EMPLOYMENT TRIBUNALS

Claimant: **Mr Paul Anthony Oldham**

Respondent: **Nottinghamshire Fire and Rescue Service**

Record of an attended Hearing at the Employment Tribunal

Heard at: East Midlands Employment Tribunal

Heard on: 28 August 2024 with written submissions presented on 11 September 2024

Before: Employment Judge Broughton (sitting alone)

Appearances:

Claimant: Mr Hardcastle, Counsel

Respondents: Mr P O'Keefe, Counsel

LIABILITY JUDGMENT

The Claim of unfair dismissal is well founded and succeeds subject to a finding of contributory fault.

REASONS

Background

1. The Claimant presented his claim to the Tribunal on 21 March 2024 following a period of ACAS Early Conciliation from 16 January to 22 February 2024.

2. The claim is a complaint of unfair dismissal only.

Documents

3. The parties prepared a joint bundle numbering 416 pages. There were no additional documents presented during the course of the hearing.

4. The Claimant prepared a witness statement and gave evidence under an affirmation and was cross-examined by the Respondent. He did not call any supporting witnesses.

5. The Respondent called two witnesses; Mr Andrew Macey who was employed at the relevant time by the Respondent as an Area Manager and who chaired the disciplinary hearing, and Michael Sharman, Assistant Chief Fire Officer who heard the disciplinary appeal. Both those witnesses gave an affirmation and were cross-examined by the Claimant.

Summary

6. In summary the Claimant had been employed by the Respondent from 10 September 2018 until his employment was terminated summarily for gross misconduct on 21 November 2023. He had been employed by the Respondent as a Fire Fighter. The reason for his dismissal was that a GIF (a digital image file/Graphic Interchange Format) of a picture of a gorilla was sent from the Claimant's personal Instagram account, on 9 July 2022, to a Black colleague , Mr Thomas. There was an investigation in 2022 which resulted in the decision by the Respondent not to issue disciplinary proceedings and the Claimant was informed that the case was closed on 23 September 2022.

7. Mr Thomas then brought a grievance in June 2023, in part because of how the investigation had been conducted and as a result of that grievance investigation the decision was taken to initiate disciplinary action. The Claimant was suspended and then ultimately dismissed in November 2023.

8. The essence of the complaint of unfair dismissal, is that it was unfair to have taken disciplinary action almost a year after informing the Claimant that the case was closed.

9. As established with Counsel for the Respondent at the outset of the hearing, the Respondent's case is that there was new evidence, albeit it accepts that this was evidence which could have been available or obtained during the original investigation but the decision was taken that the original investigation had not been sufficiently thorough.

Findings of Fact

10. The facts in this case are largely not in dispute, what is in dispute is the reasonableness of the belief based on those facts and of course the reasonableness of the decision, in effect to, re-open, the case against the Claimant.

Disciplinary Policy

11. The Respondent has a disciplinary procedure for uniformed employees [pages 33-66]. It includes the following relevant provisions.

    Key Information

    "1.4 The basis of the procedure is that the principle of natural justice applies, at every stage.. [page 35]

    1.5 Employees will be expected to always act with integrity in line with the NFRS Code of Conduct and Code of Ethics Values of the Organisation. The Code provide all employees with clear set of guidelines and how to act and portray the service in a variety of situations." [page 35]

    Gross Misconduct

"*15. Acts which constitute gross misconduct are those resulting in a serious breach of contractual terms and thus potentially liable for summary dismissal. …" [page 40]*

Disciplinary Procedure Guidance

*"5. The basis of this procedure is that the principle of **natural justice both applies and is clearly seen to apply,** at every stage. The aim is to ensure that appropriate action can be taken **without unnecessary delay**, but in a framework which also ensures fairness for both employees and managers." [page 41] Tribunal stress*

"10. The disciplinary procedure is designed to cover behaviour which is contrary to that necessary for ensuring a safe and efficient workplace, and for maintaining good employment relations. Such behaviour could include, but is not limited to:

- *Harassment, victimisation or bullying.*

11. Acts which constitute gross misconduct are those resulting in a serious breach of contractual terms. Examples of gross misconduct might include, but is not limited to:

- *Unlawful discrimination or harassment." [page 43]*

Investigation

*"16. An investigation should be carried out to **establish the facts promptly**. It is important to keep a written record for later reference…" [page 44] Tribunal stress*

Information for the employee before a disciplinary hearing

*"19 At all stages the employee shall be **fully informed**"[page 44] (Tribunal stress)*

12. The Claimant's Contract of Employment (pages 80-89) provides under paragraph 25 that:

"The Nottinghamshire Fire and Rescue Service is committed to ensuring quality of opportunity for all groups in both its service provision and its employment practices and requires its employees to adhere to its core values whilst at work. A copy of the services Equality Statement of Cores Values is attached at Appendix C."

The alleged offence

13. It is not in dispute that on 9 July 2022, Mr Thomas, with whom the Claimant worked occasionally and had a friendly working relationship, put a post on his Instagram story about the Black MP, Ms Badenoch, entering the race to become the next Prime Minister. Mr Thomas then received at 9:35pm on 9 July 2022, from the Claimant's own Instagram account, a GIF picture of a gorilla. There was no message with the picture.

14. After receiving the gorilla picture, Mr Thomas, sent a message to the Claimant 10 July 2022 via Instagram, consisting of nothing more than a question mark. The message was seen by the Claimant at 3.16pm on 10 July 2022 [page 98].

15. It is not in dispute that the Claimant did not respond to Mr Thomas's message on 10 July 2022.

16. The Claimant works a shift pattern of 2 days followed by 2 nights and then 4 days' rest. He was at work on the 9 July when the gorilla GIF was sent from his account. The 9 July was his last night shift before he took 4 rest days.

17. When Mr Thomas did not get a response to his 'question mark' message he sent a further message on 12 July 2022 at 6:09pm [page 99] to the Claimant's Instagram account which stated:

    "I posted an Instagram story regarding MP who has put herself forward to be the next Prime Minister you responded to that story. I responded with a question mark on Sunday at 15.16. I can see you read my last message but have not responded, so I have still not had an explanation regarding your last message and what it meant. Please can you explain."

18. The Claimant did not respond to that message either.

19. In his evidence in chief before this Tribunal [w/s paragraph 8] the Claimant alleges that when he received the 'question mark' message on 10 July from Mr Thomas he did not reply because he did not understand the message and thought that it may have been a mistake. His evidence is that while he had seen the question mark message and the gorilla GIF he had not seen the post about Ms Badenoch.

20. The Claimant's evidence is that when he received the further message from Mr Thomas on 12 July, she did not reply to that message either because he was 'tied up' with a family issue at the time. The Claimant alleges in his evidence in chief [w/s paragraph 10], that as the days went by he was occupied with this family issue and *"I just forgot all about it".*

21. The Claimant informed the Tribunal that the family issue related to a safeguarding matter concerning his father. He did not provide further details of this family issue in his evidence before this Tribunal and did not provide further details during the course of the disciplinary or appeal hearings. He confirmed however that he had not taken any time off work to deal with that family matter.

22. After having no response from the Claimant to either of his messages, Mr Thomas then approached his Watch Manager on 18 July 2022 and complained about having received the gorilla picture from the Claimant's Instagram account.

First Investigation

23. The Claimant went into work on 22 July 2022 and was spoken to by the Station Manager, Paul Harley, who was accompanied by Watch Manager, Mathew Monaghan. The Claimant was presented with a copy of a screenshot from his Instagram [page 106] showing the gorilla GIF. He was informed that a formal complaint had been made and that he was under investigation for posting an image of a racist nature.

24. The Claimant was advised by Mr Monaghan to contact Mr Thomas.

25. The Claimant alleges that on the evening of the 22 July 2022, when he returned home after being informed about the complaint, he explained the situation to his wife and his teenage daughter who both looked at his Instagram account and noticed some other messages/GIFs had been sent from his account to other people which he alleges he had not sent. The Claimant took screenshots of those messages on 22 July which he relied on as evidence that his account had been 'hacked'. Those 3 others GIFs appear to be entirely innocuous and were sent over a period of several years. One of the GIFs is an image of a car in response to a story it seems to a post by the television personality, Phillip Schofield (who had been advertising on television a company which provides a car buying service). There was also a 'Good Morning' GIF which appears to have been posted in reply to a story by Piers Morgan and a Giff of Tom and Jerry sent to a different work colleague (pages 94 to 96).

26. The Claimant's evidence is that when looking at his Instagram account with his family on 22 July, his daughter checked his mobile telephone phone and was able to see the location where his Instagram account was logged into and saw that his account was active in London. The Claimant's case is that he had not been in London or within the vicinity of London for a number of years and this information was further evidence that his Instagram account had been hacked.

27. The Claimant then put a message on his Instagram account on 22 July 2022 (page 109) which stated that it appeared his Instagram account had been hacked and if anyone received or had received any unusual messages or GIF's from his account, to disregard them.

28. On 25 July, the Claimant and Mr Monaghan contacted Mr Thomas by telephone to discuss the GIF. Mr Monaghan explained that the Claimant wanted an opportunity to explain what had happened however, Mr Thomas did not want to discuss it, commenting that the incident was now being dealt with by the Respondent.

Notification of Investigation

29. The Claimant was placed on modified duties on **26 July 2022** and informed that a formal investigation was to be initiated under the Respondent's Disciplinary Procedure.

30. Mr Revill, Group Manager and Ms Macpherson, HR Business Partner carried out a number of interviews.

31. Mr Thomas was interviewed on 8 August, [pages 148-160]. He explained how he had been shocked on first seeing the gorilla GIF and sent the question mark message in response. He was able to see from the Claimant's Instagram account that he was 'active' on Instagram on 11 July 2022 but Mr Thomas did not receive a response to his message and therefore followed this up with his next message on 12 July. Mr Thomas was able to see that the Claimant had been 'active' on this account on 13 July and had viewed his message. Mr Thomas had given the Claimant two opportunities to explain the gorilla GIF and after failing to respond to either message, only then had Mr Thomas reported it. Mr Thomas also gave evidence that the Claimant had put the message on his Instagram account on 22 July that his account had been hacked but the Claimant had then shared a post on his Instagram account about the Respondent's recruitment exercise. Mr Thomas produced a screenshot of that post.

32. The Claimant attended an investigation meeting on 8 August 2022 [pages 161-168] accompanied by a trade union representative.

33. The Claimant denied any knowledge of the GIF until he had received the question mark message from Mr Thomas. His evidence at the time included the following:

"*I knew nothing about the gorilla… being posted to a post …until a day or two after and I received the question mark post from firefighter Thomas and it was at that post [sic] I opened my Instagram and looked at it very very very bizarrely and like why is there a picture of a gorilla and why is [Mr Thomas] asking me a question mark because I had no reconciliation [sic] of [Mr Thomas's] original post , I never seen [Mr Thomas's] original post .At this point I thought [Mr Thomas's] account been spammed , hacked and I was receiving a message maybe not from [Mr Thomas] …I then did nothing with it … and I think another couple of days later I received another message stating that there had been a post… regarding an MP putting themselves forward. And yet again I have never seen original post so it at this point I was little bit like who is this , is this [Mr Thomas] or is this someone else and if reply do I open myself up to my account being hacked….so obviously did nothing with it , personal life is very busy at the minute… so yeah, I kinda of forgot about it.*"

34. The Claimant gave evidence that he had not seen the post about Ms Badenoch until it was shown to him by Station Manager, Mr Harley, when he had been called into the office on 22 July and shown the screenshot because it was a post on Mr Thomas's Instagram Story which would have disappeared after 24 hours. He accepted however then when Mr Thomas had sent the question mark message, the Claimant had seen the gorilla GIF.

35. The Claimant then gave evidence during this interview that after speaking with Mr Harley on 22 July, he went home and with his wife noticed the other three posts/GIFs sent from his account which he denies sending and which date back to 2018. He then explained how he had logged into his account with the assistance of his daughter which had shown that his account was 'active' in London while his wife's account was showing as 'active' in Nottingham. He produced a screenshot showing that his account was 'active' in London on 22 July. He went on to explain how he had then put a message on his account that it had been hacked.

36. The Claimant went absent on sick leave from **6 September** [page 174] and complained at the time about how long it was taking to complete the investigation process, because by this stage it had been ongoing for over a month.

Investigation by Tracy Crump

37. Ms Crump the Head of People and Organisational Development (Head of People and OD), as part of the ongoing investigation, contacted Jacob Collier, employed by the Respondent as its Communications Officer. There was some discussions between them and she followed that verbal discussion up with an email on 31 August [page 211] asking Mr Collier to confirm the advice he had given her, namely that it is possible for an Instagram to be "hacked" and the messages posted without the express knowledge or consent of the individual account holder. Mr Collier confirmed his advice in an email [page 210]:

    *"yes, this is **possible** . It could happen because of a data leak where someone gets hold of someone's username and password and logs in. Sometimes Instagram will flag it up as a malicious login but that isn't always the case." Tribunal stress*

38. What Ms Crump did not ask Mr Collier, was for his assessment of how *likely* it was that the Claimant's account had been hacked on the facts of the case, or if there was any further investigation which could be undertaken to help establish the likelihood of that having happened in this case.

Evidence of Crew Members

39. The investigators interviewed the crew members who had been on duty with the Claimant on **9 July** when the Gorilla GIF had been posted [pages 170-179].

40. The evidence of the crew members was not particularly helpful. Unsurprisingly perhaps the Claimant's colleagues who had been on shift with him that evening had little recollection when they were interviewed on **6th and 9th September 2022**, of whether the Claimant had been on his mobile phone during the shift on 9 July.

41. One crew member who was interviewed, Ms Curtis, had no idea where they were at 9.30pm on 9 July. She did not know whether they were travelling to the Fire Station at Mansfield or whether they had arrived at the Fire Station. She had no recollection of any conversation about Ms Badenoch or about any Instagram post to Mr Thomas. In terms of the Claimant using his mobile telephone on the journey there and back, she did not know whether the Claimant had done so: *"it was quite a quiet journey on the way there because I was looking at my phone …"*

42. There was also an interview with Mr Turley [page 175], he could not recall exactly where the Claimant would have been at 9.30pm but thought that he would have been riding in the back of the Fire Truck. He had no recollection of any discussion about politics and commented that he makes a point of not really talking about politics and would not have known whether the Claimant had been on his phone.

43. Another colleague on shift that evening with the Claimant, Mr Telfer could not recall the Claimant being on his phone either but commented that they all go on their phones [page 179]

Investigation Report

44. Following the interviews an investigation report was prepared by Mr Revill and Ms Macpherson dated **16 September 2022** [pages 181 -196]. The report was presented to Tracy Crump .

45. The report set out a summary of the evidence and raised that there was a possibility that the Claimant's Instagram account had been hacked. The report commented that after the Claimant had changed his password on his Instagram account his activity status had changed from London to Nottingham but that proving whether or not his account had been hacked was "*beyond the realms of the investigating team's capability".*

46. Tracy Crump set out her approach on 16 September 2022 [pages 197- 199]:

"In my view this is a racist posting. As a gross misconduct issue, this could result in summary dismissal if proven. I am therefore mindful that the weight of evidence needs to be at a level to merit a hearing at a level 3 under the disciplinary procedure."

47. It appears from these comments, that Ms Crump was conflating the need to ensure that the investigation was sufficiently thorough, (given the seriousness of the offence and its potential consequences for the Claimant), with the appropriate burden of proof. However, it is clear that Ms Crump had formed the view that she considered it likely that the Claimant's explanation was correct and that his account had been hacked:

"I have asked about whether Instagram accounts can be hacked and been advised by a social media expert that this is possible where there has been a data leak and someone gets hold of a username and password .The account holder would not necessarily know, although sometimes (but not always) Instagram flag up a malicious log-in."

And;

"I concur with the investigation team that it is not possible to affirm with any certainty that [the Claimant] sent the GIF to Mr Thomas or to prove or disprove that the fact that this Instagram account had been hacked . However, the explanation and evidence that [the Claimant] has presented ***make it likely*** *that this is what happened." Tribunal stress*

48. It is not in dispute that on **23 September 2022** the Claimant was contacted by telephone and told that the investigation was over and the **case was closed** and no further action was taken.

Letter – outcome of investigation

49. By letter of the 28 September 2022 the Claimant was told 2 key things [page 203]:

48.1 *The investigation about the allegation of posting an image of a racist nature on*

*Instagram had **"concluded";***

*A*nd;

48.2 *The head of People and Organisational Development, has determined that the case will not progress to formal disciplinary action.*

50. The Claimant was absent on sick leave at the time and it was acknowledged that this had been a difficult time for him. The Respondent does not dispute that the Claimant's sick leave was a result of the investigation.

Grievance

51. Mr Thomas however, was unhappy with how the Respondent had handled the grievance and with the decision not to proceed to a disciplinary hearing and raised a grievance on 8 November 2022 [pages 325-326].

52. As part of the grievance, Mr Thomas complained that a thorough investigation had not taken place and questioned what specialist advice had been sought around the issue of alleged hacking. Mr Thomas complained that he had been left feeling unsupported by the Respondent.

53. On **6 June 2023** the Claimant was contacted and informed that Lela Henry, Area Manager had been appointed as the Grievance Hearing Officer [page 204].

54. It is not in dispute that at no point was the Claimant informed that the disciplinary investigation was being reopened. He was only informed that this was a grievance investigation and he was asked to attend a meeting; *"… as part of the grievance process."*

55. Ms Henry's report into the grievance is dated 8 August 2023 [pages 205- 209].

56. In her introduction Ms Henry states that the purpose of the report is to address the third ground of the grievance, namely how thorough the original investigation had been and the decision not to proceed with the disciplinary hearing. It was not however limited to reviewing the original investigation itself but:

*"The purpose of the report is to **present additional** relevant evidence that was gathered during the course of the grievance investigation which either corroborates or refutes that gathered during the course of the original investigation*." [page 206] Tribunal stress

57. The Ms Henry noted in her report that it was never the intention to reinvestigate the original complaint, it was to investigate the original investigation decision not to proceed with the disciplinary hearing (page 206).

58. It is clear however, the Tribunal find, that Ms Henry had decided to obtain further evidence about the possibility of hacking and that could only have been with a view to determining whether there had and were, grounds to take disciplinary action. Despite that, Ms Henry did not make this known to the Claimant, that she was to all intent and purposes, re-investigating the allegation. The Claimant was not made aware that this was the purpose of meeting with him.

59. Mr Macey, who would chair the disciplinary hearing, accepted in cross examination that Ms Henry did in fact re-investigate and the Claimant was not aware that this is what was happening at the time.

60. Ms Henry sought further professional 'advice' from Ken Johnson, the Respondent's ICT Security manager and Jack Grasby, the Respondent's Senior Communications Manager on 3 main areas:

    - *Whether more could have been done at the time of the original investigation to substantiate if the Claimant's Instagram account had been hacked*
    - *The accuracy of Instagram location services*
    - *Alerts of notifications that are sent if unusual or suspected logins take place*

61. Ms Henry also sought advice from Mr Grasby around her understanding of Instagram functionality generally as well as understanding the form that Instagram hacking commonly takes.

62. The investigation report set out the advice Ms Henry had been given,.

63. The report recorded that Mr Johnson had advised that: *"…**more could have been done at the time that the complaint was raised to substantiate whether [the Claimant's] account had been hacked or not, however due to the time that had now passed the likelihood of being able to trace this information had reduced**. Subsequent enquires were made with Instagram however this confirmed the likelihood of being able to obtain the relevant information was **now** low, and that if necessary an information retention request should have been made within 90 days of the message date.*

    Ken provided a technical opinion about the accuracy of Instagram location services. He explained that this is not accurate and that device location will frequently display as being somewhere other than where the device itself is."

    And;

    *"…**Due to the time that has passed** it is unlikely that this location information would not be traceable via Instagram" And;*

    " …Ken confirmed that failure to receive an alert would not indicate categorically whether an account had been accessed by a third party or not". (Tribunal stress)

64. Mr Grasby confirmed that the information in the original investigation report was correct namely that stories disappear after 24 hours for both the poster and any comments, although direct message (DM) chat remain visible. He also gave advice that hacking commonly takes the form of accounts being taken over and links for the purpose of generating money and sending GIFs in response to a story is not usual hacker behaviour.

65. Ms Henry decided that more could have been done to investigate the Claimant's claim that he had been hacked in the original investigation and she concluded as follows [page209];

    - Instagram location services had been seen to be inaccurate
    - Instagram hacking routinely takes the form of malicious links being sent in multiple messages to multiple persons. A direct message (DM) in response to an Instagram story is not routine hacker behaviour.

Suspension from Duty

66. On **17 August 2023** the Claimant was informed that incident around the GIF was going to

be dealt with as a disciplinary matter [page 216] and that he was suspended from duty.

67. The disciplinary decision log records the further evidence obtained during the grievance investigation process by Ms Henry, namely the information from Mr Johnson and Jack Grasby, around the possibility of hacking.

Instagram – request for information

68. The Claimant sent a request to Instagram on 30 September 2023 for the IP address, device and location of where the GIF was sent from. His evidence is that he received no reply from Instagram [page 302]. This would appear to be consistent with an email he sent to Instagram on 14 November 2023 following up on that email request [page 303]. The Respondent did not contact Instagram (with the Claimant's authority) to request information or to check that Instagram had not already provided a response.

Disciplinary Hearing : 11 October 2023

69. Mr Andrew Macey, Area Manager dealt with the Stage 3 Disciplinary Hearing. He had not been involved in the original investigation.

70. Mr Macey was candid under cross examination and quite prepared to accept the failings in the process. He agreed with counsel for the Claimant in cross examination that when the case progressed to Stage 3, the Claimant was not at the time subject to the disciplinary process because he had not been formally notified that he was the subject of a disciplinary investigation process. The Claimant had only been told that he was being interviewed as part of a grievance process.

71. Mr Macey in cross examination also agreed that the original investigation had been thorough, that the Claimant had been entitled to rely on the decision not to take disciplinary action and that the decision to proceed to this Stage 3 hearing was completely outside of the Respondent's Disciplinary Procedures

72. Mr Macey also agreed, on being taken to the Respondent's disciplinary policy [page 57], that the procedure had not been followed, because as of 28 September 2022 the Claimant was not under a disciplinary investigation and therefore the disciplinary hearing he had undertaken should never have taken place.

73. The Respondent's Disciplinary Policy expressly provides that where the alleged offence is sufficiently serious that it may warrant dismissal, the Area Manager/ Brigade Manager shall initiate, conduct or delegate an appropriate investigation and;

    *"b. The employee shall be **notified in writing immediately** of the investigation and the nature and details of the case. However, in exceptional circumstances that notification may be delayed.*

    c. Keep a record

    *d. Ensure the investigation is **completed in good time"** Tribunal stress*

74. Mr Macey also accepted that the Respondent's Disciplinary Procedures are underpinned by the rules of natural justice, and that the rules of natural justice were not followed in this case.

75. On **11 October 2023** Mr Macey met with the Claimant to conduct a disciplinary hearing. The Claimant was accompanied by his trade union representative. An external HR consultant, Laura Braddock, was also present to support Mr Macey [244 – 278].

76. The Claimant was asked whether he understood why the receiving of such a GIF or an image from "*a black colleague would potentially be troubling and upsetting for them*":

    Claimant: "*Yeah I understand [Mr Thomas's] feeling around that, obviously his post is about a black female, [Mr Thomas] being black himself so he can see that in two interpretations. You know is the post towards the female MP or is it personal to him. But obviously receiving it on his account it's going to be personal to him so yeah I understand why [Mr Thomas] is upset"."*

    Mr Macey: "*So the clear racist connotations around…*

    PO:" Yeah". [247]

77. The Claimant is then asked why he did not therefore respond when Mr Thomas sent him the question mark message.

    "*So, because obviously I know 100% I haven't seen the original picture ok. I never saw [Mr Thomas's] story ok. So at this time of this being sent I was on duty. So I've never seen [Mr Thomas's] story. I didn't actually see [Mr Thomas's] story until it was presented to me on 22nd July by Station Manage Harley. So, obviously I see a question mark from [Mr Thomas] , comes up why's [Mr Thomas] ending me a question mark, why is there a picture of a gorilla. Supposedly me sending. Immediately I'm like hold on a minute, is this [Mr Thomas].You know, I know I've not sent that.* ***There's now a response I'm starting to think is this a spam message. So, hence why I didn't response*****".** [page 248] Tribunal stress.

78. The Claimant accepted during the disciplinary hearing that while he says in that meeting that the situation around the nature of the GIF sent to Mr Thomas sent '*alarm bells* ringing', he made no attempt to contact his Colleague. His explanation at this stage appears to be that he thought the follow up messages from Mr Thomas were not genuine.

79. The Claimant is then questioned around why he did not attempt to contact Mr Thomas by other means if he was concerned about responding via Instagram and he is specifically asked why he did not email him or him. The Claimant appears to accept that he has no good explanation for not doing so; *"yeah and I will hold my hands up to that one yes…"*

80. Mr Macey goes on to ask the Claimant, if he thought the Instagram account of Mr Thomas had been hacked, why he made no effort to let him know. Mr Macey points out that Mr Thomas is someone who was a friend, a friend on social media and a colleague he has spent time with detached on a watch and yet did not contact him to warn him that the Claimant thought Mr Thomas's Instagram account may have been hacked. The Claimant again appears to accept that he has no good explanation for his behaviour in not contacting him [page 248]: "*No sorry, I apologise for that, yeah you know thinking about it yeah could have*".

81. The Claimant also mentioned in the disciplinary hearing that he was a naive about social media and was busy around the time of the incident with his father, and yet also says he had felt a little bit of panic when he saw the message from Mr Thomas and he felt a bit of panic;

    The Claimant:"…*I'm not on it all the time and because I am not using the messenger to then see that was kind of like 'oh hang on a minute' so yeah. There's a sense of panic like but because I've been* busy and I'm not on social media"…

    AM: "So you had a sense of panic at the time"

    Claimant: Yeah "… there was a little bit of oh shit" [page 250].

82. Under cross examination the Claimant also accepted that he knew that Mr Thomas was likely to be offended by the gorilla GIF and that he was likely to think that it had been deliberately sent by the Claimant. The Claimant also conceded under cross examination that as the GIF had been sent from his own Instagram account, his alleged belief as stated during the disciplinary hearing, that he thought the Instagram account of Mr Thomas was the account which may have been spammed, made no sense.

83. The Claimant also made a comment during the disciplinary hearing, in response to questioning about why he had not tried to contact Mr Thomas, that Mr Thomas could have contacted him [page 249]. However, the Tribunal note that Mr Thomas had been sent an apparently racist picture and yet made two attempts to engage with the Claimant and give him a chance to explain or apologise. Mr Thomas, the Tribunal note, was not quick to complain, he gave the Claimant a fair chance to engage with him and resolve this situation between them directly and it was only when the Claimant ignored his attempts to do so, that he reported the behaviour.

84. The Claimant was taken to his contract of employment during cross examination [page 87] which states: "*The Nottinghamshire Fire and Rescue Service is committed to ensuring equality of opportunity for all groups in both its service provision and its employment practices and requires its employees to adhere to its core values whilst at work . A copy of the Services equality Statement and Core Values is attached in Appendix C"*

85. Appendix C was not contained in the Tribunal bundle unfortunately, however, the Claimant accepted that the core values of the Respondent include not being racist and reporting other people's racist behaviour.

86. The Tribunal appreciate why Mr Macey felt that the Claimant's explanations for not responding to Mr Thomas were not convincing or satisfactory, indeed the Claimant himself in the disciplinary hearing comments that he behaved in a manner which he accepted was a "*little bit ignorant*" and that had he responded, he was of the opinion that the matter would not have got that far:

    "…if we are being really honest with each other, had I replied to that I don't think we'd be here today in this situation, it could have been resolved" [page 250]

87. The Claimant explained to Mr Macey that he had emailed Instagram but not received a response [page 259].

88. Despite his alleged concern about hacking, the Claimant did not take any steps to secure his Instagram account. He had not changed his password immediately when he became aware of the GIF or contacted Instagram to report his concerns. He did nothing immediately to prevent potentially further offensive images being sent from his account until he was spoken to on 22 July by the Station Manager. The Tribunal consider that any right thinking person, would view his behaviour as, at worst, indicating guilt or at best, indifference to the offence he may have caused.

89. Ms Henry was asked questions by Mr Macey during the disciplinary hearing, and she gave evidence that the focus of her investigation was to ascertain if professional advice on media and security should have been engaged by the Respondent during the first investigation. During her investigation she had thought it necessary to seek additional professional advice which indicated that Instagram location services are not accurate and hacking is usually in the form of multiple malicious links from multiple people and not a direct message (DM) to an Instagram story.

90. Ms Henry explained what additional expert advice she had obtained [page 261] and referred

to Mr Johnson's advice.

91. The Claimant's TU representative, Mr Tucker, asked questions of Ms Henry, Mr Johnson, ICT Security Manager and Mr Grasby, Senior Communications Manager [266 – 276].

92. Mr Johnson was asked by Mr Tucker about the reliability of location services on Instagram as compared to services such as 3 words or google maps. The advice of Mr Johnson was that the location services on Instagram are not unreliable because someone can use a VPN or proxy server to show a different location. Even without using a VPN his advice was that how reliable it is depends on how someone has connected to Instagram, whether through Wi-Fi or a mobile phone provider. He advised that the more reliable way to identify the location is via the IP address where someone has logged on to a server.

93. Mr Johnson was asked by Mr Tucker what the likelihood was, if someone was sat at home using their W-Fi connection, the device would show as over 100 miles from the actual location. It is not clear however Mr Johnson's answer appears to relate to the reliability of location services (because he had commented immediately prior to this, that location services are a little different to the IP and may or may not be accurate) and advised that the likelihood of accuracy of the location services, in the scenario Mr Tucker presents, was "*Probably 50/50. It depends on the service provider you use."* [page 267]. Mr Johnson went on to comment:

"You can investigate that further and find out a lot more detail but it won't be through somebody like Instagram etc."

94. The evidence Mr Johnson, from whom the Respondent had sought advice about the possibility of hacking, during the disciplinary hearing when commenting on the accuracy of Instagram location services, assessed them as : "*Probably 50/50. It depends on the service provider you use."* There was no discussion about who the service provider was and what difference that may have made. That was not explored with Mr Johnson.

95. In terms of what Instagram, or someone else, could provide, Mr Johnson does not explain and he is not asked to do so in the disciplinary hearing. He was asked however whether, if someone had genuinely hacked the Claimant's account, he would expect to say something different from the evidence the Claimant had already provided (i.e. screenshot of his location from Instagram location services), to which Mr Johnson in effect, appeared to say it would not look any different. He went on to say that that if the Claimant's account had been logged into from London this would potentially show that his account had been hacked. However, the Tribunal note that his response appears to be clearly based on the premise that the account was actually logged into in London, however what the Claimant had produced was not the IP address which was more likely, it seems, to would show that (unless a VPN/proxy server was used). What the Claimant had produced was a screenshot from the account's location services function.

96. The Tribunal find on the evidence, that the IP address and location services, are two different things. The IP address can show the location where a device has been logged into. It is a unique number assigned to a personal internet connection however, the address can be hidden by the use of a VPN.

97. The location service is a different tool, and is less reliable. The location can simply be changed in the application's setting function or simply turned off. The location service function is therefore a less reliable way of identifying location.

98. Mr Johnson also advised that if the Claimant and his wife had been logged into Instagram via the same Wi-Fi, he would expect to see the same location on their location services app.

and if, as the Claimant alleged, he changed his password and it then showed that he was logged in from Nottingham, it would indicate a potential hack.

Reconvened disciplinary hearing

99. The disciplinary hearing was reconvened on 16 November 2023 [pages 334 – 341].

100. Mr Grasby had when asked by Mr Macey, after the first disciplinary hearing, to obtain some external expert advice about 'hacking'. The evidence of Mr Macey is that Mr Grasby informed him that the only advice he could get was from someone called Justin Clark. Mr Clark provided a document headed an Expert Insight Statement [page 324]. That was provided to the Claimant on 7 November and would be discussed at the reconvened hearing.

101. Mr Macey had received on 14 November from the Claimant: a follow up email he had sent to Instagram, an article about Disneyland being hacked [page 307-310] and a further article from July 2022 written by James Gelinas [page 311]. The latter advert was about hackers sending images through Instagram that hijack the recipient's phone.

Mr Clark's Expert Insight Statement

102. Mr Macey in cross examination accepted that it had transpired that Mr Grasby and Mr Clark were connected in some way (although he did not appear to know how exactly). Some challenges were made to the legitimacy of Mr Clark's report by the Claimant's representative just before the reconvened disciplinary hearing and because of that, he decided to discount the evidence of Mr Clark [page 324]. He was rather vague about those challenges and around his decision to discount this evidence, a decision clearly not communicated to the Claimant until the appeal stage.

103. Mr Grasby had put the scenario to Mr Clark, when seeking his advice, of an offensive direct message being sent from an Instagram account from one member of staff to another and the likelihood of that being the result of hacking. Mr Jack had structured his advice around that scenario. However, the Claimant challenged during the disciplinary hearing itself, the reliability of his advice, on the basis that the message was not a direct message, it was a GIF sent in response to an Instagram story, a feature which allows users to share photos and videos [page 301]

104. Mr Macey went on to give evidence that he arrived at the belief that what had happened to the Claimant's account was not typical type of hacker behaviour based on the statement from Mr Grasby [page 208], namely that hacking via Instagram usually take the form of hacking for the purpose of generating money.

105. Mr Macey gave evidence in cross examination, that had been keen to get more advice about hacking but he took no further steps to get further advice because he was lead to believe by Mr Grasby, that the Respondent had exhausted all opportunities to do that.

106. The Tribunal are not persuaded that the Respondent could not have managed to obtain further expert advice specifically around 'hacking'. There is no evidence to support their case that this was not possible. It is not clear what if any further steps were actually taken to try and source that sort of expert advice

107. The Claimant had produced journalistic articles relating to various people who had their Instagram hacked, not for financial gain but for malicious reasons [page 307 -315]. He also produced a at the reconvened hearing, a typed document from someone called Alex Bount about VPN. The document list his role and previous roles including former Principal Software Engineer at Microsoft, a contact of the Claimant who works in IT in the US [page 304] about

VPN. It is unsigned and undated. It sets out a summary of what VPN is and concludes that: "*Without using a VPN the location specified previously by Paul would be relatively accurate*". It is not clear what is meant by 'relatively accurate' and the author of the documents does not go on to explain what information he has been provided with by the Claimant.

108. The Claimant at this reconvened hearing was now not as accepting that the GIF was necessarily racist:

*Mr Macey: " I think sending an image of a Gorilla to a back colleague is a racial slur on its own without any text added to it"**...***

The Claimant: " yes and no . because it's down to interpretation." [page 338]

109. The Claimant was still accepting however, that had he spoken with Mr Thomas sooner, the disciplinary proceedings may never have taken place;

110. *Claimant "…the only thing I've failed at is not replying to [Mr Thomas] but without sounding arrogant it's not a criminal offense [sic] to not reply to a message, You know, **had we spoke this could have been resolved sooner**. But I would never put myself in a position of you know, its professional suicide, To send an image to a colleague who is black of a Gorilla for his to be able to screen shot it. Walk into the boss's office and go Paul Oldham sent that. It's professional suicide" [page 340] Tribunal stress.*

111. Mr Macey, in cross examination, accepted that he had not taken into consideration when deciding whether the offence had been committed, the evidence of the Claimant's colleagues who were working with the Claimant on the 9 July because he considered that their statements provided him with "*no real evidence*" one way or another.

112. Mr Macey prepared a decision making matrix [page 342 - 346]. He set out the evidence and his reasons for discounting some of the evidence and his reasons for forming the belief that the Claimant had sent the GIF, which in summary were:

- *The Claimant showed little remorse for the fact the Gif came from his account and Mr Macey would have expected a little more empathy*
- *The Gif was sent at a time and date when the Claimant was on duty and had his phone with him*
- *It is not credible or acceptable that the Claimant ignored the messages from his Colleague asking him to explain the Gif and his mitigation around why he did not reply is not convincing.*
- *The Claimant only took steps to secure his account after he was being investigated on 22 July 2022.*
- *The Claimant produced a screenshot of the location of his device but the advice of Mr Johnson is that device location is not accurate and the evidence is compromised in that; the screenshots were not take on 9 July, the screenshot of his wife's phone does not show it was connected the same or any Wi-Fi. There is no proof when the screenshots were taken after password resent had no date or time.*
- *The alleged other posts from the Claimant's account which he says were not sent by him are different in nature*
- *It was established that hacking is commonly in the form of malicious links sent in*

multiple messages to multiple people Mr Grasby

- *Evidence of hacking of Disneyland very different in nature*
- *The James Gelinas article refers to a bug but the article is from September 2020 and Mr Macy considered the likelihood of this bug still being a risk two years later is low.*
- *There is no evidence that the Claimant approached Instagram on 22 November 2022 other than the Claimant saying he did so, and only chased the request of 30 September 2023 when this was raised by Mr Macey with his representative what the focus of the reconvened hearing would be*
- *The evidence of Alex Blount, is a friend of the Claimant, it is not signed, not on letter headed paper and he appears to be a software engineer and not ICT professional and has been discounted*

113. In cross examination, Mr Macey accepted that his conclusions were a result of inferences he had drawn from the Claimant's actions or inaction and what he considered how he, or any reasonable person would reacted in those same circumstances.

114. Mr Macey in cross examination, expressed his view that he would have expected the Claimant to have made more effort to protect his Instagram account and get evidence to disprove that the image had been sent from where he was working in Mansfield. However, he also accepted that the Claimant did not know about the ability to obtain evidence from Instagram and the 90 day time limit for doing so, until he read the addendum investigation report but in cross examination accepted that the onus is on the Respondent to have carried out a reasonable investigation and:

"We could have done more at the time, but stand by that I expected the Claimant to have done more."

115. Mr Macey under cross examination could however see the unfairness in conducting another investigation after that 90 day window for getting information from Instagram had closed. The Tribunal note that the Claimant, having been told no action was to be taken, would have had less reason to approach Instagram to try and obtain the location data.

116. Mr Macey concluded that on the balance of probabilities, it was likely that the Claimant had sent the GIF. In his evidence in chief, he explained that the Claimant had shown little remorse that the GIF had been sent from his account and, that even if his account had been hacked, he considered that a person would have reached out to Mr Thomas and apologised . He comments that if it had been himself, he would have contacted the account provider and made an official complaint. Mr Macey considered the failure by the Claimant to respond in this manner to be 'persuasive'. His evidence was clear in terms of what evidence weighed against the Claimant:

*"The **strongest factor** for me was the behaviours after the message was sent – it was the strongest deciding reason – it far outweighed anything else for me." Tribunal stress*

117. The Claimant was then summarily dismissed. The reason for dismissal is set out in the letter from Mr Macey [page 352];

"I conclude that on the balance of probability you sent the image (GIF) of a racist nature to …Such behaviour is abhorrent and conflicts with NFCC's Code of Ethics, our organisational values and is wholly inappropriate behaviour for a member of the Fire & Rescue Service."

118. Mr Macey did not make any mention that he would have dismissed even if he had found that the Claimant had not sent the GIF, because he had failed to report the incident.

119. The Claimant registered an appeal on 29 November 2023 [pages 355- 365].

Appeal

120. The Claimant submitted a detailed appeal [pages 356 – 363].

121. Mr Macey had not explained in his outcome letter, that he had not relied upon the Expert Insight Statement of Mr Clark and in his appeal the Claimant challenged Mr Clark's evidence on the grounds that it:

- *Was potentially unsuitable, of unknown/dubious qualification*
- *Expressed the flawed opinion that hacker motivations is limited to financial again and failed to acknowledge or have any awareness of the concept of the troll hacker.*
- *Was not provided with accurate content and the question was flawed.*

122. The Claimant also referred to the evidence of the ICT Security Manager, Mr Johnson at the disciplinary hearing [page 361] and the responses he had given to questions put by the Claimant's union representative as supporting the Claimant's case that his Instagram had been hacked.

123. The Claimant's appeal was chaired by Mr Michael Sharman, Assistant Chief Fire Officer, and was held on 21 December 2023 with another independent HR Advisor, Ms Chambers in attendance. Mr Macey attended to explain his decision and the Claimant was again represented by his trade union representative, Mr Tucker.

124. Mr Sharman in cross examination, was not the Tribunal find as prepared to consider the situation in an even handed way. Mr Sharman was not prepared to accept that the Claimant was not the subject of disciplinary proceedings at the time that he was called to the Stage 3 Hearing. Mr Sharan gave evidence under cross examination, that the Claimant had been written to about the grievance and Mr Sharman considered that it was a continuation of the process. The Tribunal find that such a view fails however to take properly into consideration that the Claimant had been told that there would be no disciplinary action. After further cross examination, Mr Sharman was prepared to only accept that the process which was followed was '*not ideal'* but did not consider that it had prejudiced the Claimant.

125. Mr Sharman, under cross examination, gave evidence that he '*would have liked'* to have got information from Instagram but he was not confident that it would provide the level of detail required and referred to what Mr Johnson had said about the reliability of the IP address .

126. Mr Sharman did not accept that Mr Johnson at the disciplinary hearing, when talking about how unreliable information was, had been talking about the information the Claimant had produced in the screenshots he had provided, rather than what information Instagram could provide:

"*Johnson gave a view about device and inaccuracy, page 269, he said VPN could hide where log in, I took it not only location of device but where image could be sent from, I understand if want to hack, could do from another location – I took it as inconclusive and could not say what had been sent or not from what location"*.

127. The Tribunal find that it was not clear what precisely of Mr Johnson at the disciplinary was

saying about the reliability of the information Instagram could provide but seems clear that he was saying that the IP address is a more reliable way of locating the login location but that someone can still disguise that through a VPN. The reference 50/50 however appears to the Tribunal to be a reference to the reliability of location services [page 267]. In response to a question from the Tribunal about whether Mr Sharman had asked on appeal, where the further detail Mr Johnson had mentioned during the disciplinary hearing, may be obtained from, Mr Sharman gave evidence that he felt there was no need for that level of further exploration given the facts he had and he: "*thought it would be difficult to get robust information – given time passed…".*

128. Mr Sharman in cross examination was asked whether he accepted that if the Claimant did not use a VPN, information about the IP address from Instagram would be more likely to be conclusive about where the account was logged in from, Mr Sharman did not comment on whether the Respondent accepted the Claimant's evidence about not using a VPN, and commented only that; *"as we did not get data from Instagram, I cannot say conclusively."*

129. Mr Sharman considered that he needed to ask further questions of the Mr Clark, to clarify the process in which the Expert Insight Statement had been obtained and to do so reviewed the communications between the Head of Communications and Mr Clark .The emails exchanges between Mr Clark and Mr Grasby show that they were familiar and on friendly terms, Mr Grasby in their email exchanges enquired after Mr Clark's daughter [pages 331-333]. Mr Sharman shared that information with the Claimant's trade union presentative [pages 407 – 409]. In the appeal hearing, Mr Sharman referred to those communications and asked Mr Macey to comment on the 'use' of Mr Clark. Mr Macey [page 388] explained that he had wanted some expert information about typical types of hacking because he felt that was something *'hacking'* however, the information Mr Clark provided had no bearing on his decision which is why there is no reference to it in the outcome letter.

130. On balance, the Tribunal accept Mr Macey's evidence that that he had decided not to take into account the evidence of Mr Clark because his evidence on this is supported by the absence of any reference to it not only in the outcome letter but his decision making matrix.

131. Mr Sharman decided to uphold the decision to dismiss and wrote out to the Claimant on 11 January 2024 to explain his reasons for doing so [pages 403 – 406]. He set out what he saw as the main issues which included:

- *The evidence presented by the Claimant of hacking was metadata for 22 July 2022 and not 9 July 2022 when the image was sent.*
- *During the intervening period of 13 days, (from 9 July to 22 July) the Claimant continued to use the social media platform*
- *The Claimant took no action to address or respond to the messages from his Colleague about the Gif*
- *The Claimant took no action to determine the security of his social media account immediately after the evet or in the following weeks, any subsequent action taken was as a result of being informed of an investigation.*

132. Mr Sharman broadly summarised the grounds of appeal into 3 headings and addressed each, which in summary were as follows:

The decision to dismiss was procedurally and substantively unfair

133. It was accepted that the time between the GIF being sent and the further investigations, did

not help either the Claimant or Respondent ascertain whether hacking had taken place. However, Mr Macy did not find that procedural issue rendered the dismissal unfair.

Decision maker relied upon the opinion of a purported expert

134. Mr Sharman commented that much of the focus at the appeal had been on the lack of technical evidence around hacking and that whilst he acknowledged that the comments of the ICT Security Manager that there was uncertainty regarding the 'logged' on location and what this may imply with regard to potential hacking, the metadata provided by the Clamant was produced on 22 July 2022, it was not meta data obtained before or on 9 July 2022 and thus he did not consider this evidence to be relevant as it did not relate to the date when the image was sent.

135. New correspondence from Justin Clark was presented at the Appeal Hearing and Mr Sharman referred to his further investigation and that he was satisfied that Mr Macey had confirmed that the Expert Insight Statement had no bearing on his decision and hence it was not commented on in his outcome letter.

136. Mr Sharman set out how the answer to the question of whether the Claimant's Instagram account had been hacked had not been answered because the expert evidence provided no assistance however, he did not accept that this rendered the decision to dismiss unfair and " *I returned to the facts and I considered your conduct following your Colleague's receipt of the image".*

The decision maker expressed doubt about the evidence supplied in your defence without clarifying whether there was further evidence that could address that doubt.

137. At the appeal hearing further digital evidence was provided, which clarified the date the photographs were taken, however Mr Sharman did not consider that it further influenced the dismissal decision, the metadata provided was not on the date the image was sent.

138. Mr Sharman referred to considering what he would have done and what he would expect another colleague to have done in the same situation and considered that the Claimant's response was not consistent with someone whose account had been hacked and was shocked by the matter: "*Your 'defence' of hacking was too late and inconsistent with someone who was appalled that an image from their account had been sent to colleague and caused offence.".*

139. Mr Sharman formed the belief that the Claimant had sent the image, that it was reasonable to conclude that it was a racially offensive image and not appropriate to have sent to a colleague and in terms of sanction, commented that he had not seen any evidence or acknowledgment of the hurt and offence the image had caused .

140. In cross examination Mr Sharman stated that he did not explicitly discount the evidence from the crew members, but he did not consider it conclusive. They had not been interviewed until 2 months after the incident and he felt that it would be difficult for them to say if they had seen the Claimant on his mobile telephone 2 months before. It was not explained to the Tribunal why it had taken the Respondent 2 months to interview those colleagues.

141. Mr Sharman under cross examination explained that he had formed the view that there was no conclusive evidence of hacking and it was clear from his evidence that the Claimant's response, when aware of the GIF, was not consistent with someone who believed they had been hacked. He did not consider his reaction it to be 'normal' behaviour.

Legal Principles

142. The starting point is the working of the relevant statutory provisions under section 98(1) and (2) ERA which require that the employer to show the reason for dismissal and if it is a potentially fair one, namely that it is a reason which falls within the scope of section 98(1) and (2) of the Employment Rights Act ("ERA") and was capable of justifying the dismissal of the employee, the next step is to consider section 98 (4):

98 General.

(1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer *to show—*

(a)the reason *(or, if more than one, the principal reason) for the dismissal, and*

(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2)A reason falls within this subsection if it—

(a)relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b)relates to *the conduct of the employee,*

(c)is that the *employee was redundant, or*

(d)is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

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

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

143. It will not in general be possible for an employer to show that it acted reasonably in treating the conduct reason as sufficient reason to dismissal unless it has followed certain procedural steps : **Polkey v AE Dayton Services Ltd 1988 UCR 142, HL.**

144. The Acas Code of Practice on Disciplinary and Grievance Procedures (Acas Code) sets out the basic requirements for fairness. The Code is intended to provide the standard of a reasonable behaviour and while the Code is not legally binding, it is admissible as evidence before a tribunal. Tribunals must take its provision into account where they are relevant. The Acas Code includes the following guidance:

4. …whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:

- *Employers and employees should raise and deal with **issues promptly** and should not unreasonably delay meetings, decisions or confirmation of those decisions.*
- *Employers and employees should act consistently.*
- *Employers should carry out any **necessary investigations**, to establish the facts of the case.*
- *Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.*
- *Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.*
- *Employers should allow an employee to appeal against any formal decision made. Tribunal stress*

145. A non-binding and non-statutory Acas Guide on discipline and grievances at work accompanies the Acas Code and provides practical advice on the operation of disciplinary proceeding. It states that procedures should:

    - *provide for matters to be dealt with **speedily.** Tribunal stress*

146. When assessing whether the employer adopted a reasonable procedure, the range of reasonable responses test is applied: **Lord Justice Mummery in J Sainsbury plc v Hitt 2003**ICR 111, CA: "*The range of reasonable responses test …applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason."*

147. Mr Justice Brown Wilkinson in ***Iceland and Frozen Foods Limited v Jones ICR 17 EAT*** set out the law in terms of the approach a Tribunal must adopt, as follows:

    a) The starting point should always be the words in section 98(4) themselves.

    b) In applying the section the Tribunal must consider the reasonableness of the employers conduct, not simply whether they (the members of the Tribunal) consider the dismissal to be fair.

    c) In judging the reasonableness of the employers conduct the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employers.

    d) In many (though not all) cases there is the band of reasonable responses to the employees conduct in which the employer acting reasonably may take one view, another quite reasonably take another.

    e) The function of the Tribunal is as an industrial jury, it is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, if it falls outside the band it is unfair.

148. The employer must hold a genuine belief that the employee is guilty, on reasonable grounds, after having carried out as much investigation into the matter as was reasonable in the all the circumstances: **British Homes Stores v Burchell 1980 ICT 303, EAT.**

149. The burden is neutral when it comes to reasonableness: **Boys and Girls Welfare Society v McDonald [1996] IRLR 129.**

150. The ACAS Guide emphasis that the more serious the allegations the more thorough the

investigation ought to be.

151. **RSPCA V Cruden 1986 ICR 205, EAT**: an unjustified delay of 7 months before disciplinary proceedings were commenced made an otherwise fair dismissal unfair, even though the employee suffered no prejudice. The Eat held that :

"In summary, what the tribunal found was that his employers had dismissed Mr. Cruden, an inspector, for gross misconduct; that they honestly and reasonably believed that he had been guilty of such conduct, and that was why they dismissed him; and that it had in fact been very clearly established *before the tribunal, on the evidence they had heard, that he was guilty of such conduct. They went on, however, to find that the appellants had handled the case in a manner which they regarded as "quite deplorable" and that on that account the dismissal was unfair. When they came to consider contributory conduct they found, hardly surprisingly, that the respondent had contributed to his dismissal, and that the appropriate way to reflect his contribution was by depriving him altogether of a compensatory award but giving him his basic award in full.*

152. The ET had determined that : "*Furthermore, we are satisfied that the actual delay in the implementation of the disciplinary proceedings did not actually prejudice the applicant. Had they* been *instituted sooner the result would have been exactly the same, and indeed of course he would thereby have lost his job and his remuneration so much the sooner."*

And;

"In paragraph 33 of their decision the tribunal expressed themselves in the following terms:

"In our view, however, we are entitled to find independently of our conclusion that the respondents had lost their right lawfully to terminate this contract without notice or payment in lieu, to find …that the respondents' enormous delay in taking disciplinary action in relation to the incidents made the dismissal unfair as being contrary to equity and the substantial merits of the case unless the respondents had some good grounds for the delay."

153. **Christou and anor v London Borough of Haringey 2012 IRLR 622, EAT***:* the EAT upheld a decision that a delay of 18 months between the alleged misconduct and a second set of disciplinary proceedings did not render the dismissal, unfair. This was however, the Tribunal note, an unusual and very serious case, around a failure to prevent the death of an abused baby.

154. In **A v B [2003] IRLR 405 the EAT** (Elias J presiding) held that the relevant circumstances include the gravity of the charge and their potential effect upon the employee and that it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as on the facts of that case, the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite. In ***A v B* the** EAT held that:

*"*Serious *allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries* ***should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him."*** *Tribunal*

stress

155. In **Kelly Madden v Manor Surgery [2007] ICR 203 (para 35):**

"Prior to the coming into force of this section, the House of Lords had established that if a dismissal was found to be unfair for procedural defects then the fact that the employer would have been dismissed in any event, even had he complied with all the proper procedures, would not generally render a dismissal fair. It could only do so in the very exceptional circumstances where a reasonable employer could dispense with all such procedural safeguards. The relevance of the fact that the employee might have been dismissed in any event went to the question of remedy and not liability: see Polkey v A E Dayton Services Limited [1987] IRLR 503 HL overruling the earlier Court of Appeal decision in British Labour Pump Co Ltd v Byrne [1979] ICR 347 IRLR 94."

Submissions

156. The hearing did not conclude until shortly after 5.00pm and therefore there was no time for the parties to give oral submissions. It was therefore agreed that written submissions would be provided. Due to the availability of counsel, it was agreed that they could be filed with the Tribunal on 11 September 2024.

157. I have considered the submissions of both parties in full and I set out here a summary of them.

Claimant's submissions

158. It is submitted that Group Manager Macey gave his evidence in an entirely straight forward and impartial manner and was attempting to assist the Tribunal, while Assistant Chief Fire Officer, Sharman was less ready to make concessions and his evidence was considerably less impartial and he give answers intending to deflect and defend.

159. It is submitted that the Respondent adopted an unfair procedure leading to the Claimant's dismissal and reopening the investigation meant that the investigation was not prompt or conducted in a good time and there is no reason why the original investigation could not have done what Ms Henry had done.

160. It is submitted that it was not one process and that while Group Manager Macey during cross examination accepted that the Respondent had not followed the disciplinary procedure when the Claimant was invited to a stage 3 hearing, Mr Sharman would not accept this and saw no difficulty with the process adopted.

161. The disciplinary procedure refers to being underpinned by the principles of natural justice and it is submitted that to reopen the investigation without advising the individual that they are being investigated again, was unfair and an abuse of process and that proceeding to a disciplinary hearing after the opportunity to obtain important location data had been lost, was unfair.

162. It is submitted that while the Claimant had applied to Instagram late, outside the 90 day window for location data, that it may have been different had the Respondent contacted Instagram, especially if made within the 90 days window and it appears from Ms Henry's report that there had been direct communication with Instagram which confirmed that the likelihood of obtaining the relevant information was now low [page 208].

163. It is submitted that there was criticism of the Claimant for not obtaining the data when questioned at the appeal [p.346], even though the Mr Macey accepted that the Claimant

would not have been aware of the 90 day window until receipt of Ms Henry's Addendum Investigation Report.

164. Mr Sharman's evidence is that he had read Ken Johnson's answers to questions and concluded that he would have had no confidence in the location data being able to assist but it is submitted that Ken Johnson, as recorded in Mr Henry's report, considered that more could have been done at the time of the original investigation to obtain location data and it is submitted that he would not have said this unless there was some probative value in the data and that the data could have shown the location of the device posting the image if no VPN or other masking service was in use.

165. It is submitted that location data would have confirmed the question of the location of the device posting the image.

166. The Claimant's defence of hacking was casually dismissed without any cogent evidence,

167. Further, the screenshot evidence was considered irrelevant because it did not show the location of login on the date of the alleged post. It was put to the Claimant in cross examination that the screenshot showing his device being logged-in, in London showed precisely that, that his device was logged in in London. However, it is submitted that this was never put to the Claimant during the investigation, disciplinary hearing or at the appeal, if this had been the Respondent's understanding of what the screenshot showed (and did not show). No expert evidence has been provided to support this interpretation but there is also no evidence that this is what the decision makers believed.

168. Mr Macey explained that he had not placed any weight on the expert statement from Justin Clark but it was not entirely clear why, but if he did not, it was not clear why he felt able to rely on the opinion of Jack Grasby.

169. Mr Macey stated that he would have liked more speciality independent evidence on hacking but he simply accepted what Jack Grasby had said, that it was not possible to obtain more evidence and if he felt he needed more evidence counsel questions how he could have reached a reasonable belief that the hacking defence was without merit.

170. In terms of the crew members on call with the Claimant, it is submitted that their evidence favours the Claimant because no one could positively recall seeing him on his telephone. The evidence should have been considered, even if it was decided it had very little evidential value but there is no evidence that it was considered at all or weighed in the balance. Mr Sharman stated there were problems with the reliability of the evidence because of the passage of time.

171. There was no location data obtained and there was no independent hacking evidence which means the decision makers were in no letter place after the re-investigating than after the first.

172. It is submitted that Mr Macey appeared to accept that his decision was based on inference in light of the Claimant's behaviour after the image had been sent. Counsel accepts that the Claimant himself accepts that what happened after the immediate aftermath may look 'troubling' and counsel accepts that it cannot be denied that his answers during the disciplinary proceedings, at times, demonstrated a lack of empathy and understanding.

173. It is submitted that the evidence about what the Claimant had said however, could be misleading in that the 'oh shit' reference [p.250] was in October 20203, some 15 months after the event had occurred.

174. To fail to exhibit empathy on becoming aware of the image sent from his account, does not mean guilt and that people respond differently to difficult situations and it is troubling that guilt by inference from such behaviour was found sufficient to maintain a reasonable belief in is guilt.

175. After the first investigation the Ms Crump [p.198] had recorded that she was conscious of the seriousness of the matter and the weight of evidence required to move to a Stage 3 Hearing, there was no evidence of the Claimant being seen on his phone at the material time and she had taken into account his failure to engage with the receipt of the message when contact was made.

176. It is submitted that the Respondent simply wanted to revisit the outcome of the previous investigation because they were unhappy with the conclusion reached by the Ms Crump. The re-investigation under the guise of a grievance did not reveal new evidence, just a different opinion. An opportunity to obtain new evidence was lost.

177. The process was an abuse of process, namely commencing a second process without informing him that he was under investigation and there was insufficient investigation which renders it unfair and not sufficient to found a reasonable belief.

178. It is submitted that there is no basis for a finding of contributory fault on the grounds that if a fair process had been followed the outcome would have been as per the decision by Ms Crump.

Respondent's submissions

179. The Respondent cites the following cases with reference to the need for genuine belief: **Trust House Forte Leisure Ltd v Aquilar [1976] IRLR 251,and Maintenance Cp Ltd v Dormer [1982] IRLR 491** and the nature of the conduct **: CJD V Royal Bank of Scotland [2013] CSIH 86.**

180. Counsel for the Respondent refers to the cases of **Christou v Haringey LBC [2013] IRLR 379, CA** and that the case of **Northamptonshire Health care NHS Foundation Trust v Dr M Chawla UKEAT/0075/15/JOJ** and its finding that the correct test is not that an employer needs exceptional circumstances to re-open disciplinary proceeding but the test is whether it is within the band of reasonable responses.

181. The Respondent cites **Sharkey v Lloyds Bank plc [2015] UKEAT/0005/15 and Taylor v OCS Group Ltd [2006] IRLR 613 (CA)** for authority for the proposition that it is necessary to consider the procedural flaw in context and ask whether the employee was unduly prejudiced because procedural flaws do not sit in a' vacuum'. The Respondent also cites the case of: **Securicor Ltd v Smith [1989] IRLR 356,CA.**

182. The Respondent submits that there should be a reduction in the basic and compensatory award sunder section 122 (2) and 123(6) ERA citing **Hollier v Plysu [1983] IRLR 260 and Nelson v NNC [1979] 346.**

183. In terms of the evidence, in summary what is submitted is as follows:

184. That the disciplinary procedure [page 33-66] while it does not account for investigations which are re-opened, there is no prohibition on doing so and thus no process to be followed.

185. It is submitted that the process nonetheless was fair, the Claimant was permitted to be accompanied at the investigation while having no statutory right to have a companion, there was no duty to set out the allegations at the investigation meeting, he was told of the

allegations in good time and at the disciplinary hearing he was able to respond in full and provide evidence.

186. In terms of the statements from the colleagues, the Claimant accepted in cross examination that there was nothing in any of them which the Respondent should attach weight to and the Respondent's witness were not taken to the transcripts in cross examination.

187. The Respondent submits that it was fair to re-open the disciplinary proceedings when it was revealed that the first process had not been sufficiently robust.

188. There was no prejudice it is submitted, because:

- Apart from asking a more nuanced question of its expert (about hacking) , the second investigation relied on the evidence from the first and it is submitted the first would have come to the same conclusion had the right question been asked of the expert (i.e. the likelihood that his account was hacked rather than what was asked, which was if it was possible to do so)

- The next point to come of the new expert evidence was that most hackers hack for financial gain but it is submitted whilst a relevant question it does not need an expert to ask it.

189. It is submitted that a fair basis for re-opening a disciplinary process may be a view of an inadequate sanction and in this case it was fair given the Colleague's second grievance.

190. It is submitted that it is unlikely that the proceedings were impacted by the availability of data from Instagram in that the ICT Security Manager, Ken Johnson gave evidence that it was very easy to fake an IP address by using a VPN and even without VPN, the location data shown by Instagram has only a 50/50 chance of being accurate .The Claimant says he did not use a VPN address but there is no evidence to support that however, the Instagram screenshot the Claimant accepts shows it was his home where his account was logged in. There is no expert evidence either way to show whether it is possible to fake a device rather than a location and there is no guarantee Instagram would have responded to a request for location data within the required 90 days.

Conclusion and Analysis

The Reason for Dismissal

191. The burden is on the Respondent to show the reason for dismissal: **Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA.**

192. The reason relied upon by the Respondent is misconduct which is a potentially fair reason pursuant to section 98 (1)(b) ERA.

193. The Claimant does not seek to argue that this was not the reason for dismissal.

194. The Respondent must also show at this first stage, that the reason for dismissal was capable of justifying the dismissal of the Claimant, not that it did actually justify the dismissal (that is a matter to be assessed when considering the next stage of reasonableness). All that is required at this initial stage is for the Respondent to establish that the reason relied on is not so trivial or unworthy that it could not have justified dismissal.

195. The Claimant does not seek to argue that the alleged offence would not be capable of justifying his dismissal. In any event, the Tribunal have little difficulty in concluding that the

sending of an image on social media to a work colleague, during working hours, which could be reasonably interpretated as racist and likely to cause offence, could justify dismissal.

196. The burden of proving a potential fair reason or dismissal is clearly made out in this case.

Reasonableness

197. The next issue for determination is whether the Respondent acted reasonably in accordance with sections 98 (4)(a) and (b) ERA.

The Investigation

198. The Tribunal conclude that the Respondent failed to comply with its own Disciplinary Policy (Policy) when it re-opened the investigation without informing the Claimant that he was subject to a further investigation and proceeded to then call him to a Stage 3 hearing.

199. The Claimant was not notified in writing '*immediately'*, as required by the Policy that the investigation had re-opened. The Tribunal is not persuaded by the Respondent's argument that this was not a breach because the Policy does not cover a situation where there is a re-investigation. It was not within the band of reasonable responses to treat the proceedings in 2023 as a mere continuance of the investigation in 2022. The Claimant had clearly been told that matter had been closed. The letter of the 28 September 2022 [page 203] was clear, that the investigation had concluded.

200. In terms of contractual interpretation, the Policy itself provides that it is underpinned by natural justice and when reading those requirements into the Policy, that would the Tribunal consider, require the Policy to be followed where an employee had been previously told that an investigation had closed, and a decision is taken to start another investigation. The Respondent does not allege that there is a practice in place or any other policy or document that aids construction of the provisions of the Policy terms, however, the Tribunal find that the terms are clear, the Policy does not distinguish between situations where there is a re-investigation, it simply provides that for the steps to be taken where there is an investigation .The Tribunal conclude that to all intent and purposes, there was another investigation undertaken by Ms Henry which clearly included investigating the offence again and gathering further evidence, and the Claimant was not '*fully informed'*.

201. Even on the Respondent's own case that it was a continuance, an ongoing process as Mr Sharman considered it, it was still in breach of the Policy, because the Policy makes it clear that an investigation must be completed in "*good time"* [page 57] and the investigation should be carried out to "*establish the facts promptly*" [page 44]. It cannot reasonably be argued that an investigation started in July 2022 and concluded in August 2023 and which concerns a one off incident and a relatively straightforward set of facts, has been completed in good time**.**

202. The Tribunal have reminded itself of the guidance in ***A v B*** **[2003] IRLR 405** :

61. The Tribunal appear to have considered that the fact that there was a real possibility that the Appellant would never work again in his chosen field was irrelevant to the standard of the investigation. In our view the Tribunal was strictly in error in saying that it has no significance. However, it seems to us that it is only one of the very many circumstances which go to the question of reasonableness.

62. We accept the observations of Mr Pepperall, for the Respondent, that the standard of reasonableness required will always be high where the employee faces loss of his employment. The wider effect upon future employment, and the fact that charges which are

criminal in nature have been made, all reinforce the need for a careful and conscientious enquiry but in practice they will not be likely to alter that standard.

203. The Claimant was a firefighter who the Tribunal accept enjoyed his job. The allegation against him was serious with the potential to end his career. The Tribunal find that this is the sort of case that demanded a careful and thorough investigation.

204. Section 98 provides expressly that the determination of the question whether the dismissal is fair or unfair shall also be determined in accordance with equity. 'Equity' in this context means 'fair play'. This is not a discrete element of reasonableness, it is part of the overall reasonableness test: **W Devis and Sons Ltd v Atkins 1977 ICR 662, HL.**

205. There is a fundamental problem with the way this disciplinary process was conducted, namely the magnitude of the delay. This gives rise to issues of natural justice or in any event, inequity, in circumstances where the Claimant had been told in September 2022, in no uncertain terms, that his employer considered that there was insufficient evidence to call him to a disciplinary hearing and that the matter was closed, only to re-open it again almost a year later. The reason for re- opening the investigation is relevant. Essentially the reason in this case, was because the Respondent considered that the first investigation could have been done better, in that expert evidence should have obtained about hacking. However, the Respondent in 2023 still failed to obtain any expert advice to really assist it with making an assessment of the likelihood that the Claimant's account had been hacked. The Respondent relied, in order to making a finding that the Claimant had on balance committed the offence, on information that it had access to and had considered, back in 2022 namely, his conduct after the incident.

206. Further, the first investigation was not conducted by a junior member of staff, it was carried out by the Head of People and Organisational Development.

207. The Tribunal must stress, that nothing in this judgment should be read as trivialising the hurt and offence suffered by Mr Thomas however, despite the seriousness of the misconduct in issue, this was an employer with the HR support and resources to be able to carry out a fair and thorough process first time around and be able to comply with its own policies.

208. The delay also impacted on the evidence which may have been available to the Respondent.

209. The Tribunal have had regard to the EAT decision in **Northamptonshire Healthcare NHS Foundation Trust v Chawla:**

The ET thereby failed to apply section 98(4) in a straightforward way; the band of reasonable responses did not require the importation of a higher test of "exceptional circumstances". The question for the ET was simply whether it was fair to institute the second set of proceedings (per Elias LJ at paragraph 56 of Christou and Anor v London Borough of Haringey [2013] IRLR 379 CA). Having acknowledged that the doctrines of res judicata and estoppel were "not strictly applicable", the ET had proceeded to assume those doctrines provided the answer in this case. It failed to allow that the process in question - the internal HR process - might be different in nature to the response to a patient complaint and ***failed to consider the evidence (accepted by the Claimant in evidence) that the internal HR process had never been closed but had expressly been left open and only delayed because of subsequent complaints.*** Tribunal own stress

210. Unlike the Chawla case, the Claimant in the case before this Tribunal, had been expressly assured that the investigation was closed.

211. There were no exceptional circumstances at play in this case. There was a difference of

opinion about the reasonableness of the first investigation and whether more expert evidence should have been sought.

212. The decision to investigate was, the Tribunal conclude, not carried out in accordance with the provisions of the Acas Code and guidance which provides that a key part of a reasonable process, is dealing with issues promptly. To drag such investigations over many months can not only put employees under significant strain and impact on their wellbeing, it can have a serious impact on the evidence, including the recollection of witnesses and availability of other evidence.

Was the Claimant prejudiced by the delay?

213. The Respondent submits that it is necessary to consider, in the context of any procedural flaw, the prejudice to the Claimant. Regardless of the delay, it is submitted that the Claimant suffered no prejudice.

214. The Tribunal have found that the Claimant had been made unwell by the first investigation, he was absent for a period on sick leave and had complained about the time the first investigation had taken. He was notified of the first investigation on 26 July 2022, he waited until almost 2 months later to learn that there would be no disciplinary action. It had also taken the Respondent until September to interview his colleagues, asking them if they could recall discussions or whether the Claimant had used his phone at a particular time, 2 months prior.

215. It is purely on a personal level, whether someone is guilty or innocent, upsetting to go through an investigation which may result in the loss of a career and livelihood, and to be put through that process a second time is prejudicial, in terms alone of the personal impact.

216. It may be argued that the delay, only delayed the dismissal however, in this case the Claimant denied responsibility for sending the message and the decision not to proceed with the disciplinary, did (according to the Respondent's own expert, Mr Johnson during the second investigation) make it less likely that relevant evidence could be obtained about the issue of whether or not his phone had in fact been hacked:

"*..more could have been done at the time that the complaint was raised to substantiate whether [the Claimant's] account had been hacked or not, however due to the time that had now passed the likelihood of being able to trace this information had reduced…"*

217. While the Respondent argues that any further expert was unlikely to assist, because even with an IP address the location could have been concealed by the use of a VPN, the Respondent did not produce any expert evidence at the Tribunal to assist the Tribunal in assessing what further information could have been obtained. Even after receiving advice from Mr Johnson and Mr Grasby, Mr Macey still felt that an expert in hacking would have been helpful, and while he did not pursue this advice because he understood it could not be obtained, the Tribunal are not persuaded by his evidence on this issue. Certainly the Tribunal consider that the combination of the assistance of advice from an expert in hacking' and acting in a timely fashion to obtain more data, may well have been helpful in assessing more carefully and successfully, the prospects that the Claimant's account had been hacked.

218. While a VPN may have disguised the actual IP address, the Respondent did not for example seek to obtain advice about whether it is possible to know whether an IP address is linked to a VPN. Mr Johnson had said clearly that more information may be available from other sources, other than Instagram, however, he was never asked about that and what this other information may consist of, and where it can be sourced from.

219. Mr Macey was persuaded by the Claimant's behaviour and while the Tribunal can appreciate why that was the case, further evidence which indicated a greater than 50% chance of hacking, even slightly greater than 50%, may have made a difference to the outcome.

220. The Tribunal do consider that there was prejudice caused by the delay.

221. The issue for this Tribunal when determining fairness, is not whether or not the conduct was committed but the reasonableness of the Respondent in reaching that decision on the evidence.

222. The dismissal of the Claimant in those circumstances was, the Tribunal conclude, outside the band of reasonable responses.

223. Mr Macey, who chaired the disciplinary hearing himself accepted that it was unfair to inform the Claimant within the 90 day window to obtain location data from Instagram, that the case was closed, only to re-open it after that window had expired.

224. There was possible prejudice to the Claimant which it is not possible, on the basis of the evidence presented to this Tribunal, 1 year on, to be able to accurately assess.

225. It is not possible to say whether more information could have been obtained from Instagram or other sources, if a request had been more promptly made for information.

226. The fact the Respondent may have felt that it had let Mr Thomas down by not doing an adequate enough job of investigating the first time, does not mean that it is within the band of reasonable responses, almost a year later, to decide to have another attempt at it.

Has the Respondent established the fact of his belief in the misconduct ?

227. It was not put to Mr Macey that he did not genuinely belief that the Claimant had committed the misconduct, nor is this put in submissions. What was put in submissions is that there were no reasonable grounds on which to form that belief and no reasonable investigation had taken place.

228. Mr Macey did not consider the evidence of the Claimant's colleagues, and the Claimant submits that their evidence, should be weighed in the balance. However, the Tribunal consider very little turns on this. It was within the band of reasonable responses to consider that there was no real evidential value in that evidence. The witnesses simply did not know. In the circumstances, it was reasonable to conclude that their evidence was not going to tip the balance in any direction.

229. The Tribunal accept on the evidence, that Mr Macey did form a genuine belief that the Claimant had sent the offending message. He arrived at this belief principally because he could not understand the Claimant's reaction, which to his mind was not consistent with the behaviour of an innocent person in those circumstances and to take that into account was within the band of reasonable responses. However, his belief in the circumstances was not based on an investigation which fell within the band of reasonable responses. The delay undermined the fairness including in terms of its possible impact on the evidence. The Respondent failed to obtain expert evidence despite deciding to conduct a second investigation because of a lack of expert evidence and despite considering that it would have been helpful it have it. There was an obligation to focus "*no less on any potential evidence that may exculpate or at least point towards the innocence of the employee…*" The Respondent did not take reasonable steps to investigate the further information that may have been available to it.

230. The dismissal in the circumstances, was unfair.

Polkey

231. The Tribunal have gone on to consider whether it is appropriate to make a 'just and equitable' reduction under section123(1) of the Employment Rights Act 1996 (ERA) on the grounds that the Claimant could have been dismissed fairly if a proper procedure had been followed: **Polkey v AE Dayton Services Lt 1998.**

232. The Respondent submits (it a very brief submission on this point) that the Claimant would have been dismissed in any event had a fair process taken place, albeit he does not expand upon that proposition at paragraph 55.1 of his witness submissions, other than to refer to the guidance in **Sharkey** that procedural issues do not sit in a vacuum.

233. A process had taken place in 2022 which Mr Macey himself, had considered to be a thorough process and which involved the Head of People and Organisational Development, who had decided that there was insufficient evidence to proceed to a disciplinary hearing..

234. In ***King and ors v Eaton Ltd (No.2) 1998 IRLR 686, Ct Sess (Inner House)*****,** the Court of Session held that, in considering the question of what would have happened had the unfairness not occurred, making a distinction between the 'merely' procedural and the more genuinely substantive will often be of some practical use. If there has been a merely procedural lapse or omission, it may be relatively straightforward to envisage what the course of events might have been if procedures had stayed on track. If, on the other hand, what went wrong was more fundamental, and seems to have gone 'to the heart of the matter', it may well be difficult to envisage what would have happened in the hypothetical situation of the unfairness not having occurred. In that case, the tribunal cannot be expected to 'embark on a sea of speculation'.

235. Mr Johnson had commented in the disciplinary hearing, that: *"You can investigate that further and find out a lot more detail but it won't be through somebody like Instagram etc."* Mr Johnson was not asked the obvious and simple question of what more detail could be obtained and how.

236. The Tribunal are not able to make any assessment, without embarking on a sea of speculation, of what other information would have been available, how easily this could have been obtained and what would have shown. Neither Mr Macey nor Mr Sharman, conducting the disciplinary and appeal knew the answers to those questions, because they never asked.

237. The Respondent had not as part of these tribunal proceedings, produced any expert evidence to assist the Tribunal with determining what evidence the Respondent may (or may not) have been able to obtain, to assist this Tribunal in determining the evidence which would have been available to the Respondent had it made further enquiries, at the time and the likelihood therefore that the Claimant would have been dismissed in any event.

238. The Respondent also submits that the Claimant would have been dismissed had a fair process been carried out because he had failed to comply with the Respondent's Core Values and report the discrimination. The document setting out the Core Values was not contained the Tribunal bundle and the evidence of the Respondent witnesses is not that the Claimant would have been dismissed in any event for not reporting this incident. The letter setting out the outcome of the disciplinary hearing makes it clear that the decision to dismiss was taken because Mr Macey believed the Claimant had sent the GIF, he does not say he would have been dismissed in any event if he had not sent it, because he should have reported it. There is no evidence to support that submission.

239. The Tribunal conclude that in this case, the unfairness of the dismissal was so unjust as to preclude any speculation about whether the employee could and would have been fairly dismissed and thus decline to make any reduction to reflect the prospects that the Claimant would have been dismissed had a fair process been carried out.

Contributory Fault

240. The Tribunal now turn to the issue of contributory fault.

241. There is a distinction between considerations relevant to an investigation of fairness of dismissal on the one hand, and those relevant to an investigation of contributory fault on the other **: *Iggesund Converters Ltd v Lewis 1984 ICR 544, EAT*.** The latter requires clear findings of fact as to what (if any) blameworthy conduct on the employee's part the employer knew about at the time of dismissal. The question of fairness, on the other hand, entails the tribunal considering whether, in all the circumstances, the employer's decision to dismiss fell within the band of reasonable responses.

242. Counsel for the Claimant accepts that the Claimant's answers during the disciplinary hearing at times demonstrated a lack of empathy and understanding and his behaviours "*may not have been what the service would like to see from an employee*". [para 26 written submissions. The Claimant's own counsel in submissions anticipated an argument that the Claimant's behaviour, in not responding to Mr Thomas, was not consistent with the Core Values of the service, although he makes the point that the Equality Statement and Core Values document was not in evidence before the Tribunal,.

243. Section122(2) ERA gives tribunals a wide discretion whether or not to reduce the basic award on the ground of *any kind of conduc*t on the employee's part that occurred prior to the dismissal.

244. Section123(6) ERA applies where the conduct in question is shown to have *caused or contributed* to the employee's dismissal.

Claimant's conduct : basic award

245. Given the language of section 122(2), the capacity to make reductions to the compensatory award is more restrictive than in respect of the basic award however the conduct stills needs to be blameworthy conduct:**Steen v ASP Packaging Ltd 2014 ICR 56, EAT**, held that the correct approach under section 122 (2) ERA is:

- *Identify the conduct*
- *Decide whether is it culpable or blameworthy*
- *Decide whether it is just and equitable to reduce the amount of the basic award*

246. The EAT in ***Sanha v Facilicom Cleaning Services Ltd EAT 0250/18*** stressed that the words 'culpable' and 'blameworthy' are synonyms, not *alternatives:* culpable *just means* 'deserving of blame'.

Claimant's conduct: compensatory award

247. The relevant test for deciding on reductions to the compensatory award are as set out in **Nelson v BBC (No.2) 1980 ICR 110, CA,** where the Court of Appeal said three factors must be satisfied:

- The relevant action must be culpable or blameworthy
- It must have actually caused or contributed to the dismissal
- It must be just and equitable to reduce the award by the proportion specified

248. What is blameworthy could include conduct which is 'perverse or foolish', 'bloody minded' or merely ' unreasonable' : **Nelson.**

249. The Tribunal conclude that the Claimant's behaviour, after learning of the GIF which had been sent from his own account, in failing to respond to Mr Thomas, was the Tribunal conclude, blameworthy behaviour.

250. Mr Thomas was someone the Claimant was on good terms with, he was a work colleague who he sometimes worked with and the Claimant accepted, during the disciplinary process, that the GIF was likely to have caused offence to Mr Thomas and yet he ignored two messages from Mr Thomas asking him to explain. The Claimant accepted that Mr Thomas probably thought that he had sent this offensive message deliberately and it was that behaviour that lead Mr Macey to believe that the Claimant had sent the GIF.

251. The Claimant's explanations for not responding, range from the fact he was busy with family matters to thinking Mr Thomas's account had been scammed. Even when he went into work, he did nothing until he was spoken to. He could have sent an email or telephoned Mr Thomas had he generally had concerns about contacting him via Instagram.

252. The Claimant himself accepted, that had he acted differently the matter would probably have not resulted in disciplinary proceedings and thus it seems accepts that his conduct contributed to the decision to hold a disciplinary hearing.

253. The Claimant accepted that his behaviour was a "little bit ignorant." The Tribunal conclude that the Claimant offered no satisfactory explanation during the disciplinary proceedings for not replying to Mr Thomas. The most likely explanation, in the absence of any satisfactory explanation, is either ignorance and a lack of concern for the impact the message may have had on Mr Thomas or of course, guilt.

254. The Claimant's behaviour led Mr Thomas to register a complaint and it led the Respondent to form the view that he was guilty. His behaviour in not contacting Mr Thomas was unreasonable, it was indeed ignorant and it led directly to the decision to dismiss.

255. The parties will be given an opportunity at the remedy hearing, based on these findings to make further submissions on what the percentage reduction should be to both the basic and compensatory award.

Employment Judge Broughton

Date: 28 November 2024

JUDGMENT SENT TO THE PARTIES ON

.....03 December 2024.....

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FOR THE TRIBUNAL OFFICE

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