time worker by being subject to any other detriment by his employer (Regulation 5(1)). This right applies only if the treatment is on the ground that the worker is a part time worker and if it is not objectively justified (Regulation 5 (2)).
60. The legislation requires an actual comparator between a part time worker and comparable full time worker. The wording of the Regulations suggests a narrow comparison. A worker is a part-time worker if he is paid wholly or in part by reference to the time he works and having regard to the custom and practice of the employer under the same type of contract is not identifiable as a full time worker (Regulation 2 (2)).
61. A full time worker is paid wholly or in part by reference to the time he works and having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract is identifiable as a full time worker (Regulation 2 (1).
62. A full time worker will be a comparable full-time worker in relation to a claimant part-time worker within the meaning of regulation 2(7) where at the time of the less favourable treatment occurs ; (a)both workers are employed by the same employer under the same type of contract and both are engaged in the same or broadly similar work having regard where relevant to whether they have a similar level of qualification, skills and experience and (b) the full time worker works or is based at the same establishment as the part time worker.
63. In the case of **Matthews v Kent and Medway Towns Fire Authority (2006) IRLR 367** the requirement that the part time worker and the full time worker proposed as a comparator be employed under the same type of contract is directed to comparable types of employment relationship rather than comparable terms and conditions of employment. In respect of the same or broadly similar work the Tribunal should consider whether the work is the same or broadly similar and non concentrate on the differences in the work carried out.
64. It was held in the case of **Carl v University of Sheffield** on the ground that means that part time work must be effective and predominant cause of the less favourable treatment complained of; it need not be the only cause.
65. Any less favourable treatment may be justified on objective grounds.

Submissions

66. Both parties made detailed written submissions supplemented by oral submissions. The Tribunal take account of the submissions and provide a summary below.
67. The respondent submitted that the Tribunal should determine when applying the section 98 test the claimant's involvement and failure to address the WhatsApp messages as the conduct for which an employer could fairly dismiss.

The respondent relied upon the cases of **CJD v Royal Bank of Scotland (2014) IRLR 25, Singh v London Country Bus Services Ltd (1976 IRLR 176; Smith v Trafford Housing Trust 2012 EWHC 3221** where there was an acceptance that prohibition of promotion of political or religious views cannot be rigidly confined in the workplace or to working hours. “Pub talk” may be subject to disciplinary proceedings. He further relied upon **Game Retail v Laws and British Waterways Limited v Smith; Weeks v Everything Everywhere Limited**. The respondent submitted guidance on WhatsApp was given in **BC v Chief Constable of the Police Service of Scotland (2020) CSIH 61;** it was stated in that case that it was difficult to see how trust and confidence could exist when the members of the group knew that each one of them was bound to report challenge of take action against any of the others who exhibited behaviour which was below that expected in the standards applicable to police officers. The Outer House held there was no reasonable expectation of privacy in respect of police officers’ messages in that case and that the status or office of the police officers could be a relevant consideration to that finding.

68. The respondent submitted that the respondent had established on the evidence that it genuinely believed that the claimant was aware of the content posted in the WhatsApp group was inappropriate and offensive and against the cultural framework and failed to challenge this and further had taken part in a coordinated and deliberate series of actions alongside other members of orange watch. There is a connection between the WhatsApp group and work as it was used to communicate work matters. The claimant was calling the watch to rebellion and spearheaded insubordinate action. The claimant accepted at the disciplinary hearing that he did not roster down as instructed. The disciplinary policy covered a failure to follow a reasonable instruction; and behaviour in contravention of the leadership message. The social media policy prohibits brining the respondent into disrepute.
69. The respondent submitted that the sanction of dismissal was appropriate taking account that civilians could see the content of the messages; the status of the claimant as a manager and need to shed the toxic culture in a robust manner in the context of two reports about the service’s culture. The claimant had not fully reflected on his conduct and continued to raise a technical defence that the respondent should not have seen the WhatsApp messages and the comment about fudge packers was not offensive.
70. There was no inconsistency of treatment. Fortunately for Mr. Jones, Mr. Watts inaccurately concluded that Mr. Jones did not see the fudge packer statement; this does not mean that the claimant was treated inconsistently. Mr. Fox Hewitt was rescued from the precipice of dismissal by his level of contrition which the claimant lacked. His involvement was different form the claimant’s involvement in respect of allegation 3 because here the claimant is a primary participant in the insubordinate activity.
71. The claimant was guilty of culpable conduct and by reason of the claimant’s attitude to the process there was a certainty he could have been dismissed. Accordingly there should be deductions for contributory fault and Polkey.
72. In respect of part time worker discrimination, Mr. Sokhal was the only comparator. Darren Jones and Thomas Harrison were not comparators as they were in a different contractual position to the claimant and Mr. Harrison was stationed elsewhere. The correct causal connection is the sole reason. The claimant’s case does not support his contention he was dismissed for his part time status; the respondent relied upon the fact that Jake Humphreys, Craig

Profitt and Richard Butterton were not dismissed; they were part time. Mr. Fox Hewitt who was a full time service employee was severely disciplined and initially dismissed. Further it was submitted that the respondent's actions were justified taking account of the evidence of Mr. Barber that there was a wider concern within the service about a toxic work culture and a need to eradicate homophobic and offensive language.

73. The claimant submitted that the reasoning of the dismissing officer Mr. Watts was confused and on this basis the Tribunal should find there was no genuine belief in misconduct. In respect of the dismissal decision letter the claimant submitted that wrongly Mr. Watts found the claimant to be the administrator of the WhatsApp group; this was wrong; finding that the claimant had an influential role based on a snapshot of messages and no interviews with others where Mr. Jones and Mr. Fox Hewitt were in management positions too; insufficiently exploring but finding there were issues between management issues and firefighters on orange watch which the claimant was found to have encouraged; challenging the integrity of the fire service and police staff and that the claimant was a negative influence where there was an insufficient basis to find this. Under cross examination Mr. Watts stated that the claimant had not found the WhatsApp message offensive but the claimant did not say that he said he did not find the comment homophobic. Further the claimant submitted that Mr. Barber wrongly stated that the claimant would be fine for weeks or months but failed to take into account the claimant's statement at page 463 that he had "changed not just for short time but for the length of career; this undermined Mr. Barbers' conclusions that the claimant's expressions of remorse were not genuine. Further that Mr. Barber took personal affronts which were not part of the allegations made against the claimant.
74. Further it was submitted that there was an inadequate investigation; the investigation into the claimant concerned limited documentation and interviewing the claimant. It did not fall within the range of what was reasonable. The sanction of dismissal was outside the band of reasonable responses; the language was ill advised and unprofessional but did not warrant the sanction of dismissal. The policy did not make clear a single incident a failure to challenge or address a homophobic comment is of itself gross misconduct.
75. The treatment was inconsistent; Mr. Fox Hewitt who had engaged in unacceptable messaging; see pages 500-1; 503; 512-3; 516; 518. There was no rationale reason why Mr. Jones did not face further action. Mr. Parry who made the comment was not actually dismissed but received a 18 month warning. The inconsistency can be explained that dismissal was a pre-determined outcome for this claimant.
76. There was no fair process. The claimant submitted that the allegation in the suspension letter changed in the disciplinary hearing and he was not provided with witness statements from others. Reliance was placed upon **London Borough of Hammersmith and Fulham v Keable (2022) IRLR 4** and in particular its reference to ensure the adoption of a fair disciplinary procedure which equates to an opportunity to convey relevant information to the decision maker prior to a decision being taken; ensuring decisions are not reached on an inaccurate basis or without all relevant information. Although the claimant did not pursue a specific argument that the respondent was not allowed to look at the WhatsApp messages due to Human Rights concerns the claimant submitted that a distinction should be made from the claimant's circumstances to those in ***C v Chief Constable of Police Service of Scotland (2018) CSOH***

104 which concerned police officers who unlike firefighters are subject to additional obligations and statutory regulations in and outside work. Further the claimant relied upon ***Strouthos v London Underground Limited (2004) IRLR 636*** that disciplinary charges should be precisely framed.

77. The claimant submitted it was unfair not to have held a grievance hearing. The sanction of dismissal was too harsh and it was inconsistent in comparison to others namely Mr. Fox Hewitt who received a 12 month warning and formal personal improvement plan particularly as he was more senior officer in the respondent's employment. Further Mr. Jones who responded to the stupid fuckers comment was not dismissed nor was Mr. Parry who made the comment and received an 18 month warning. This could be explained by a pre-determined outcome.
78. The respondent took into account irrelevant information such as Mr. Barner's personal affronts and failed to take account of relevant information such as what the claimant had said about the WhatsApp group (social and encrypted) and he had reflected. There was a failure to take account of mitigation including the claimant's long service and the events took place on one evening during the pandemic. Classifying the conduct as gross misconduct was wrong and there was insufficient or warning that such behaviour would justify dismissal.
79. The claimant submitted there should be no deduction for Polkey; the nature of the procedural failings by the respondent means that there was a significant chance the claimant would have been retained. The conduct of the claimant taking account of all the circumstances was not such that a deduction should be made for contributory fault.
80. In respect of part time worker detriment the claimant submitted that the approach in the case of **Sharma v Manchester City Council** should be followed namely that the phrase on the ground that should apply the standard causation test utilized in discrimination claims namely it is not necessary for the claimant being a part time worker to be the sole reason for the treatment; it is sufficient that it is significant, material or effective ground. The claimant focused the submissions on CM Darren Jones but did not drop the other comparators. Darren Jones and the claimant were both employed by the respondent under the same contract (they were employees); they were engaged in the same or broadly similar work; they were both firefighters at the level of crew managers and both worked at the same fire station Newcastle. Jaswender is also a full time comparator; as a crew manager but he was on the blue watch. Thomas Harrison was based at a different station. It was submitted that the claimant was subject to less favourable treatment because Darren Jones faced no case to answer; Mr. Sokhal was not suspended and had a management discussion and Thomas Harrison had no case to answer. It was submitted the claimant being a part time worker was the significant, material and effective ground for the treatment. There was no justification. Although the legitimate aim was accepted the measure was not rationally connected to the objective; a lesser sanction could have achieved the aim and dismissal was disproportionate.

<u>Conclusions</u>

81. The starting point is the status of the WhatsApp messaging. This initially was substantially a mode for social interaction between colleagues and former colleagues (civilians) which evolved into substantially work/professional interactions. Further the Tribunal considers whether an encrypted messaging service means that employees using its service can be confident they can exchange shocking or discriminatory material and be free from discipline. The

Tribunal notes the comments of the Inner House in **BC v Chief Constable of the Police Service of Scotland 2020 CSIH 61** where it was stated that it was difficult to see how trust and confidence could exist when the members of the group knew that each one of them was bound to report challenge or take action against any of the others who exhibited behaviour which was below that expected in the standards appliable to police officers.

82. The fire service is a professional public service with a hierarchal organisational structure. Its officers although not subject to the same regulations as police officers are employed to conduct highly skilled public work and therefore the standards expected of the officers are high as shown by the cultural framework. The tribunal has already found that WhatsApp is caught by the respondent's social media policy. There can be no expectation that an officer cannot be disciplined for inappropriate engagement in an WhatsApp messaging group which has evolved into a substantially work related interaction. In particular the Tribunal takes account that the group contains members of the public (former officers) and there is a duty placed on officers to call out unacceptable behaviour.

83. The Tribunal determined that the claimant by reason of his management position and knowledge of the cultural framework, standards of behaviour and disciplinary policy should have been aware that he was under the duty to call out unacceptable behaviour on a work WhatsApp group. He should have been aware a failure to call out unacceptable behaviour would be deemed to be serious misconduct for which he could obtain a disciplinary sanction including dismissal. The Tribunal found the claimant's attitude to be defiant and his initial position in the process had been the acceptance of casual discriminatory language which as it was on a WhatsApp message and not face to face was not challenged by him. Furthermore, in a management position the claimant was well aware of the requirement to implement the respondent's policies and not to delay the implementation of these or stir up revolt against the policies.

84. On the basis that the dismissal is admitted by the respondent the Tribunal considered the other issues.
85. <u>(2)What was the principal reason for the claimant's dismissal and was it potentially fair reason falling within section 98 (2) or section 98 (1)(b) of the ERA 1996</u>
86. The Tribunal concluded that the respondent had established that the reason for dismissal was misconduct. The respondent investigated the claimant for his WhatsApp messaging and failure to challenge the inappropriate comments of others and the coordination of the delay of the implementation of the crewing policy.
87. The conditions of the claimant's service place direct responsibility on the claimant to ensure that harassment and bullying of colleagues or members of the public in any form did not occur. He also had a duty to uphold the good reputation and prestige of the SFRS. Comments such as *"we should battle this as much as we can..never known a place like it..so use your words and put that into something a bit ore official..but surely you cant just make a decision like that….before we start firing in or do we just get out head down and go for it.."* may well be considered misconduct and breach of the cultural framework and

inconsistent with the claimant's role as a manager with responsibility to call out unacceptable behaviour and implement the respondent's policies.

88. (3)In the circumstances (including the size and administrative resources of the employer's undertaking) did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the claimant in accordance with equity and the substantial merits of the case?

89. In respect of section 98 (4) of the Employment Rights Act 1996 the claimant has raised a number of points which the Tribunal deals within turn.

90. (a)Did the respondent believe the claimant guilty of misconduct;

91. The Tribunal concludes that the respondent did genuinely believe that the claimant was guilty of misconduct. The respondent formed the view that the claimant took part in a co-ordinated and deliberate series of actions alongside members of the orange watch to prevent or delay the implementation of a reasonable change of policy. The respondent genuinely believed this by considering the WhatsApp messaging of the claimant namely *"we should battle this as much as we can..never known a place like it..so use your words and put that into something a bit more official..but surely you can't just make a decision like that….before we start firing in or do we just get out head down and go for it.."*

92. The claimant accepted in his evidence that the respondent was entitled to investigate the WhatsApp messages. In respect of the allegation concerning the inappropriate posting in the WhatsApp group which may deem to be appropriate, offensive and against the cultural framework which was targeted against colleagues and managers the claimant failed to address or challenge the behaviour in line with the expectation of his role of the service management, the respondent again considered the WhatsApp messages, along with the social medial policy, disciplinary policy and social media policy. In particular the respondent considered the message from Mr. Parry stating "cunts funcking useless bunch of overpaid fudge packers" and the claimant's response of **"So use your words** and put that into something a bit more official. I will be next time I'm down here." The claimant did not challenge it.

93. (b)Did the respondent have in mind reasonable grounds upon which to sustain that belief;
94. In reaching the conclusion that the claimant was guilty of misconduct the respondent took into account the claimant's management position; he was in a position of trust and as a manager has the responsibility of implementing the respondent's policies; it was not his role to encourage challenge to the policy. Furthermore he failed to challenge the comments of Mr. Parry which the Tribunal finds to be inappropriate and offensive. The claimant had knowledge of the social media policy; was aware of the standards of conduct; was aware in the context of his management role he should challenge inappropriate behaviour but he failed to do so.

95. (c)At the stage at which that belief was formed on those grounds had it carried out as much investigation into the matter as was reasonable in all the circumstances?

96. The Tribunal is satisfied that the respondent carried out a reasonable investigation in the circumstances. The WhatsApp messages were there to view. The claimant had participated in the WhatsApp messages and was aware as to what was posted and exchanged. The claimant was provided with an investigation pack. He was able to provide an extremely detailed written document defending his position; his statement of case to answer the allegations. He was given an opportunity within the disciplinary hearing to state his case and at the end of the disciplinary hearing he was provided with time to give any further comments.

97. Although the respondent held a mistaken belief that Mr. Jones did not see the most egregious message this does not detract from the reasonableness of the investigation of the claimant's misconduct. The Tribunal does not consider that it fell outside the reasonable responses not to provide the claimant with any other witness statements. In the context of the misconduct that is contained in WhatsApp messages there was no obligation upon the reasonable employer to provide others statements when the focus of the investigation was what the claimant did in the WhatsApp message exchange which was clear to view. Furthermore, the claimant did accept that there was a delay in the implementation of the respondent's policy page 269-270. This did not require any further investigation in the circumstances.

98. (d)In particular the claimant alleges that the following make the dismissal unfair;
99. (i)sanction of dismissal falling outside the band of reasonable responses; The Tribunal finds that although the sanction of dismissal was harsh it further concludes that it did fall within the band of reasonable responses. The Tribunal reaches this conclusion because it finds that WhatsApp messages were included in the social media policy implicitly. The policy widely defines social media to include online interaction and creation of content allowing users to share opinions and information; that includes WhatsApp messages. It applies not only to personal usage but also considers personal/professional usage. There is a prohibition on bringing the respondent into disrepute, offending and commenting on organizational matters. There was no requirement of the respondent to specifically identify WhatsApp as being covered by the social media policy; the Tribunal found that this was obvious and in particular taking account of the commentary from **BC** case and **Smith v Trafford** (covering a discussion in a public house). Furthermore the disciplinary policy describes a non-exhaustive list of types of behaviour described as misconduct; see page 108 namely failure to comply with a reasonable instruction, policy; offensive behaviour; behaviour which is in contravention of the leadership message or does not adhere to the service values. It also notes gross misconduct examples as including bringing the respondent into disrepute and serious breach of confidence and trust. The cultural framework's expectation is the highest of standards for its officers. Taking account of the claimant's admission that there was a delay in the implementation of the policy; a matter which as a manager he was duty bound to implement, a reasonable employer could on the reading

of the messages above reach a conclusion that the claimant was indeed coordinating a revolt against the implementation of the policy with his team. Furthermore he did not challenge the offensive (casual discriminatory comment) by Mr. Parry but actually stated "**So use your words**" and encouraged official action against the implementation of a policy. Although it was a harsh decision, the Tribunal notes the context of a toxic culture which the respondent was seeking to eliminate. The claimant had not been contrite but defiant in his defence to the allegations. In the circumstances the dismissal fell within the band of a reasonable response.

(ii)inconsistency of treatment;

100. The case law in this area cautions Tribunals against to comparing cases of which it does not have all the facts and including mitigation put forward on behalf of an employee. In the case of **Hadjioannus v Coral Casinos (1981) IRLR 352** the EAT held that the evidence of inconsistency is relevant in a limited range of circumstances namely (i)it may be evidence as to how an employee has been led to believe that certain categories of conduct will be viewed by his employer; (ii)it may suggest that the purported reason for the dismissal advanced by the employer is not the real or genuine (iii)it may support an argument that the sanction of dismissal was unreasonable. However inconsistent treatment should only be relied upon where the cases are "truly parallel" or "similar or sufficiently similar" because the emphasis should be on the employee's case. Tribunals should be cautious in finding dismissal to have been on grounds of inconsistent treatment.

101. There was different treatment given to the claimant to other colleagues because he was dismissed unlike them but the Tribunal is mindful that the claimant made the following comments *"we should battle this as much as we can..never known a place like it..so use your words and put that into something a bit more official..but surely you can't just make a decision like that….before we start firing in or do we just get out head down and go for it..".* The respondent could reasonably conclude that he was coordinating action to prevent or delay of a reasonable change in policy and in the context of his managerial position this was unacceptable. Furthermore, he actively participated in the comment of Mr. Parry and did not challenge it stating *So use your words and put that into something a bit more official I will be next time I'm down there.* The respondent could reasonably conclude that the claimant was taking a lead role in not implementing and challenging the policy in contradiction to his management position. Furthermore, the respondent's evidence was that Mr. Fox Hewitt was contrite in a way the claimant was not. A disciplinary case against one employee to another even in a similar situation will be very fact specific. The Tribunal is not satisfied that in respect of Mr. Fox Hewitt there was inconsistent treatment because it is not satisfied looking at the conduct of the claimant that it could be safely suggested that the cases were truly parallel or similar of sufficiently similar and especially since the view formed by the respondent was that Mr. Fox Hewitt was truly contrite.

102. In respect of Mr. Jones he was treated more leniently than the claimant. However this was based on the good fortune for Mr. Jones that the respondent erred in considering that he not seen the most egregious comment. In the

circumstances the Tribunal do not find that Mr. Jones's treatment can be compared to the claimant's in terms of inconsistency.

103. Mr. Parry was the maker of the most egregious comment. He received an 18 month warning. However he was not in a position of management and he was not considered to have breached his responsibility to implement a policy. The Tribunal do not find that his situation was truly parallel with the claimant's.

(iii)dismissal being a pre-determined outcome;

The Tribunal rejects the suggestion that dismissal was a pre-determined outcome. The claimant relied upon the fact that after the bullying and harassment investigation there was no effort to manage the relationship between the complainant and the team. The Tribunal was not satisfied that this was indicative of the employer pre-determining the claimant's dismissal. Shortly after the conclusion of the bullying and harassment investigation, the respondent investigated the WhatsApp messages. The Tribunal concluded that a reasonable employer was entitled to investigate these before considering the working relationships of the team. The respondent followed a process and the claimant was provided with an opportunity to state his case and offer any explanations he wished; this is inconsistent with a suggestion that the dismissal was a pre-determined outcome.

(iv)a fair process not being followed

The claimant contends that it was unnecessary suspend him, his suspension letter was late; Sarah Baddeley was involved at the disciplinary stage; change of allegations; leaving out of witness statements; Mr. Watts impartiality because fraud was considered; Mr. Barber did not analyse allegation 1 and 3 separately. The Tribunal did not find that it was unfair for the respondent to suspend the claimant for conduct which might be deemed gross misconduct and for which he could be disciplined for. The claimant suffered no disadvantage by the delay in receipt of the suspension letter; he was informed on the telephone on the day the reason for his dismissal. Sarah Badeley was the adviser and note the decision maker and the Tribunal find that it was reasonable for her to be involved as adviser at the disciplinary stages. Mr. Watts did mention that initially fraud was considered in terms of whether the lack of policy implementation could benefit the team. This was not pursued and the claimant himself in his statement of case declared there was no financial benefit. The fact that matters are initially considered but discarded and not pursued at a disciplinary stage does not mean that someone such as Mr. Watts could not conduct the disciplinary. The Tribunal accepted the evidence of Mr. Watts that "fraud" was not a factor in his decision making and despite the best efforts of claimant's counsel in cross examination the Tribunal were not persuaded that his decision to dismiss was tainted by any initial investigations into fraud.

104. The Tribunal considers the overall process followed including the appeal in accordance with **Taylor v OCS Group**. The criticism made by the claimant that Mr. Barber failed to analyse allegations 1 and 3 is not made out. The allegations in themselves are somewhat intertwined in that the claimant was alleged not to have challenged the inappropriate comment and instead responded immediately to put in an official grievance. The Tribunal does not find that there was a failure to analyse the allegations separately.

(v)failing to properly or adequately consider or act upon the claimant's concerns and grievance raised during the disciplinary process;
The claimant relies upon being suspended and a delay in the suspension letter. The Tribunal has dealt with this above. His grievance was about the disciplinary process; he was entitled to raise this in the disciplinary procedure. The Tribunal finds that a reasonable employer in these circumstances was not required to pause the process and hear the grievance; the claimant can and did raise his concerns via a detailed statement of case presented for his disciplinary hearing. The fact that the respondent did not agree with the claimant's concerns does not make the process necessarily unfair.

(vi)failing to conduct a sufficient or appropriate investigation;

105. The Tribunal has already commented upon this. For completeness the extent of the investigation is dependent on the context of the misconduct, Here the investigation centred around WhatsApp messages sent and received by the claimant. Therefore, the extent of the investigation in the Tribunal's view did not have to be that extensive. The WhatsApp messages were there to be seen. The claimant was given an opportunity in the investigation, disciplinary hearing and the appeal hearing to explain. The fact that the respondent failed to investigate properly another co worker so to reach an inaccurate picture as to whether he saw the WhatsApp messages was fortunate for him. This does not detract from the investigation of the claimant who can be seen to repeat the message of Mr. Parry and request his colleagues to use that to put into official grievances and to this extent the respondent and any reasonable employer could have reached the reasonable conclusion that the claimant was indeed guilty of the disciplinary charges.

(vii)insufficient basis for findings made at both disciplinary and appeal stage and/or unreasonable conclusions being reached;

106. The respondent faced with the content of the WhatsApp messages and the claimant's investigation was entitled to find that the claimant was guilty of misconduct. Although the claimant has sought to forensically attack the stages of the process, the Tribunal concluded that the respondent had adopted a reasonable process and reached reasonable conclusions based on that material and the claimant's account that the two allegations against the claimant were well founded.

107. (viii)taking into account irrelevant information;

The Tribunal did not find this allegation was made out. Although the Tribunal does find that the respondent took account that the claimant complained about the process he was subject to and contended that he should not be disciplined, the Tribunal does not find that this was impermissible or unfair. The grievance was substantially about the disciplinary process; the claimant was defiant. The respondent was entitled to take this into account when it considered any contrition on behalf of the claimant.

(ix)failing to take sufficiently into account all relevant information;
The claimant's case is that the respondent failed to take into account the pandemic; it was outside of work; and he had reflected on his conduct. The

Tribunal is not permitted to substitute its view for the respondent. The respondent did take into account the context but it was reasonable for the employer to find that this did not militate from the duties and responsibility of the claimant as a manager in a public service. Furthermore the respondent formed the view that the claimant's reflection was not complete. Although the claimant had apologised, the respondent relied upon the claimant's comments about his behaviour namely "the behaviours will now be gone I will be fine for weeks months." The respondent was not satisfied that the claimant was contrite enough and the Tribunal finds it was reasonable to have this view.

(x)failing to adequately take into account matters of mitigation and/or claimant's long service;

108. The Tribunal accepts that the respondent did consider the claimant's long service and his mitigation and that he apologised; that he had been resistant to the new policy but after a delay had in fact imposed it. However it was not outside the band of reasonable responses to consider these matters and still conclude that the misconduct was so serious that a sanction of dismissal was appropriate.

(xi)unreasonable to have found gross misconduct rather than misconduct at disciplinary stage and that it still justified dismissal albeit on notice at the appeal stage;

A reasonable employer was entitled to find that the claimant was guilty of gross misconduct at the disciplinary stage. The Tribunal does not find that it was inconsistent for this employer to conclude at the appeal stage heard by another officer that the claimant should be paid notice but still dismissed. Even at this stage the claimant remained reluctant to accept that the comments were homophobic p.459.

(xii)insufficient warning and/or indication that such behaviour would be regarded as misconduct justifying dismissal.

109. The claimant was a manager in the respondent's organisation. He was in a position of responsibility and leadership. He was fully aware of the social media policy; his obligation to challenge inappropriate behaviour and of his responsibility to implement policy. The Tribunal finds that there was no requirement to warn the claimant specifically that such behaviour would be regarded as misconduct justifying dismissal because there was sufficient information available to the claimant to be aware that dismissal could be an option. The disciplinary policy is clear gross misconduct includes bringing the respondent into disrepute and serious breach of trust. Misconduct also includes failure to follow an instruction or policy; behaviour which is in contravention of the leadership message or does not adhere to service values. The social medial policy prohibits bringing the respondent into disrepute. By failing to challenge the comments of Mr. Parry and encouraging the delay/implementation of the policy the claimant should have reasonably realised that his conduct was in breach of the social media policy, disciplinary policy and standards expected of a manager and he could face disciplinary action including dismissal.

110. The tribunal having found in all the circumstances that the respondent fairly dismissed the claimant it does not deal with Polkey or contributory fault.

Less Favourable Treatment of Part time Worker per the Part time Workers (Prevention of Less favourable Treatment) Regulations 2000 (PTW 2000) regulations 5 and 8

111. (5)The following treatment is admitted :
(a)the respondent subjected the claimant to a disciplinary process, including suspension, investigation and disciplinary hearing;
(b)the respondent dismissed the claimant.

(6)If so did such treatment amount to a detriment.
The Tribunal accepts that detriment means some kind of disadvantage and a reasonable person would view the said treatment amounted to a detriment. The Tribunal accepts that suspension, investigation and a disciplinary hearing is a detriment. There is no dispute that the respondent dismissed the claimant.

(7)Are the following comparable full time workers ? (8)If so was the claimant treated less favourably by reason of the above treatment than the comparable full-time worker(s) were?
The Tribunal does not find that the claimant was treated less favourably to his alleged comparators
(9)Was such treatment on the ground that the claimant was a part time worker?

112. The Tribunal takes account of the case of **Matthews v Kent and Medway Towns Fire Authority (2006) IRLR 367** the requirement that the part time worker and the full time worker proposed as a comparator be employed under the same type of contract is directed to comparable types of employment relationship rather than comparable terms and conditions of employment. In respect of the same or broadly similar work the Tribunal should consider whether the work is the same or broadly similar and non concentrate on the differences in the work carried out.

(a)CM Darren Jones
(b)CM Jaswender Sokhal
(c)WM Thomas Harrison

113. The Tribunal finds only CM Jones was a potential actual comparator. The claimant focuses his case on Darren Jones. Darren Jones and the claimant were employed by the respondent on the same type of contract; they were employees. They were both firefighters and crew managers and therefore were engaged in the same or broadly similar work. They were both based at the same establishment. However, in the course of the investigation the respondent erred in considering that Mr. Jones had not seen the most egregious message; the Tribunal has explained this above. Therefore, the difference of treatment between the claimant and Mr. Jones is the fact that the respondent did not consider Mr. Jones had been guilty of the same or similar misconduct carried out by the claimant. The Tribunal do apply the test in **Carl n**amely part time work must be the effective and predominant cause of the less favourable treatment complained of; it need not be the only cause. The tribunal do not find that part time work was the effective and predominant cause. The respondent

made an error in its analysis of whether CM Jones saw the most egregious comment.

114. CM Jaswender Sokhal and WM Thomas Harrison were not actual comparators. Mr. Harrison holds a management position elsewhere within the respondent's service, his role on orange watch is a firefighter only. Mr. Sokhal holds a management position on another watch and his inclusion in the orange watch WhatsApp group was in his capacity as FBU representative only. Unlike the claimant neither Mr. Harrison nor Mr. Sokhal were part of the management team at the time of the WhatsApp group conversation.

115. The Tribunal finds that the claimant was dismissed because the respondent reached the conclusion that the content of the postings on the WhatsApp group were inappropriate, offensive and against the cultural framework and that the claimant did not address or challenge the behaviour as he was expected to do as a manager. Further the respondent reached the conclusion he took part in a coordinated and deliberate series of actions alongside other members of the watch to prevent or delay or implement a reasonable change in policy. The Tribunal concludes that in all the circumstances the dismissal was fair and non-discriminatory.

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Employment Judge Wedderspoon

20 November 2022

Sent to the parties on:

…22nd November 2022….

For the Tribunal:

…Eamonn Murphy…

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