EMPLOYMENT TRIBUNALS

Claimant: Philip Staines

Respondent: North Yorkshire Fire and Rescue Service

HELD AT: Leeds Employment Tribunal (by CVP) **ON:** 14, 15 January 2021

BEFORE: Employment Judge Buckley

REPRESENTATION:

Claimant: Mr Blitz (Counsel)
Respondent: Miss Brewis (Counsel)

This has been a remote hearing by CVP, which has not been objected to by the parties. The form of remote hearing was V: (Video). A face to face hearing was not held because it was not practicable, and no-one requested the same and all the issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The claim for unfair dismissal is dismissed.
2. The claim for breach of contract (notice pay) succeeds.
3. The award for breach of contract (notice pay) will be subject to an uplift of 10% for breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures.

REASONS

1. The issues which I have to determine were agreed at the start of the hearing to be:

1.1 What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

1.2 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? In particular, whether:

1.2.1 there were reasonable grounds for that belief;
1.2.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
1.2.3 the respondent otherwise acted in a procedurally fair manner;
1.2.4 dismissal was within the range of reasonable responses.

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

1.4 If so, should the claimant's compensation be reduced? By how much?

1.5 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

1.6 Did the respondent or the claimant unreasonably fail to comply with it?

1.7 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

1.8 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

1.9 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

1.10 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

2. It was agreed that I would determine the above issues first and that evidence on remedy would be called after the determination of the above issues, if appropriate.

Witnesses

3. I heard evidence from the claimant. For the respondent I heard evidence from Andrew Blades, Group Manager, Jonathan Dyson, Area Manager, Lynne Elliott, HR Manager and Thomas Thorp, Interim Assistant Chief

Executive and Deputy Monitoring Officer of the Office of the Police, Fire and Crime Commissioner.

Findings of fact

Introduction

4. The claimant worked for the respondent as a firefighter from 3 April 2006. He became On-Call Watch Manager for the blue watch at Tadcaster on 17 December 2018. He was dismissed on 30 July 2020.

Background – the previous disciplinary action

5. The claimant was given a final written warning in May 2019 for using the word 'bitch' on three occasions in relation to a female fire fighter. This was held to amount to inappropriate behaviour and harassment and to be in breach of the respondent's Bullying and Harassment policy. The warning was to remain active on the claimant's file for a period of 18 months.

6. The disciplinary officer also determined that the claimant had to undergo a full induction before returning to Tadcaster blue watch and recommended that the claimant be provided with a specific education programme in relation to bullying and harassment to be arranged by Human Resources. The claimant's progress would be monitored by his station manager on an ongoing basis and he would review the claimant's progress in August 2019 and at regular intervals thereafter.

7. The claimant was informed that a repeat of any similar misconduct or any other instance of misconduct within 18 months could lead to dismissal.

8. The claimant was given additional time to read, or re-read, the respondent's policies, including the Bullying and Harassment policy, as part of the induction referred to above. At the time of the incident which led to his dismissal the claimant had not yet undertaken the training that had been recommended.

Disciplinary action leading to dismissal

Background to the complaints

9. On 7 August 2019 Anna Spragg, Crew Manager, Thomas Mortimer (Watch Manager and Anna Spragg's line manager), and Jonny Metcalfe (Watch Manager) made a complaint of inappropriate language by the claimant to Mr. Metcalf on 15 July at Grassington Fire Station. The complaint was made orally with Alan Bell, Group Manager (Staff Risk).

10. Anna Spragg confirmed the details of what had led up to this complaint by email to Mr. Bell on the same day. The email sets out that during an OSR training day on 27 July 2019 she had had a conversation with two members of the OSR (operational staffing reserve) who said that the claimant had greeted Jonny Metcalfe with the words, 'Now then Jonny you bent bastard'.

She had asked Thomas Mortimer for advice on 29 July 2019. He had told her that it was harassment and attacked a protected characteristic. They had decided to gather the facts by speaking to Mr. Metcalfe when he returned from leave on 5 August 2020.

11. The email reports that Ms Spragg spoke to Mr. Metcalfe on 5 August. He confirmed that it was said. Ms Spragg told Mr. Metcalfe that she had told Mr. Bell and asked Mr. Metcalfe if he wanted to discuss it with both of them and he said that he did. On 6 August Ms Spragg and Mr. Bell spoke to OSR members to gain the facts and spoke to Mr. Metcalfe to discuss 'where he wanted to take it'. Mr. Metcalfe decided to make a complaint to Mr. Bell.

12. Mr. Metcalfe also followed up the oral complaint with an email to Mr. Bell, dated 7 August 2016. In it he states that when he arrived at Grassington Fire Station on Monday 15 July at 14:45 he walked to the mess room where the Claimant and Scot Wilson were sitting. He said hello and 'immediately got approx. 20 to 30 seconds of homophobic abuse directed at me from Phil Staines. This I think put me in shock mode and I walked away. I didn't reply or engage other than to say "thanks for that Phil" or very similar. I then left and went home. I decided to leave this incident alone in my own mind, upsetting thought it was I have learned to take abuse about my sexuality over the years (rightly or wrongly).' He then gives a similar account to Ms Spragg as to how a complaint came to be made.

13. Mr. Bell referred the complaint to Carl Boasman, Area Manager (Head of Professional Standards).

14. On about 12 August 2019 Suzanna Post, a firefighter at Selby Fire Station, made Mark Upton, Training Centre Manager, aware of a further alleged incident at Richmond Fire Station on 30 July 2019. Ms Post told him about it in a conversation and set out her recollection of the incident in an email to Mr. Upton dated 13 August 2019. Ms Post is sometimes referred to as Suzanna Lumb in the documents.

15. In the email Ms Post states that Selby blue Watch had been sent standby to Richmond Fire Station. She said she was chatting mostly to the Selby crew and the claimant said to her 'Well you're not like silly bitch from Tadcaster!'. She asked who he meant and the claimant said something with similar effect to 'that Amy'. The claimant continued to tell her how 'she's reported him and he's done nothing wrong.' and explained how he had the crew manager's signature saying that he never called her a 'silly bitch'. The claimant continued to explain that 'apparently' he had said her feet were a good size to fit in the kitchen. Ms Post stated that she tried to make a joke of the situation, because it was starting to make her feel a little awkward.

16. In the email Ms Post then describes a later incident when control called the station at around midnight. Ms Post was closest to the phone so jumped up to take the call. Whilst on the phone she heard the claimant say something comparable to 'it's good to see you've got her well trained; answering the phones" to which she replied 'as I'm a woman I can do two things at once so I heard that'. She states that she was still on the phone to control when she

said this so it may have been recorded. After the claimant left Ms Post states that she asked who he was and was given his name.

The investigation

17. Mr. Blades was the investigatory officer tasked with investigating these two complaints. The claimant was on annual leave from 31 July to 15 August 2019. When he returned from annual leave he was suspended by letter dated 16 August 2019 pending a disciplinary investigation into an allegation of gross misconduct. The letter states that the allegation is the use of offensive and homophobic language towards colleagues which constitutes harassment as defined within the Equality Act 2010 and is contrary to the Service's Bullying and Harassment policy.

18. Mr. Blades carried out investigatory meetings with Scot Wilson (on 20 August p117), Jonny Metcalfe (on 20 August p119), Anna Spragg (on 20 August p131), Bob Hoskins (on 2 September p161), Suzanna Post (on 4 September p163) and Sam Cockerham (on 9 September p165). Mr. Blades asked Wayne Cook to provide a written statement, because he was said to have been part of the conversation with Anna Spragg on 27 July 2019.

19. In the investigatory meeting with Mr. Metcalfe, he did not say that the claimant had said 'you bent bastard'. His account of events was recorded as follows:

> I entered station and walked into the room with Scot [Wilson] facing me and PS at the computer. I knew they were at station because I had received some email during the day about doing STARR.
>
> I said hello and cannot recall the exact reply from PS, but it was along the lines of 'How are you doing fella, well you're not a fella, half a fella'.
>
> I was a bit taken back by this. There was a short conversation with Scot about driver training and then I went into the appliance bay without reply to PS.
>
> I was followed by Scot and a I said to him 'I was going to book on and let one of you go but not sure now'.
>
> I left station shortly afterwards.
>
> I felt Scot knew something was wrong and on reflection it was apparent that PS knew he had said something too much as he gave an uncomfortable laugh.
>
> …

20. When asked what action he took afterwards he said:

> I didn't take any notes. I feel that I should have taken notes, but this is the first time this has occurred to me since I've been in the fire service.

21. When asked about the impact of the alleged conduct the notes of his response are:

> I felt empty and very low. It took me back to where I had been before, feeling demoralised [JM was visibly and emotionally upset…]

22. Mr. Metcalfe was asked how well he knew the claimant. The notes record that he said that he knew the claimant only through driver training and in passing, he knew the claimant professionally. He had no social contact with him and no recollection of attending courses with him.

23. The notes of the interview with Scot Wilson record that he was working at Grassington Fire Station with the claimant on 15 July when Mr Metcalfe arrived about 14.45. The notes record:

> JM greeted both SW and PS [words to the affect] Hello.
>
> I started a conversation with JM about a driving course and don't recall where the conversations was, but PS said "well it doesn't matter as you're only half a man anyway". It wasn't made in a sinister way and I believe it was due to JM's openness about being gay.
> JM responded in a relaxed way, but I recall thinking "that's a bit close to the bone".
> …
> I can see why it would offend someone and I wouldn't want it said to a friend or family member who is gay.
> …
> On reflection I recognise that is something that I should have challenged but didn't at at the time as I knew how serious it could be for PS due to his recent circumstances.

24. In the investigatory meeting with Ms Post the notes record that during part of a general conversation with the claimant and other members of blue watch the claimant said to her 'you're not like that silly bitch' and 'that silly bitch at Tadcaster' in reference to 'Amy'. The claimant continued to detail the circumstances relating to his recent discipline case. He mentioned a comment he had made about the size of Amy's feet and being able to fit in the kitchen. As the evening went on the telephone rang and she jumped up to answer. The claimant said 'you've got her well trained' and Ms Post replied 'well as I'm a woman I can do two things at once'. The notes record that that part of the conversation may have been picked up on the recorded fire control line.

25. The notes record that Ms Post did not know the clamant and this was the first contact she had had with him. When asked what action she took the notes record her reply as 'Nothing at the time, I wasn't offended as such but I did find it inappropriate' and refers to it as 'inappropriate and unacceptable'.

26. Ms Post mentioned a number of fire fighters who were present, and as a result Mr Blades interviewed Sam Cockerham. The notes record that during the general conversation he heard the claimant say 'bloody hell, I'm not used to this' in reference to what Ms Post was discussing. The claimant then went on to discuss the discipline case that he had been involved in at Tadcaster. During the evening when Ms Post answered the telephone he heard the claimant say 'you've got her well trained' and Mr Cockerham replied 'that's probably why you've got into trouble'. He heard Ms Post reply 'Well as I'm a woman I can do two things at once'. The notes record that he didn't find the comment offensive, and Ms Post did not appear offended, but he did describe the comment as having a 'sexist nature'. He thought that the claimant was too open with his conversation and careless and naïve about how he talked about things.

27. The investigatory meeting with the claimant took place on 3 September 2019 (p121). The claimant attended with his union representative. The claimant was not given details of the allegations before the meeting took place, other than the information set out in the suspension letter, which states that the allegation is the use of offensive and homophobic language towards colleagues which constitutes harassment as defined within the Equality Act 2010 and is contrary to the Service's Bullying and Harassment policy.

28. The claimant was only given his invite letter on the way into the meeting, but it contains no further details of the allegations than were set out in the letter of suspension in any event.

29. Both the claimant and Mr Blades stated that the notes of the investigatory meeting did not contain everything that was said. This is not surprising. Unless the meeting is recorded and a transcript obtained, the notes will not be verbatim. The minute taker will not necessarily have recorded everything that happened. Given that the notes were taken contemporaneously they are probably the best evidence I have as to what happened in the meeting.

30. In the investigatory meeting Mr. Blades gave the claimant the specific details of allegations. The notes record that the allegation relating to 15 July 2019 ('the first allegation') was set out at the beginning of the meeting as follows:

> Relates to the incident on 15 July 2019 when on detached duty to Grassington Station on OSR. Inappropriate comments were made to Johnny Metcalfe of a homophobic nature. Members of OSR had mentioned this to senior managers who had spoken to JM who confirmed he had been offended and upset. It was reported that you had greeted JM with one other person present saying, 'you're not a real man, only half a man'.

31. The claimant said that he was only referring to Mr Metcalfe's size. The meeting records that he said:

> PS I call him Arthur, Arthur man, half a man. The call me Ragger…ragging the machines around. I call JM small because of his size. I can't call him Stumpy or anything else. It's just banter. We were just laughing and joking.
> …
> PS JM came into the recreation room and I said 'Hi Arthur'. It's not degrading.
> AB So its targeted at his height?
> PS Yes but is just banter. I respect him.
> …
> AB What was JM's reaction to that greeting?
> PS Normal, chatting. I offered him a brew.
> …
> PS [Scot Wilson] said something like 'what do you mean by that?' I said well I can't call him Stumpy or Dwarf.

32. During this part of the interview in relation to allegation 1, I find that the allegation was set out clearly for the claimant. The claimant was told that the allegation was of inappropriate comments of a homophobic nature that had caused upset and offence. He was told what was alleged to have been said. He accepted that he had said it, but stated that he was referring to Mr

Metcalfe's size, he had known him a long time and that it was banter. The claimant was told the case against him and had the opportunity to respond.

33. The second allegation is recorded in the notes as having been described as 'Use of incorrect terminology at Richmond Station on 30 July 2019' The claimant was initially asked if he remembered whether anything was said which caused offence. He alleged that he had been shocked by certain comments made by Ms Post and that he had said 'I can't be in here'.

34. The specific allegations were then put to him. He was told that Ms Post had said that he had said 'well at least you're not like that silly bitch from Tadcaster. He said that he 'never said that' and that 'it never happened'. It was put to him that there was a general conversation about his previous disciplinary case and he replied 'It's the women who have thrown allegations'.

35. Mr Blades is then recorded as saying:

> You'd said 'Your feet are a good size to fit in the kitchen'. This is important Phil as she was on the phone to Control at the time. While on the phone she's heard you say to someone 'you've got her well trained to answer the phone'. The potential here is that the call to Control is recorded. Do you recall that conversation? Do you think you may have said that?

36. The claimant's response in relation to the 'feet' comment is not recorded, but in relation to the comment said to have been made while Ms Post was on the phone to Control he said: 'I do not know. I could have said it'.

37. Mr Blades asks two questions about potential witnesses. Firstly he asks 'Was anyone else there, Steve Webster?' The notes do not record an answer to this question. Later Mr Blades says 'It would be appropriate for me to find other witnesses. But you can't remember individuals who could help that were there to witness it?' The notes do not record the claimant naming any potential witnesses.

38. In relation to the second allegation, I find that the claimant was made aware of the comments he was alleged to have said by Ms Post and was given the opportunity to give his response. He was aware of the case against him and had the opportunity to state his case.

39. On 3 September 2019 the claimant submitted an email complaining that Ms Post had used language with a sexual connotation in the conversation on 30 July 2019. This allegation was passed to Mr. Blades and also dealt with separately by the respondent.

40. After the investigatory meeting the claimant submitted a sick note for 4 weeks on about 5 September 2019, initially for a period of about 4 weeks. The claimant's union representative requested that the investigation be paused while he was ill.

41. Mr. Blades prepared an investigation report dated 4 October 2019. The report was passed to Carl Boasman, Area Manager (Head of Professional

Standards). He reviewed it and on 26 November 2019 he confirmed that he was content for it to proceed to a Stage 3 hearing.

42. The claimant left the union in January 2020 at which point he was still covered by a sick note. The claimant contacted the respondent on about 20 January 2020 and asked that the investigation be restarted. Mrs Elliot consulted the Occupational Health Nurse to discuss whether the respondent could continue with the investigation while he was still signed off sick. After being advised that OH had no concerns about continuing, the investigation was re-started.

43. On 6 February 2020 the respondent sent the claimant a copy of the notes of the investigatory hearing to check. He was told that if there was anything he wished to change that was not captured in the way he intended or anything that was omitted he should make the necessary changes (highlighting as appropriate) and return for mutual agreement.

44. The claimant replied on 9 February. He did not make any changes to the notes but made a more broad objection stating that there were so many aspects that required clarification he did not know where to start. He stated that important information had not been recorded, that 'there are at least two allegationa that are completely untrue' and that there were other firefighters there who would support this. The claimant stated that he had had no prior warning of the allegations and now needed more time to consider how best to reply. He asked for the notes taken by Jan Dennis and for a face to face discussion to clarify the anomalies.

45. In her response dated 15 February Lynne Eillot stated that the notes were based on what was captured that day, but, in order for the claimant to respond further to the notes the respondent would accept a written statement from him which would be appended to the notes and be taken into account as part of Mr. Blades' investigation.

46. The claimant submitted a written statement on 27 February 2019 which sets out further detail on his version of events. I have taken account of all the points set out in that letter where relevant to my consideration of fairness and/or my findings on the wrongful dismissal claim.

47. In relation to the first allegation he states that he absolutely denies saying 'you're not a real man; only half a man'. He states that he said, 'alright Arthur do you want a brew'. Mr. Metcalfe had replied 'no' and sat down with him, and they continued to chat amicably as usual. He did not appear to be offended or upset or tell the claimant that he felt uncomfortable. The claimant stated that he usually called Mr. Metcalfe 'Arthur' in reference to his height. He stated that he was devastated by the the fact that Mr. Metcalfe was offended and upset by his comments.

48. He stated that he had known Mr. Metcalfe for 14 years and they have always had a good relationship. He stated that they have always shared nicknames. The claimant said he had never showed any offence or upset and that he would have stopped if Mr. Metcalfe had discussed the issue with

him. All the Grassington crew including Mr. Metcalfe called the claimant 'Ragger'. If he was against the comment he should have put an end to the comments they gave each other. The friendly nicknames were started over 14 years ago, before Mr. Metcalfe came out as a gay man, so the comments could not be taken as homophobic. He alleged that Scott Wilson had a negative opinion of the claimant and was making the complaint to make trouble for him. The comment was not homophobic and Mr. Metcalfe was aware of that.

49. In relation to the second allegation, the claimant stated that he had not had sufficient detail of the allegations before the meeting and needed time to recollect his thoughts. He said that Ms Post (referred to in the statement as FF Lumb) was using inappropriate and offensive language and describing a vulgar incident at home. The claimant had said 'I can't be in here' because the conversation was inappropriate and he felt uncomfortable and that he wished to put a counter allegation in against Ms Post.

50. He stated 'I completely deny [Ms Post's] claim that I said 'well at least you're not like that silly bitch from Tadcaster'' and stated that the crew manager and crew from Selby were present and would support his denial of the claim 'as I am in no doubt that I did not say this'.

51. He stated that there was no general conversation about his previous case except when he said he could not be in the room when crude comments being made by Ms Post.

52. He also denied saying 'your feet are a good size to fit in the kitchen'. He stated it was a ludicrous allegation.

53. He stated, 'If I have said 'you've got her well trained' this is a comment I could have directed at anybody but particularly as she was very busy doing all the jobs. The crew from Selby were still sitting around the table as she did everything and are witnesses to this.

54. He then comments on Mr. Blades' summary. He states that he is confused the third bullet point ('you have used language which, whilst not homophobic, has caused offence – You're not a full man, only half a man, this has been taken as homophobic comment and not in reference to their height). He states that this is contradictory and Mr. Blades needs to decide if the comment is or is not homophobic.

55. The claimant also makes some broader points about matters that should have been included and complains about not being given adequate time to prepare or advance warning of the allegations.

56. After the respondent received the claimant's written statement Mr. Blades finalised his investigation, producing a final report dated 16 March 2020. This is about 2.5 weeks after the claimant sent in the statement.

57. The final report is similar to the report produced in October 2019. In the section recording the 'investigation findings' in the relation to the first

allegation he states that it is evident that the claimant used language that was inappropriate and directed towards Mr. Metcalfe. He stated that the investigation was not able to find consistent evidence that the words used by the claimant were homophobic. Using the explanation provided by the claimant, the phrase 'you're half a man' was directed in reference to the height of Mr. Metcalfe. Mr. Metcalfe had considered this to be a reference to his sexual orientation and derogatory.

58. In relation to the initial allegation that the claimant had used words to the effect 'now then you bent bastard' Mr. Blades stated that it was evident that the occurrence on 15 July had been discussed in general conversation within the OSR group which had contributed to misinformation and inaccurate accounts of what was said.

59. In relation to the words used by the claimant, he stated that it was evident that Mr. Metcalfe was offended and emotionally upset by the language used and it is reasonable that the wording used by the claimant could be interpreted to have homophobic connotation.

60. The findings also state that, whilst the claimant may not have used homophobic language, he does not recognise that using inappropriate language which causes offence is not acceptable.

61. The phrase 'homophobic language' is ambiguous. It could refer to whether the language was intended to be derogatory in relation to a person's sexual orientation. It could refer to the effect: how it was subjectively interpreted, or reasonably interpreted by the individual to whom it was addressed or how it would be objectively interpreted by a reasonable person. It could refer to language which is 'related to' sexual orientation in the sense that is used in the Equality Act.

62. I accept that the use of the phrase could make some of the findings appear contradictory depending on which meaning the phrase is given. However, Mr. Blades is not a lawyer, and his use of language must be looked at in that light. I find that looked at as a whole, Mr Blades's findings are set out sufficiently clearly as follows.

63. Looking at the findings as a whole, it is, in my view, sufficiently clear that he has rejected the initial allegation that the claimant said 'now then you bent bastard'.

64. Further it is sufficiently clear that:

    64.1 He finds that the claimant used the phrase 'half a man'.
    64.2 He accepts that this was not intended to be a reference to Mr. Metcalfe's sexuality but was intended to be a reference to Mr. Metcalfe's height.
    64.3 He accepts that Mr. Metcalfe was offended and emotionally upset by the remark.
    64.4 He accepts that it was reasonable for Mr. Metcalfe to interpret the remark as having homophobic connotations.

65. The conclusion section makes this abundantly clear:

> The investigation concludes that for item 1, PS did not use language that was intended to be homophobic. However, it is recognised that JM has reasonably interpreted the wording to have a homophobic connotation and it has caused offence.
>
> The investigation concludes that on the 15th July (Item 1) PS has conducted himself in a manner that is contrary to Service policy, specifically, the Staff Code of Conduct (Appendix 16).

66. It is also clear from the findings that Mr. Blades has concluded that despite having been asked to re-read the policies recently, Mr. Blades does not recognise that the use of inappropriate language that causes offence is unacceptable.

67. In relation to the second allegation Mr. Blades records that there were likely to be other witnesses and that there was a potential for a recording of a telephone conversation which might include some of the language used by the claimant. However, the findings record that this has not been pursued because the claimant provided information which aligned with the account of Ms Post and when questioned specifically about the content of the language used whilst Ms Post was on the telephone, he stated that he was not able to say that he did not use the alleged language. He found that the language used has caused concern about its sexist nature and is inappropriate, but that it had not caused offence.

68. The conclusion does not state specifically what inappropriate language has been found to have been used:

> The investigation concludes that for item 2, PS did use inappropriate language towards SP on the 30th July. The content of the language is sexist and derogatory to women.
>
> The investigation concludes that on the 15th July (Item 1) PS has conducted himself in a manner that is contrary to Service policy, specifically, the Staff Code of Conduct (Appendix 16).

69. It is not explicitly stated that the language to which Mr. Blades is referring was limited to the 'you've got her well trained' comment, although I accept from his evidence given at the tribunal that that was the position.

70. The report recommends that Mr. Staines be subject to a formal disciplinary hearing. Approximately a week after the investigation report was produced the lockdown started on 23 March 2020.

Disciplinary stage

71. Once the lockdown restrictions were lifted the respondent wrote to the claimant on 9 July 2020 to invite him to the disciplinary hearing on 30 July 2020. The respondent was required to give at least 21 days notice of a

stage 3 disciplinary hearing. The hearing was held at stage 3 because the claimant was already under a live final written warning for gross misconduct.

72. The letter sets out that the purpose of the hearing is to discuss the following alleged gross misconduct:

    72.1 Use of inappropriate and homophobic language towards a colleague on 15th July at Grassington fire station
    72.2 Use of inappropriate language towards a colleague on 30th July at Richmond fire station.

73. Unlike in the letter of suspension, the allegation is not that the behaviour amounts to harassment under the Equality Act 2010.

74. The letter states that depending on the facts established at the hearing, the outcome could be summary dismissal.

75. The letter included copies of the investigation report and its appendices, which included the notes of all the investigatory meetings.

76. Although the letter does not state the precise language that is alleged, it was clear from the enclosed investigation report that the first allegation related only to the use of the term 'Arthur' or 'half a man' to Mr. Metcalfe. Further, although the letter uses the ambiguous phrase 'homophobic language' it is clear from the investigation report that the respondent is not saying that the language was intended to be homophobic, but that it is alleged to be language that was reasonably interpreted by Mr Metcalfe to have a homophobic connotation and that it has caused offence.

77. I find that it would not have been clear to the claimant at this stage either from the letter or the attached investigation report that the respondent was only pursuing the 'well trained comment' in relation to the second allegation. The claimant might therefore have reasonably attended assuming that he was also facing the other allegations made by Ms Post in relation to the 30th July.

78. The claimant wrote to the respondent on 20 July 2019 asking for clarification of the actual inappropriate and homophobic language he is alleged to have used on 15 and 30 July. Mrs Elliot replied on 21 July 2020 stating that 'everything which the Service has received in relation to the allegations is contained within [the] investigation reports and the witness testimony appendices. This is what will be presented at the hearing.'

79. The disciplinary hearing took place on 30 July 2019. The disciplinary officer was Mr. Dyson. The claimant attended without a representative, as he was no longer a member of the union.

80. The notes of the hearing were sent to the claimant on 14 August 2020. He made a number of comments in a an email dated 16 August 2020 and there was some further correspondence where he suggested certain additions

and amendments. I have taken these into account when making findings about what happened at the disciplinary hearing.

81. In relation to the first allegation, Mr. Blades set this out clearly at the start of the meeting. I find that the precise allegation was made clear to the claimant, and it should have been clear to him that he was not being accused of saying 'you bent bastard'.

82. The claimant was then given the opportunity to ask questions of Mr. Blades and to respond. The claimant stated that he had said 'Arthur, do you want a cup of tea.' It was banter as he had known Mr. Metcalfe as a friend/colleague for 16 years. He said 'Arthur' because Mr. Metcalfe is half the size of him. He has never said half a man as a derogatory comment.

83. In relation to the second allegation the respondent sets out the details of the allegations made by Ms Post. It is not made clear to the claimant that the allegation is limited to the 'well-trained' comment, and he gives his version in relation to all the allegations made by Ms Post.

84. The claimant was given the opportunity to set out his position in relation to the second allegation. He states in relation to the 'you're well trained' comment that, 'I did say I could have said it but could not remember'. He states that Ms Post was not offended. He asks why the recording has not been obtained and states that he would hold his hands up if he did say that but he does not remember. If he said 'you've got her well trained' he would have said it in a complimentary way. He referred to a definition of well-trained from Google. He is asked if he said she was well trained to answer the phone and his reply is recorded as, 'I do not know if I said it but if I said this given the Google definition would have meant it in that way'.

85. He says that he did not say 'silly bitch' and has three statements to testify that. The claimant provided witness statements from Mr. Haswell, Mr. Petty and Mr. Fagg relating to the allegation on 30 July 2019. The statements broadly support the claimant's version in relation to the earlier conversation with Ms Post. They do not deal with the allegation in relation to what happened when Ms Post answered the telephone. I accept that these were taken account of by Mr. Dyson when reaching his decision.

86. The claimant was given the opportunity to question Mr. Metcalfe and Ms Post.

87. The meeting adjourned for just over an hour for Mr. Dyson to reach a decision. Mr. Dyson took the decision to summarily dismiss the claimant. After the adjournment Mr. Dyson gave his decision to the claimant by reading from a document entitled 'Disciplinary Hearing Manager's Summary of Outcomes' ('the Summary' - p 191 of the bundle).

88. I would not expect this document to contain all the matters that Mr. Dyson took account of in reaching his decision. It is a summary of the outcome, not a complete record of his reasoning. The outcome was confirmed by letter dated 4 August 2020.

89. Taking into account the contents of the Summary, the contents of the letter dated 4 August 2020 and the evidence given by Mr. Dyson at the tribunal I find that his reasons for dismissal were as follows.

90. In relation to the first allegation, Mr. Dyson found that the claimant had used the term 'Arthur' which meant 'half a man' to refer to Mr. Metcalfe. He made this finding because the claimant had admitted that he had used the term 'Arthur'. He found that the claimant had used the term in 'banter' to a colleague to describe his height because he could not use terms such as 'dwarf or stumpy. He found that this did not demonstrate self-improvement after his previous written warning for inappropriate language and that it did not demonstrate understanding in relation to dignity at work and inappropriate use of language. He found that the language was reasonably considered to have an effect on Mr Metcalfe that was degrading, whether it was intended or not.

91. The finding that the language was reasonably considered to have an effect on Mr. Metcalfe that was degrading must, in the light of the evidence given by Mr. Metcalfe and the overall finding that the language was homophobic, be a finding that it was reasonably considered to be degrading because it was seen as referring to his sexuality. This is the basis upon which Mr. Metcalfe says he was upset. He did not, at the time, consider it a reference to his height (although he later accepted that it could have been a reference to his height).

92. Further, when considering the respondent's reason for dismissal I am not limited to considering the contents of the documents. I can take account of evidence at the tribunal relating to the respondent's reasoning at the time. Mr. Dyson's evidence at the tribunal was that he took account of the fact that both Mr. Metcalfe and Scot Wilson considered this to be a homophobic comment.

93. In relation to the second allegation, it is clear from the Summary that the finding only relates to the 'well-trained' comment: Mr. Dyson states that the claimant 'could not decide if he made the comments in the second allegation' and refers to the quotation relied on by the claimant from Google in relation to 'well-trained'. In Mr. Dyson's witness statement, it is clear that he only took account of the 'well-trained' comment. At para 13 he states 'in relation to Firefighter Post's complaint, he stated he "*could have said it"* and states that if the claimant had not said the comment, Mr. Dyson felt that he would have ardently defended the position. He then goes on to consider the claimant's understanding of the appropriateness of this particular comment. It is also made clear at para 47 of the witness statement that his findings only relate to the 'well-trained' comment.

94. Under cross-examination Mr. Dyson also stated that 'the outcome was based on well-trained'. In re-examination and questioning by the tribunal, Mr. Dyson's evidence was a little confusing in relation to the effect, if any, of the 'silly bitch' allegations on his decision to dismiss. However, when asked

specifically what part, if any, the 'silly bitch' comment played in his decision he replied 'nothing there'.

95. Looking at his evidence overall, including the documentary evidence created contemporaneously and the evidence given to the tribunal, I find that the decision to dismiss was taken on the basis of the well-trained comment, and not on the basis of the other comments alleged to have been made that day.

96. In relation to that comment Mr. Dyson concluded that the comment had been made. He also took account of the fact that during the disciplinary hearing, the claimant had referred to a quotation from Google which defined 'well-trained', and said that if he had said it, it would have been complimentary. Mr. Dyson thought that this was evidence of the claimant's views of female colleagues and a lack of insight into appropriateness and how his language impacts or could impact others.

97. Although the Summary states that Mr. Dyson concluded that both comments were reasonably considered to have a degrading effect, I accept his evidence that this was a reference to the effect on Mr. Metcalfe and that he should have separated this out in the Summary. Although Ms Post was not offended, Mr. Dyson found that the comment was unacceptable and inappropriate.

98. Mr. Dyson decided that the claimant should be summarily dismissed. The Summary records that the claimant has a live warning for gross misconduct.

Summary of findings of fact on the reason for dismissal

99. In summary, taking into account the above, I find on the balance of probabilities that the set of facts or beliefs held by Mr. Dyson which caused him to dismiss the claimant were:

In relation to the first allegation

99.1 The claimant had used the term 'Arthur' or 'Half a man' to refer to Mr. Metcalfe.
99.2 This was intended to refer to Mr. Metcalfe's height.
99.3 The claimant did not think this was inappropriate.
99.4 Mr Metcalfe had reasonably considered this to be a reference to his sexuality and had been offended and upset.
99.5 The comment was reasonably considered to have had a degrading effect.
99.6 The fact that the claimant had used the term in 'banter' to a colleague to describe his height because he could not use terms such as 'dwarf or stumpy' did not demonstrate self-improvement after his previous written warning for inappropriate language and it did not demonstrate understanding in relation to dignity at work and inappropriate use of language.

In relation to the second allegation

99.7 The claimant used the phrase 'you've got her well trained' when Ms Post answered the telephone.

99.8 The claimant did not appreciate that this language was inappropriate and stated that, if he said it, it would have been complimentary. This was evidence of the claimant's views of female colleagues and a lack of insight into the inappropriateness of language and how his language impacts or could impact others.

99.9 Although Ms Post was not offended, the comment was inappropriate.

In relation to both allegations

99.10 That the claimant breached the Respondent's Code of Conduct, Bullying and Harassment policy and organisational values.

99.11 At the time of both incidents the claimant was under a final written warning for inappropriate behaviour and harassment in breach of the respondent's Bullying and Harassment policy

100. On the balance of probabilities I find that the allegations of 'bent bastard' and the other allegations made in relation to 30 July did not form part of the reason for dismissal.

Appeal

101. On 16 August 2020 the claimant requested the recording of the call on 30 July 2019. The claimant appealed his dismissal by letter dated 21 August 2021. He submitted a character reference from Robin Gudgeon.

102. The appeal had to be heard by the North Yorkshire Police Fire and Crime Commissioner ('the Commissioner'). In the week commencing 31 August 2020 Ms Elliot notified the Commissioner verbally that the claimant had submitted an appeal.

103. The Commissioner wrote to the respondent setting out the next steps on 11 September 2020. This letter sets out that the appeals process and panel members had to be confirmed with the FBU and the FOA who had been consulted on the previous process and panel membership. This may have caused some delay, although there is no clear explanation as to why a month passed before a meeting was arranged on 12 October 2020 between the respondent and the Commissioner to finalise the arrangements for the appeal.

104. Once the Commissioner had received the appeal, they wrote to the claimant by letter dated 23 October 2020 stating that they were working on the preparatory steps and would write to the claimant to outline the process within 14 days. In early November the Commissioner began to arrange a suitable date in taking into account the availability of panel members, the hearing was then fixed for 1 December 2020. It is unclear to me why available dates could not have been identified and the hearing date fixed at an earlier stage.

105. The appeal took place on 1 December 2020. Thomas Thorp was the appeal manager. The appeal panel consisted of the appeal manager and two independent advisors (the independent adjudicator for the Commissioner

and the Head of Human Resources for the Humberside Fire and Rescue Service).

106. The appeal manager had before him two additional pieces of evidence. The first was the recording of the call on 30 July 2019. The transcript of the relevant part of the call is as follows:

> FF S Post: (call answered) Richmond Fire station
> Control: Hello there, it's Mick in control, Easingwold and Boroughbridge can do
> FF S Post: (at the same time as above) I heard that I can do two things at once yeah.

107. The claimant also provided an additional statement by Mr. Fagg which stated that he was able to provide new evidence since he now knew exactly what the claimant was accused of saying. He states that at no point did he hear the claimant use the phrase 'you're not like that silly bitch from Tadcaster' or discuss the situation he was involved in with another firefighter. He also states that when a firefighter answered the telephone, at not point did the claimant say 'you've got her well trained'.

108. Although the appeal panel decided to conduct the hearing as a review rather than a rehearing, they considered both these pieces of additional evidence into account, and decided that they did not change the balance of probabilities in relation to what was said.

109. In summary the appeal panel upheld the decision of Mr. Dyson.

The tribunal's findings on the conduct of the claimant

110. These are the tribunal's findings of fact as to what happened on the 019 on the balance of probabilities. These findings are not relevant to liability for unfair dismissal. They are only relevant to any potential deductions for conduct or contributory fault and to the wrongful dismissal claim.

111. I find on the balance of probabilities that the claimant called Mr Metcalfe 'Arthur' on 15 July 2019. This was intended and taken to mean 'half a man'. The claimant intended it to be reference to Mr Metcalfe's height. I do not accept that the claimant had been using this nickname since before Mr Metcalfe had been open about his sexuality. I make this finding on the basis that it is entirely inconsistent with the statement from Mr Metcalfe, who refers to being 'taken back' by the statement, to this being the first time that this has happened and to the fact that he was upset and felt low and empty as a result. Further, Scot Wilson's reaction to the statement is more consistent with it having been the first time this term was used.

112. I accept that it was reasonable to interpret this as a reference to Mr Metcalfe's sexual orientation and reasonable to take offence. It appears obvious to me that 'half a man' might be interpreted by a gay man as an offensive comment on their sexual orientation. In my view the claimant ought also to have appreciated that.

113. I find on the balance of probabilities that the claimant did say 'you've got her well trained' in reference to Suzanna Post when she answered the

telephone. I take account of the fact that the response Ms Post says she gave was captured by the recording. This supports her version of events. It is also supported by Mr. Cockerham's evidence. The claimant denied saying those words in the tribunal hearing. However at the time he stated that he might have said them, in contrast to the vehement denials of the other allegations.

114. In my view saying 'you've got her well trained' was probably intended to be a light hearted comment. However it belittles the female colleague who has answered the phone. It carries connotations of being a 'well-trained' pet. It is not appropriate to make this sort of joke in a working environment. It is clearly not a genuine reference to the quality of the training that she has received and the claimant is either being disingenuous when he claims that it would have been complimentary or he is seriously lacking in insight.

The law

Unfair Dismissal

115. The employer must show a potentially fair reason for dismissal within section 98 of the Employment Rights Act 1996. The Respondent relies upon conduct within section 98(2)(b).

116. Section 98(4) of the Employment Rights Act 1996 requires the Tribunal to determine whether the Respondent acted reasonably or unreasonably in treating that reason as sufficient reason for dismissal in accordance with equity and the substantial merits of the case.

117. Guidance on questions to be answered in a conduct unfair dismissal case is found in the case of **BHS –v- Burchell** [1978] IRLR 379:
(1) Did the employer genuinely believe that the employee had committed the act of misconduct?
(2) Was such a belief held on reasonable grounds? And
(3) at the stage at which it formed the belief on those grounds, had the employer carried as much investigation as was reasonable in all the circumstances of the case?

118. In an unfair dismissal case it is not for the Tribunal to decide whether or not the Claimant is guilty or innocent of the alleged misconduct. Even if another employer, or indeed the tribunal, may well have concluded that there had been no misconduct or that it would have imposed a different sanction, the dismissal will be fair as long as the Burchell test is satisfied, a fair procedure is followed and dismissal falls within the range of reasonable responses.

119. The test for the range of reasonable responses is not one of perversity but is to be assessed by the objective standards of the reasonable employer rather than by reference to the Tribunal's own subjective views, **Post Office –v- Foley, HSBC Bank Plc –v- Madden** [2000] IRLR 827, CA. There is often a range of disciplinary sanctions available to a reasonable employer. As long as dismissal falls within this range, the Tribunal must not substitute

its own views for that of the employer**, London Ambulance Service NHS Trust v Small** [2009] IRLR 563.

120. The employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his or her defence, or in explanation or mitigation. In the case of **Alexander v Brigden Enterprises Ltd** [2006] IRLR 422, the EAT held that the employee had to be given 'sufficient detail of the case against them to enable them properly to put his side of the story'.

121. The need to apply the objective standards of a reasonable employer, applies as much to the adequacy of an investigation as it does to other procedural and substantive aspects of the decision to dismiss, see **Sainsbury's Supermarkets Limited v Hitt** [2002] IRLR 23, CA. The extent of investigation reasonably required will depend, amongst other things, upon the extent to which the employee disputes the factual basis of the allegations concerned.

122. In determining whether an employer carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and their potential effects upon the employee.

123. In deciding whether the dismissal was fair or unfair, the tribunal must consider the whole of the disciplinary process. If it finds that an early stage of the process was defective, the tribunal should consider the appeal and whether the overall procedure adopted was fair, see **Taylor –v- OCS Group Limited** [2006] IRLR 613, CA per Smith LJ at paragraph 47.

124. The Tribunal must have regard to the ACAS Code of Practice which sets out basic principles of fairness to be adopted in disciplinary situations, promoting fairness and transparency for example in use of clear rules and procedures. This includes the requirement that employers carry out necessary investigations to establish the facts of the case.

125. If a dismissal is unfair due to procedural failings but the appropriate steps, if taken, would not have affected the outcome, this may be reflected in the compensatory award, **Polkey v A E Dayton Services Ltd** [1987] IRLR 503, HL. This may be done either by limiting the period for which a compensatory award is made or by applying a percentage reduction to reflect the possibility of a fair dismissal in any event. The question for the Tribunal is whether this particular employer (as opposed to a hypothetical reasonable employer) would have dismissed the Claimant in any event had the unfairness not occurred.

The ACAS Code

126. Paragraph 4 of the Code provides:
    - 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.

Conduct and contributory fault

127. A tribunal may reduce a basic award where it considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such as it would be just and equitable to reduce or reduce further the amount of the award to any extent. (s 122(2) ERA 1996).

128. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, the tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable (s123(6) ERA 1996).

Wrongful dismissal

129. In a wrongful dismissal claim, the question for the tribunal is whether or not the claimant was guilty of gross misconduct.

Application of the law to the facts

What was the reason or principal reason for dismissal and was it potentially fair?

130. When determining the reason for dismissal I must decide what were the set of facts known to the respondent, or beliefs held by the respondent, which caused it to dismiss the claimant.

131. The reason given at the time is evidence of the reason for dismissal but is not determinative. An employer may, for example, describe his reasons wrongly at the time through some mistake of language or law. The reason does not have to be correctly labelled at the time of dismissal: the employer can rely on the reason *in fact* for which he dismissed the employee.

132. The reason for dismissal as I have found it is set out above under findings of fact. This is a potentially fair reason for dismissal (conduct), and I accept on the basis of the evidence that he had an honest belief in that reason.

Did Mr. Dyson have reasonable grounds for that conclusion?

The first allegation

133. The claimant accepted that he had used the term ‘Arthur’ to refer to Mr. Metcalfe which meant ‘half a man’. The claimant’s evidence was that this was a reference to height and he did not think it was inappropriate.

134. In relation to whether or not Mr. Metcalfe reasonably considered this to be a a reference to his sexuality, Mr. Dyson had before him the evidence from Mr. Metcalfe including his statements that this was how he had honestly interpreted it, that he was a bit taken aback when he heard it, that this was the first time it had happened during his employment with the respondent, that he had felt empty and very low and that he appeared upset in the investigatory interview. He also had before him the evidence from Scot Wilson who said that he believed the comment was due to JM’s openness about being gay, that he recalled thinking “that’s a bit close to the bone”, that he could see why it would offend someone and that he wouldn’t want it said to a friend or family member who is gay.

135. In contrast to this Mr. Dyson had the evidence from the claimant that he had been using this term of address to Mr. Metcalfe as ‘banter’ for 14 years and therefore it could not have been taken as a reference to sexuality or caused the level of offence claimed.

136. I do not accept that the fact that the initial allegation made by Anna Spragg was not borne out by the evidence of Mr Metcalf nor that Mr Metcalfe's initial complaint was of 20 to 30 seconds of homophobic abuse should have led any reasonable employer to doubt Mr Metcalfe's credibility. It was therefore reasonable for them to accept his evidence that this was the first time that it had happened and that it had had the stated effect.

137. It was also reasonable to conclude in the light of Mr Metcalfe's and Mr Wilson's evidence that the comment could reasonably have been taken as a reference to sexuality and therefore could reasonably have had the stated effect. Having concluded that a comment had been made which had been reasonably considered to be a reference to homosexuality and therefore had made Mr Metcalfe feel empty and very low, the respondent had reasonable grounds to describe this as having had a degrading effect.

The second allegation

138. Mr. Dyson had before him positive evidence from two witnesses who stated that the claimant had said ‘you’ve got her well trained’ when Ms Post answered the telephone. The claimant had emphatically denied the other comments alleged to have been made on this occasion, but in relation to this comment he stated, in effect, that he could have said it but he did not remember. On the basis of this Mr. Dyson clearly had reasonable grounds to conclude that the comment was said by the claimant.

139. In considering whether or not an employer acted reasonably in dismissing the claimant I must take account of new information that comes to light during the appeal process such as the recording: West Midlands Co-operative Society Ltd v Tipton [1986] ICR 192. The recording provides

further support to Ms Post's version, because it records her response to the comment.

140. The claimant also produced a further statement from Mr. Fagg. This statement supports the claimant's case, because it states that when a firefighter answered the telephone, at no point did the claimant say 'you've got her well trained'. However, given the direct and contemporaneous evidence of Ms Post and Mr. Cockerham, supported by the recording, there are still clearly reasonable grounds to conclude that the statement was made.

141. The claimant stated in the hearing that if he had said it, it would have been complimentary. The statement had been made in reference to a firefighter answering the telephone. Again, I find that the respondent clearly had reasonable grounds for concluding that this was evidence of the claimant's views of female colleagues and that it demonstrated a lack of insight into the appropriateness of language and how his language impacts or could impact others.

142. Although Ms Post's evidence was that 'she wasn't offended as such', she did state that she thought it was inappropriate and unacceptable. Mr. Cockerham stated that he did not think the comment was offensive and Ms Post did not appear offended, but described the comment as having a 'sexist nature'.

143. I find that Mr. Dyson had reasonable grounds for finding that the comment was inappropriate, even though Ms Post and Mr. Cockerham had not been offended.

Both allegations

144. Mr. Dyson concluded that the claimant breached the Respondent's Code of Conduct, Bullying and Harassment policy and organisational values. The respondent did not, and was not required to, conclude that the conduct amounted to harassment under the Equality Act 2010.

145. The Code of Conduct provides that other employees will be treated with fairness, openness, equality, respect and dignity.

146. Mr. Dyson (and Mr. Blades) were cross-examined about paragraph 4.4 of the bullying and harassment policy. The legal definition of harassment is not straightforward and neither Mr. Dyson nor Mr. Blades are trained lawyers.

147. It is clear both under the policy and in Mr. Dyson and Mr. Blades' understanding that behaviour can still be in breach of the policy if it is not intended to be offensive if it was reasonably interpreted as being offensive.

148. That is the case in relation to the definition of harassment is in the Equality Act, and that is what is summarised in paragraph 4 of the respondent's bullying an harassment policy. If an act is reasonably considered to have the effect of creating an offensive environment for a person, then, both under

the policy and under the Equality Act that act does not have to be repeated, nor does the recipient have to make clear that the act is unwanted.

149. Further, harassment as defined in paragraph 4 is not the only behaviour that is in breach of the Bullying and Harassment policy. The respondent was not required to make a finding that the conduct fell within the definition of harassment in the Equality Act. It was not required, for example, to make a finding that conduct was 'related to' a protected characteristic in the legal sense.

150. The policy also covers bullying. Examples of unacceptable behaviour given in the policy include, for example, jokes at personal expense, unwanted or inappropriate nicknames and demeaning comments about a person's appearance. These are examples, not an exhaustive list.

151. It was well within the band of reasonable responses, in my view, to find that saying 'you've got her well trained' when a female fire fighter answers the telephone was in breach of the policy, even if it was not one of the specific examples set out in that list. Further, it was well within the band of reasonable responses to find that calling someone 'Arthur' meaning 'half a man' which had been reasonably construed as a reference to sexuality was in breach of the policy.

152. In the light of the above, Mr. Dyson had reasonable grounds for concluding that the claimant breached the Respondent's Code of Conduct, Bullying and Harassment policy and organisational values.

Was the investigation reasonable?

153. The claimant states that he was handed the invitation letter on the way into the investigatory meeting. The letter contained no more detail than the letter of suspension in any event, which the claimant had had for some time. I find that it was reasonable to notify the claimant of the broad allegations in advance (in the letter of suspension) and to make clear the precise nature of the allegations during the course of the investigatory meeting. Further, the claimant had the opportunity to submit a written statement to be taken into account in the investigation after he had been made fully aware of the allegations in the meeting and through reading the respondents' notes of the meeting.

154. Mr Blitz criticises Mr Blades for the way he conducted the interview with the claimant. He contrasted the notes of the interviews with the witnesses and the open questioning used, with the style adopted in the interview with the claimant. I do not accept that it is inappropriate to have put the specific allegations to the claimant. Although other witnesses can simply be asked what they remember, it is important that the claimant knows what exactly he has been accused of, and that he can given his version. The investigatory interview with the claimant will necessarily include asking him whether he made those comments.

155. I do accept that there are parts of the notes of the interview which suggest that Mr Blades may have taken this too far on occasion, for example when he is recorded as saying 'You recall being there, Suzanna being there. You made the comment'. However, I take into account the fact that Mr Blades is not a lawyer, and that these are not verbatim notes, so we do not know the precise wording used. Further at this point the claimant had already given his response.

156. Overall, I find that the claimant was made aware of the allegations and had the opportunity to give his version of events. The occasional use of a more confrontational approach did not affect the overall fairness of the investigation.

157. I do not accept that the way in which the interview was conducted, including the summary on p 124, shows that Mr Blades had already made up his mind before he had completed the investigation.

158. I accept that the question of whether or not the claimant has been calling Mr. Metcalfe 'Arthur' for 14 years, since before he was open about his sexuality is relevant to whether or not Mr. Metcalfe reasonably interpreted it as a reference to his sexuality. In the light of the version of events provided by Mr. Metcalfe in the interview ('I was a bit taken back by this'; 'on reflection it was apparent that PS knew he had said something too much' 'this is the first time this has occurred to me since I've been in the first service') and his evidence as to his relationship with the claimant, it was not unreasonable not to interview Mr. Metcalfe again and ask him if the claimant had been calling him 'Arthur' for 14 years.

159. I do not accept that it was unreasonable not to get a copy of the recording or interview further witnesses. Ms Post had said that it might have recorded her version. Ms Post and Mr. Cockerham had given positive evidence that it was said. In the investigatory meeting, the claimant, in contrast to his denials of the other comments alleged to have been made on that occasion had accepted that he could have said it. In the written statement submitted after he had had time to reflect, he vehemently denied making the other statements but, again, did not deny this allegation ('If I have said 'you've got her well trained'…). In the light of that evidence it was not unreasonable not to obtain the transcript, or interview further witnesses.

160. In relation to the transcript it was in any event obtained before the appeal was determined and was taken account of by the employer. Because it supported Ms Post's version of events (by confirming that she had said what she reported to have said in reply to the comment), it did not change the employer's conclusion. In addition, the claimant produced further statements later in the process, and I have accepted that the respondent took those statements into account. When considering the reasonableness of the procedure I have to take account of the whole process, whether the appeal amounted to a review or a rehearing.

161. I do not accept that there was any need to interview Jeffrey Richardson, because disciplinary action in relation to the particular comment that he had allegedly witnessed was not being pursued.

162. Mr. Blades was cross-examined about paragraph 4.4 of the bullying and harassment policy. I have set out above my views on the relevance of paragraph 4.4 in particular. Mr. Blades investigated and reached conclusions both on what was said, the claimant's intention, the effect on the recipient and on the reasonableness of recipient's perception. This was a reasonable approach.

163. Although the investigation began with a number of allegations that were not sustained by the evidence, I am satisfied that Mr. Blades acted reasonably in response to this. I do not accept that his conclusions suggest that he was influenced by the original allegations.

164. Further, although Mr. Metcalfe's original email referred to 20-30 seconds of homophobic abuse, which was not borne out by the detail given in the investigatory meeting, given that the claimant accepted that he had made a comment of the nature alleged, I do not accept that Mr. Blades accorded unreasonable weight to Mr. Metcalfe's evidence. Similarly, given that the claimant accepted making the comment for which he was subject to disciplinary action, the fact that there might be an issue of gossip does not affect the reasonableness of Mr. Blades investigation.

165. I do not accept that it was prejudicial or unreasonable to refer to the original allegations of saying 'you bent bastard' in the report. The report states that these allegations were inaccurate and they provide context to how the original complaint arose.

166. The fact that the claimant alleged that he had been calling Mr. Metcalfe 'Arthur' for a long period, and that he was called Ragger because he 'ragged the machines' is not sufficient, in my view, to suggest that Mr. Blades, or any reasonable investigating officer should have considered the alleged conduct to be a cultural rather than an individual issue and therefore not suitable for disciplinary action.

Did the respondent otherwise act in a procedurally fair manner?

167. I have found that it was not made sufficiently clear to the claimant that, certainly by the time of the disciplinary hearing, the respondent was considering disciplinary action arising out of his conduct on 30 July 2019 only in relation to the 'you've got her well-trained' comment. In an ideal world, the respondent would have communicated clearly any specific elements that were no longer being pursued. However, in relation to the allegations for which he was dismissed the case against him was clear, and he had the opportunity to respond in full. Overall, I find that the respondent followed a fair procedure and one which a reasonable employer could have adopted.

168. Mr. Blitz made the point in cross-examination and submissions that there seemed to be some confusion as to whether the appeal was a review or a rehearing. There is not always a bright line between the two and I do not place any weight on the particular label which the respondent used. The way in which the appeal was conducted was not, in my view, unreasonable and the panel considered any new evidence which was made available.

169. I do not accept that there was unreasonable delay in the investigation. All the interviews had been concluded within about 4 weeks of the allegation being made. Immediately after the investigatory interview with the claimant he requested that the matter be suspended due to ill health. Once he had asked for it to be restarted, the respondent spent a reasonable period of time consulting Occupational Health. The claimant was sent the minutes of the investigatory meeting and then was allowed a reasonable period of time to submit a further statement. The final investigatory report was then issued within about 2.5 weeks.

170. The country was then put in lockdown a week later. The claimant does not criticise the respondent for the delay during lockdown and I find that this was not unreasonable.

171. Once lockdown was lifted I find that the respondent acted reasonably promptly to arrange a disciplinary hearing and provided the outcome promptly. I find that the appeal was unreasonably delayed, for the reasons set out below, but I find that the delay was not so significant that it rendered the process unfair when looked at as a whole.

Was dismissal within the range of reasonable responses?

172. Mr. Blitz submitted, in effect, that the question for me to answer was whether or not *summary* dismissal was within the range of reasonable responses. He submitted that if I found that it was outside the band of reasonable responses to conclude that the claimant had committed gross misconduct the dismissal must be unfair, even if I concluded that it was within the band of reasonable responses to dismiss.

173. I disagree. The question for me under the Employment Rights Act is whether or not the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee. The question of whether or not the employer was entitled to dismiss without notice is, in my view, relevant to the wrongful dismissal claim.

174. In determining whether or not the employer acted reasonably in treating it as sufficient reason to dismiss the claimant, I note that Mr. Dyson took account of the fact that the claimant was already on a final written warning for misconduct. That final written warning makes clear to the claimant that he is at risk of dismissal.

175. Further, Mr. Dyson had concluded that the claimant had not demonstrated self-improvement after the previous written warning for inappropriate language; that he had not demonstrated understanding in relation to dignity

at work and inappropriate use of language and that he had a lack of insight into the inappropriateness of language and how his language impacts or could impact others.

176. Looking at the two findings in the light of the above in my view the respondent clearly acted reasonably in treating the conduct as sufficient reason for dismissal. It was within the band of reasonable responses to dismiss.

177. In any event, I would, if necessary, have concluded, that it was within the band of reasonable responses to dismiss without notice. Although I have found that, in my view, the conduct did not amount to gross misconduct, I find a reasonable employer could have formed a different view particularly in relation to the first allegation which had caused offence and was seen as relating to sexual orientation.

Conclusion on unfair dismissal

178. Based on my findings above, the dismissal was fair. The unfair dismissal claim is dismissed.

Alternative findings

179. Having dismissed the unfair dismissal claim, it is not necessary for me to consider the question of a Polkey deduction or a reduction for conduct or contributory fault.

180. I have considered what my alternative findings would have been if I had determined that the dismissal was unfair on the basis of a procedural error or because summary dismissal was not within the band of reasonable responses.

181. In either of those circumstances, in the light of my factual findings, I would have concluded that there was a 100% chance that the claimant would have been dismissed in any event at the end of his notice period. As the claimant has received compensation for wrongful dismissal any compensatory award would have been nil.

182. In relation to reductions for conduct and contributory fault, I have found that the claimant behaved in an inappropriate way. I would have concluded that the claimant's blameworthy conduct was the sole cause of the dismissal. I would have found that the claimant's conduct before the dismissal was such that it would be just and equitable to reduce the basic and any remaining compensatory award to nil.

Wrongful dismissal

183. I find that the use of language was inappropriate and it demonstrated a lack of judgment and insight but that there was no intention to offend. I have accepted, in relation to the first comment, that the claimant ought to have realised that it might be taken as a reference to sexual orientation. Further, it

was reasonably considered to be offensive by the recipient. The second comment, whilst inappropriate, did not cause any upset.

184. Taking into account the nature, degree and consequences of the comments, I find that, even taken together, they are not sufficiently serious to amount to gross misconduct. I do not think that the conduct is of such a grave and weighty character that it wholly undermines the relationship of trust and confidence and is incompatible with continuing the employment relationship.

185. In my view, the conduct was certainly sufficient serious to merit dismissal with notice because the claimant was under a final written warning, but I find that the respondent was not entitled to dismiss the claimant without notice.

Breach of ACAS Code

186. The claimant argues that the respondent was in breach of the ACAS Code of Practice on disciplinary and grievance procedures. I find that the respondent carried out any necessary investigations to establish the facts of the case on the basis of my conclusions above.

187. I find that there was no unreasonable delay until the claimant submitted his appeal, but I find that the delay between the submission of the appeal on 16 August and the appeal hearing on 1 December was unreasonable and not adequately explained by the evidence of Mrs Elliot and the correspondence in the bundle. It is unclear, for example, why it was not until the beginning of November that attempts began to find a date when the panel were available.

188. I find that the respondent was in breach of the ACAS Code in that it unreasonably delayed the appeal hearing.

189. Taking into account the extent of the delay, the fact that some of the blame lay with a third party and the fact that the employer acted otherwise in accordance with the ACAS Code I find that the appropriate uplift to the wrongful dismissal award is 10%.

Next steps

190. The claimant's award will be limited to his notice pay with an uplift of 10%. I have not yet heard evidence on remedy, but I anticipate that the parties will be able to agree the amount to be awarded. I have issued a separate order requiring the parties to let the tribunal know within 21 days whether they have agreed to the amount to be awarded or if the matter needs to be listed for a remedies hearing.

Employment Judge Buckley

Date: 8 February 2021