EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Paul Renforth	**v**	**London Luton Airport Operations Limited**

Heard at: Watford **On**: 7, 8, 9, 10, 11 (pm only) December 2020

Before: Employment Judge Shastri-Hurst

Appearances

For the Claimant: Mr G Sims (Counsel)
For the Respondent: Mr A MacPhail (Counsel)

RESERVED JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent.

2. A 50% reduction in the compensatory award for unfair dismissal will be made under the principles in **Polkey v A E Dayton Services Ltd 1988 ICR 142**.

3. The Claimant contributed to his dismissal to the extent of 50%, to be applied to the basic and compensatory award for unfair dismissal.

4. The ACAS Code regarding dismissals does not apply to this matter, and therefore no uplift or downshift is made under s207A of the *Trade Union and Labour Relations (Consolidation) Act 1992* is made.

5. The Tribunal will decide the remedy for unfair dismissal at a further hearing to be listed with a time estimate of one day.

REASONS

INTRODUCTION

1. The Claimant, Mr Renforth, was employed by the Respondent, London Luton Airport Operations Ltd, as a Lead Fire Fighter (now referred to as a

Crew Commander) within its Fire Service, from 25 October 2004 until 18 May 2019 following his dismissal with notice communicated by letter of 22 February 2019.

2. By his claim form, presented on 15 July 2019, the Claimant brought a claim of unfair dismissal pursuant to s98 *Employment Rights Act* 1996 ("ERA"). Within the ET1 there was reference to a breach of contract claim, however it was clarified by EJ Bartlett at a preliminary hearing on 20 January 2020 that there was no such claim, and the sole claim was one of "ordinary" unfair dismissal.

3. The Respondent contests the claim, alleging that the Claimant was fairly dismissed by way of some other substantial reason ("SOSR"), namely potential personality clashes and/or irreconcilable differences between colleagues at the Fire Station.

4. The Claimant was represented by Mr Sims, by mechanism of the direct access scheme. Mr MacPhail represented the Respondent. I am grateful to both counsel for the fair and pragmatic way in which they presented their cases and conducted the hearing.

5. In determining the claim, I heard from the Respondent's witnesses, Alex Bradshaw (Head of HR), Paul Allan (Fire Station Manager), Nick Thompson (Operations Director) and Alberto Martin (Chief Executive Officer).

6. I also heard from the Claimant and his witnesses who attended in support, namely Matthew Bryan and Craig Henry, both of whom had worked with the Claimant within the Fire Service. Shaun Holmes, another ex-colleague of the Claimant, provided a witness statement in support of the Claimant; Mr MacPhail indicated that he was content for the statement to be accepted as read and there was no need for Mr Holmes to be tendered for cross-examination. Ryan Reynolds, a trade union representative, had also provided a statement in support of the Claimant: he was unable to attend the tribunal to give evidence due to a private family situation. I was asked to give his evidence as much weight as I felt able by Mr Sims.

7. Another witness, Nick Inskip (former Station Manager), attended to give evidence following the issuing of a witness order dated 2 October 2020. Mr Inskip duly attended as the Claimant's witness and gave evidence accordingly.

8. I initially received a main hearing bundle of 468 pages, and also a supplementary bundle from the Claimant of 44 pages. Several additional documents were added to both bundles by agreement as the case progressed. I also heard helpful submissions from both counsel.

PRELIMINARY ISSUES

9. Through the course of the hearing, several case management/preliminary issues required resolution.

Transcript & variation of witness order

10. The first was an outstanding application of the Claimant's, regarding permission to admit a transcript of a covert recording into evidence: the transcript had been produced by the Claimant and served on the Respondent some time prior to the hearing. This recording was of a conversation between the Claimant and Nick Inskip on 10 June 2020.

11. Unfortunately, through no party's fault, the Claimant's attempt to send to the Respondent the audio recording several months ago had been unsuccessful, and the Respondent's solicitors had thought nothing further of the application.

12. On my enquiry, it therefore transpired that the Respondent was not in a position to agree or disagree the contents of the transcript at the commencement of the hearing. Given that Mr Inskip had been ordered to attend the Tribunal on Tuesday 8 December at 10am, I gave the Respondent's solicitors until the afternoon of that date to listen to the (now successfully disclosed) audio and confirm firstly whether the contents were agreed and secondly their position on the application to admit that transcript and audio.

13. I varied the witness order of 2 October 2020, in order that Mr Inskip could attend at 13.30hrs on 8 December 2020.

14. By the time the matter arose on the afternoon of Day Two, Mr MacPhail (and those instructing him) had taken the pragmatic view of producing a "tracked changes" version of the transcript, with the suggestion that both transcripts be admitted. This is the course of action that was agreed upon by both counsel and myself. The tracked changes transcript is labelled "R1".

15. There is also a transcript in the bundle of a recording of another meeting, this time with the Claimant and Tim Neal (Watch Manager of Green Watch) on 6 February 2019, at p316.91 of the Bundle. Mr MacPhail on behalf of the Respondent produced a tracked changes version of this transcript as well. Again, it was agreed by all that both the transcript at p316.91 and the Respondent's tracked changes version be before the Tribunal: the tracked changes copy has become "R2".

Application to amend ET3

16. Mr MacPhail made an application to amend the Respondent's Grounds of Resistance, to remove entirely the last line of paragraph 17 on page 45, as it was not a factual representation of what had occurred on 7 February 2019.

17. Mr Sims conceded that there was little he could do to oppose the application, given that it was a withdrawing of a positive allegation.

18. I granted to application to amend. As Mr Sims had reasonably conceded, this was simply the removal of a positive allegation: the Respondent cannot be made to stand by such an allegation.

S111A *Employment Rights Act* 1998 ("ERA") issue

19. On reading the witness statements and papers, it became clear that some elements of the evidence contained the fact of a protected conversation covered under s111A ERA that occurred on 7 February 2019: I refer in particular to p322 of the Bundle, the Claimant's witness statement at paragraph 26 and Mr Thompson's statement at paragraphs 30 and 31. I did not hear any further evidence as to the content of that conversation. Mr Thompson made it clear in his evidence that he had taken the decision to dismiss the Claimant prior to the meeting on 7 February 2019 in any event. In light of this, I informed counsel that I would put such references out of my mind. Both counsel were content for me to proceed on that basis.

ISSUES

20. The issues had been set down at the preliminary hearing on 20 January 2020 by EJ Bartlett. It was agreed by counsel for both parties and myself that we would split the issues so as to deal with liability, Polkey, contribution and ACAS uplift issues at this hearing, and the remaining remedy issues, if appropriate, at a subsequent remedy hearing. In terms of the issues for me to determine at this stage, they are as follows (numbering as per the original order, including errors in numbering):

4.1 What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The Respondent asserts that it was some other substantial reason: this is not accepted by the Claimant.

4.2 If so, was the dismissal fair or unfair in accordance with ERA s98(4) and, in particular, did the Respondent in all respects act within the so-called "band of reasonable responses"?

4.3 If the Claimant was unfairly dismissed and the remedy is compensation:

4.8.1 [sic] If the dismissal was procedurally unfair, what adjustment, if any should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed/have been dismissed in time anyway? See ***Polkey v AE Dayton Services Ltd [1987] UKHL 8****; paragraph 54 of* ***Software 2000 Ltd v Andrews [2007] ICR 825****;* ***W Devis & Sons Ltd v Atkins [1977] 3 All ER 40****; and* ***Credit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604****.*

4.8.2 Would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable

conduct before the dismissal, pursuant to s122(2) ERA and, if so, to what extent?

4.8.3 Did the Claimant, by blameworthy or culpable actions, cause or contribute to any extent; and, if so, by what amount of any compensatory award, pursuant to s123(6) ERA?

4.59.2 Did the Respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("section 207A")?

4.59.3 Did the Claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to decrease any compensatory award, and if so, by what percentage, again up to a maximum of 25%, pursuant to section 207A?

21. Within the Preliminary Hearing order at paragraph 4.59.1, it appeared that there had been an error in including a standard paragraph that applies only to discrimination claims. However, Mr MacPhail requested that (taking into account removal of reference to "discrimination") the paragraph remain to be dealt with at any future remedy hearing. It transpired that the Respondent's case is that, due to COVID-19, several redundancies and pay cuts have been made since the Claimant's employment was terminated: there is therefore a live issue as to whether the Claimant would have been dismissed in any event.

22. I had initially indicated that I would deal with issue 4.59.1 within this liability stage of the hearing, as a limb of the **Polkey** issues. The Respondent had anticipated that this would be an issue for remedy only, and so it was not ready to deal with the issue as part of the hearing this week. Although I sympathise with Mr Sims' comments regarding the Respondent's lack of timely preparation and evidence on this point in readiness for this hearing, I note that the issue does appear within the "remedy" section of EJ Bartlett's issues. In any event, we did not have time within the allocated hearing time to deal with the issue. I therefore acceded to Mr MacPhail's request that this issue be hived off to deal with at a remedy hearing, as appropriate.

LEGAL FRAMEWORK

23. The relevant legislation for the Claimant's unfair dismissal claim is found at s98(1), (2) and (4) ERA.

Reason for dismissal – Issue 4.1

24. The Respondent relies upon SOSR, specifically personality clashes and/or irreconcilable differences.

25. Where a personality clash leads to a breakdown in the functioning of the employer's operation, this can equate to SOSR as a fair reason for dismissal – **Perkins v St George's Healthcare NHS Trust [2005] IRLR 934**. The Court of Appeal was however keen to stress that it is for the Respondent to prove the facts necessary to show that the specific personality clash operates in such a way as to bring the employee's actions into the remit of s98 ERA – para 59. General vague assertions will not be sufficient for the Respondent to reach the threshold.

26. Dismissing an employee who is the subject of several complaints of co-workers, who causes dissention in the workplace, in order to restore peace to the workplace, has been found to be fair – **Gorfin v Distressed Gentlefolk's Aid Association [1973] IRLR 290**.

27. **Ezsias v North Glamorgan NHS Trust [2011] IRLR 550** (para 53) draws the distinction between dismissing an employee for conduct causing a breakdown in relationship, and dismissing him for the fact of that breakdown: the former dismissal would be by reason of conduct, whereas the latter would be for SOSR.

Fairness – Issue 4.2

Substantive fairness

28. At paragraphs 64/65 of **Perkins**, it is made clear that there is no reason why the **British Home Stores Ltd v Burchell [1978] IRLR 379** test for fairness of conduct dismissals cannot be applied to SOSR cases also. This is the test that I will therefore adopt, meaning that I will consider:

    28.1 Whether the Respondent had a genuine belief that there were potential personality clashes and/or irreconcilable differences between colleagues;

    28.2 If so, whether there were reasonable grounds for the Respondent reaching that genuine belief; and

    28.3 Was this following an investigation that was reasonable in all the circumstances?

29. In all aspects of such a case, in deciding whether an employer has acted reasonably or unreasonably within s98(4) ERA, the tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances. Whether the tribunal would have dealt with the matter in the same way or otherwise is irrelevant, and the tribunal must not substitute its view for that of a reasonable employer – **Iceland Frozen Foods Ltd v Jones 1982 IRLR 439, Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 23, London Ambulance Service NHS Trust v Small 2009 IRLR 563**.

30. Before any SOSR dismissal on the basis of personality clashes will be found to be fair, it is necessary for the employers to take all reasonable steps to

attempt to improve the relationship, "*so that it could be said not only that there had been a breakdown but that their relationship was irremediable*" – **Turner v Vestric Ltd [1981] IRLR 23, EAT**, paragraph 7.

31. It will be unreasonable for an employer to reverse the burden onto the employee, and require the employee to prove that the relationship was not irretrievably broken – **Phoenix House Ltd v Stockman 2017 ICR 84, EAT**.

32. There should always be a proper investigation, reasonable in all the circumstances of the case, and there should be consideration of reasonable alternatives before reaching the point of dismissal.

33. One point for consideration regarding fair sanction is whether warnings had been given to the employee. In **Gorfin v Distressed Gentlefolks Aid Association [1973] IRLR 290**, the EAT concluded that warnings should be given (whether oral or written) prior to dismissal, and the lack of any warnings should be taken into account when considering whether dismissal is a fair sanction. On the facts of **Gorfin**, it was found that warnings would not have made a difference, and so the dismissal remained fair.

Procedural fairness

34. Both counsel submitted that, if the Tribunal found that the reason for dismissal was SOSR, the ACAS Code regarding dismissals does not strictly apply (and so neither do the s207A TULR(C)A 1992 provisions regarding uplifts and downshifts for failure to comply with the Code).

35. In terms of SOSR dismissals, what is reasonable or unreasonable pursuant to s98(4) ERA will depend very much on the individual facts of the case: no set procedure is required by the statutory provision, and it would be wrong to find that an SOSR dismissal could not be fair without a specific process in place – **Jefferson (Commercial) LLP v Westgate UKEAT/0128/12.**

36. However, where it would be futile to carry out a proper process, due to (in this context) a complete breakdown in working relationships, this it may be reasonable to dismiss without such a process – **Gallacher v Abellio Scotrail EATS/0027/19**.

Limited remedy issues – Issue 4.3

Polkey reduction

37. The decision in **Polkey v AE Dayton Services Ltd [1987] UKHL 8** permits the reduction of compensation when, even if a fair procedure had been followed, the Claimant would have been dismissed in any event.

38. Compensation can be reduced as a percentage, if a tribunal considers that there was a percentage chance of the employee being dismissed in any event. Alternatively, where it is found that a fair procedure would have delayed dismissal, compensation should reflect this by compensating the

employee only for the length of time for which dismissal is found to have been delayed.

39. The Tribunal has to consider what difference a fair procedure would have made, if any. It is for the Respondent to adduce evidence on this point. It is always the case that a degree of uncertainty is inevitable, unless the process was so unreliable it would be unsafe to reconstruct events. However, the Tribunal should not be reluctant to undertake the exercise just because it requires speculation – **Software 2000 Ltd v Andrews [2007] ICR 825**.

Contribution

40. Under s122(2) ERA (Issue 4.8.1), the relevant test is whether it is just and equitable to reduce compensation in light of conduct of the Claimant prior to the dismissal. The conduct need not contribute to the dismissal. The EAT has confirmed that the same test of "culpable or blameworthy" applies to the s122(2) reduction question as to s123(6) ERA – **Langston v Department for Business, Enterprise and Regulatory Reform UKEAT/0534/09**.

41. Under s123(6) ERA (Issue 4.8.2), the test is whether any of the Claimant's conduct prior to dismissal was "culpable or blameworthy" – **Nelson v BBC (No.2) 1980 ICR 110, CA**. This requires the Tribunal to look at what the Claimant in fact did, as opposed to being constrained to what the Respondent's assessment of C's culpability was – **Steen v ASP Packaging Ltd [2014] ICR 56**.

42. The EAT in **Steen** summarised the approach to be taken under s122(2) and s123(6) ERA – paragraphs 8-14:

    a. Identify the conduct which is said to give rise to possible contributory fault;
    b. Ask whether that conduct was blameworthy, irrespective of the Respondent's view on the matter;
    c. Ask, for the purposes of s123(6), whether the conduct which is considered blameworthy caused or contributed to the dismissal; and, if so,
    d. Ask to what extent the award should be reduced and to what extent it was just and equitable to reduce it.

43. **Steen** also indicated that a reduction of the basic award to nil would be a rare finding.

FINDINGS OF FACT

44. I have restricted my findings to those that are relevant to my consideration of the above listed issues in this matter.

45. The Claimant was a long-serving employee of the Respondent, having been employed since 2004 within the Fire Service as a Crew Commander.

46. The Fire Service hierarchy is set out in the organisational chart at p449 of the Bundle: there are four "Watches" denoted by colour, namely Green, Red, Blue and White. Each Watch is headed up by a Station Manager. All Station Managers report to the Fire Station Manager, Mr Allen, who in turn reports to the Operations Director, Neil Thompson. There is a fifth "Float" Station Manager, Simon Smith, who, as the name suggests, floats across the four Watches. At the time relevant to this claim, the Station Managers were as follows:

    a. Green Watch – Ray Amiss;
    b. Red Watch – Gary Taylor;
    c. Blue Watch – Gary Salvage;
    d. White Watch – Nick Inskip.

47. Under each Station Manager sits a Watch Manager, who directly manages the Crew Commander. Each Crew Commander is responsible for around 7 or 8 Fire Fighters, also referred to as Watch Members.

48. For roughly the last three years of the Claimant's employment, he was Crew Commander of Green Watch. His Watch Manager was Tim Neal, and his Station Manager was Ray Amiss.

49. The Claimant had, during his employment, worked for some of the Station Managers: his (unchallenged) evidence on this was as follows:

    49.1 He had never worked with Gary Salvage, other than "the odd shift".

    49.2 Nick Inskip and the Claimant had worked together over ten years ago, at which point they had been on the same watch for three years. For the last ten years of the Claimant's employment, he and Mr Inskip had been on opposite shifts.

    49.3 Ray Amiss had been his Station Manager for the last three years of the Claimant's employment.

    49.4 The Claimant had been on the same watch as Gary Taylor for about three years. This period ended approximately four years before his dismissal.

    49.5 Simon Smith and the Claimant had never been on the same watch, but Mr Smith has general oversight and so there were times when they needed to work together.

50. It is common ground between the parties that the Fire Service is a small, close-knit community, and that it is a safety critical function which, ultimately, deals with life and death situations: the work is therefore very intense. Further, it is agreed that the functioning of the Fire Service requires strong working relationships, accompanied by trust and mutual respect.

51. There is however, within this tight-knit team, a level of what has been referred to as "industrial banter", with nicknames being used without any disciplinary consequence, such as "Spanner" (denoting the specific individual as a tool) and "Slap". The Claimant used such industrial language, for example calling an electronic system known as Opscom "Opscock" instead – p125(ii).

Difficulties in 2015

52. The events with which this Tribunal is concerned begin with the Claimant's return from a tour of duty in Afghanistan. He returned to the Fire Service following his thirteen-month tour in 2015, at which point he joined the Green Watch.

53. Mr Allen was appointed to the Fire Station Manager role in May 2015, around the time therefore that the Claimant was returning from his tour of Afghanistan. Mr Allen's view was that the two had had a difficult relationship since about 2016.

54. The difficulties between the Claimant and Mr Allen began when the Claimant was passed over for an opportunity to temporarily step up into the role of Watch Commander. He was the only one with the requisite qualifications, and yet he was not appointed to act up to cover the role.

55. The Claimant raised a grievance about this Temporary Watch Commander issue on 16 September 2015 – p120. He handed his grievance letter to Mr Amiss, who supported the Claimant's ability to do the stepping up role. He also commented that the Claimant had a reputation for "*being quite an angry individual*" – p123.

56. The Claimant submitted a further grievance on 15 December 2015 regarding the Respondent's promotion selection procedure – p124. In this grievance, the Claimant reported that he did not want Mr Taylor on the interview panel as he was aware that Mr Taylor had described him as "*unmanageable and a nightmare*". An informal discussion was held on 30 December 2015 between the Claimant, Ms Bradshaw and Mr Allen, at which the Claimant took the decision not to pursue the grievances through formal channels – p125.

57. In 2017, Mr Allen indicated to the Claimant that his "*door is always open please feel free to talk*" – p133. This thread of communication arose through Mr Allen's belief that the Claimant was suffering from PTSD. There is no such medical evidence, and the Claimant denied and still denies that he has ever suffered with PTSD. The only medical evidence before the tribunal states clearly that the Claimant was not suffering from PTSD (or related issues) at the time of the report, in July 2018 – p151.

Management concerns

58. From the time of the Claimant's return to work in 2015, through to spring of 2018, there had been some issues regarding his demeanour/conduct that had been picked up upon by various of the management team and others, for example:

    58.1 October 2015 – Mr Smith reported to Mr Allen that he considered the Claimant had directly challenged his authority – p125(i);

    58.2 January 2017 – Mr Amiss and Mr Allen held a meeting with the Claimant in order to discuss his conduct and demeanour. Mr Allen referred to the Claimant and Respondent being "*at the tipping point where [the Claimant's] bad conduct has now outweighed any good conduct, and this now has to end, this behaviour will no longer be tolerated any further*" – p413;

    58.3 April 2018 – Mr Smith had cause to speak to the Claimant following an incident of insubordination. On this occasion, the Claimant apologised unreservedly and informed Mr Smith that he was aware he had anger management issues – p133(i).

59. At the end of June 2018, Mr Neal (the Claimant's Watch Manager) reported to Mr Smith that the Claimant had referred to Mr Smith as a "buffoon" at the commencement of a shift – p146. Mr Smith in turn reported this by email to Mr Allen. Mr Smith also mentioned that, on 30 June, the Claimant had messed about at roll call – see p148/149. Mr Smith ends his email with "*I do not know what your plans are for him and I don't want to step on your toes but enough is enough with him, I want to deal with him but if you deem it better to wait then I can do that, if that's the case then please accept this as a report of his further continued poor conduct*".

60. Mr Allen's response on 2 July 2018 was to inform Stephanie Kwok of HR of this incident, stating "*I now feel with need to accelerate [the Claimant's] process…*" – p148.

    6 July 2018 meeting

61. These communications resulted in a meeting being held by Mr Allen and Ms Kwok on 6 July 2018 with the Claimant, to discuss various aspects of his conduct. No note was taken.

62. In this meeting, Ms Kwok produced a list of conduct issues that had been made, relating the Claimant's conduct. It was the Claimant's case that this document had been produced with a threat that, unless the Claimant stepped down a rank, the Respondent would pursue those matters listed as disciplinary matters. Ryan Reynolds, present at the 6 July meeting as the Claimant's companion, supported this account in his statement to a later grievance investigator – p213.

63. Mr Allen was interviewed in November 2018 about this meeting at which he said that the Claimant was offered the opportunity to step down.

64. Mr Allen did not refer to this meeting in his witness statement. In cross-examination, he denied that such a threat as suggested by the Claimant was made. He also initially denied that a list of allegations had been shown to the Claimant. Mr Allen was taken to pp224-225, which record Ms Kwok's recollection of the 6 July meeting, in which she recalls that a list of allegations was produced to the Claimant, and that the Claimant "*could step down or move crew*". Mr Allen's answer to Ms Kwok's account was "*this is just Ms Kwok's comment, it was not my idea of this meeting at all*". He later said he could not remember a document of allegations being produced at the meeting. I found Mr Allen's evidence regarding this meeting somewhat vague and evasive.

65. On balance, I find that the suggestion of the Claimant stepping down was suggested to him as a way of avoiding disciplinary action. I find this for the following reasons:

    65.1 I refer back to Mr Allen's email of 2 July in which he referred to accelerating the Claimant's process. Mr Allen informed the Tribunal that the process to which he referred was "*a process of getting him on the right track*". I do not accept this explanation. There is no evidence of any such supportive process being in place. Further it is difficult to understand what process Mr Allen could be referring to, other than when placed in the context of the 6 July meeting, when the Claimant was faced with a list of potential disciplinary matters.

    65.2 On 17 August 2018, the Claimant was invited to a meeting regarding the "buffoon incident": the letter stated that this matter may lead to a disciplinary hearing – p156. I find that this "buffoon matter", which had not been of particular import to Mr Smith, had been accelerated by Mr Allen as seen in his 2 July email, and did in fact result in a disciplinary process, as was suggested in 6 July 2018 meeting.

    65.3 Following 6 July meeting, in August 2018, Mr Allen sent to Ms Kwok an email with the subject title "*Operation Vulcan*" – p154. There is no mention of Operation Vulcan anywhere else in the papers, despite the Claimant specifically asking for any disclosure relating to this operation. Mr Allen's answer as to the nature of Operation Vulcan was at best vague: his evidence was that "*this was an ideas area where senior managers were working on new ideas that could help promote the company, and make costs savings*". Ms Bradshaw told the tribunal that there had been a "*period of seeking to make some business improvements*", and that Mr Allen named his business improvement plan "*Operation Vulcan*". I accept that there may well have been a business improvement plan at the Respondent, however I do not accept that the name of that plan within the Fire Service was Operation Vulcan. The content of the email of 6 August has nothing to do with business improvement, and something to do with the Claimant

and his conduct. The subject title is a fresh title, not a reply to or forward of any other email. If the Respondent is right, there is no good reason why Mr Allen would have entitled the email Operation Vulcan and then referred to something wholly unrelated to business improvement. Furthermore, if Operation Vulcan were the name for business improvement project, I find that on balance there would have been more than this one sole documentary reference to the Operation.

66. I therefore find that, from summer 2018, Mr Allen had in mind some process that would eventually result in the Claimant's removal from the First Station.

67. Following the 6 July 2018 meeting, the Claimant was suspended on medical grounds. The Claimant was referred to Occupational Health ("OH"). The OH report at 23 July 208 states that the Claimant displayed no signs of anxiety, depression, panic or PTSD and that he was fit to return to work without restrictions – p151.

68. As above, the Claimant was invited to an investigation meting by letter of 17 August 2018, regarding the buffoon matter. In response, Claimant raised a grievance over a series of letters dated 18, 19 and 20 August 2018, in which he alleged bullying, culminating in the invitation letter of 17 August.

69. Joshua Haye, HR Generalist, replied to the Claimant's grievance, stating that the issues raised regarding the Claimant's allegations that the Respondent's letter of 17 August did not comply with its own policies were misguided, and so the disciplinary investigation would continue – p175.

70. An investigation report regarding the buffoon comment was produced by Chris Jones on 13 September 2018, in which it was decided that the matter would be referred back to Mr Allen to be dealt with within the Fire Service – p177.

71. On 14 September, Jade Connelly, HR Assistant, replied to the rest of the Claimant's grievances raised in August, regarding bullying and harassment. The Claimant was invited to a meeting on 26 September 2018. The grievance was not upheld. The grievance report noted that "*the relationship between [the Claimant, Mr Allen] and the RFFS management has reached a point whereby they are at loggerheads with each other, this is as a result of the alleged behaviour displayed by [the Claimant] not being addressed*" – p188.

72. On 3 October 2018, the Claimant raised another grievance, this time against Ms Kwok – p189. This related to Ms Kwok's conduct at the meeting three months prior, on 6 July 2018. Daniel Cartwright, Security Operations Manager, was tasked with conducting this grievance process.

73. On 9 October 2018, the Claimant was invited to a disciplinary hearing regarding the buffoon incident. Mr Allen gave evidence initially to the Tribunal that he was not aware of how this disciplinary process had been started once it returned to be dealt with internally. However, he later

conceded that it would have been him who decided to escalate the matter to a disciplinary process.

74. In light of the Claimant's grievances raised in August and October 2018, the disciplinary matter was placed on hold.

75. On 9 November 2018, the Claimant was sent a grievance outcome letter regarding his grievance against Mr Allen from August 2018. Although the grievance was not upheld, the report produced by Ian Garratt concluded that:

It does appear that relationship between [the Claimant] and [Mr Allen] has broken down, and would benefit from some mediation to improve this and help them when communicating with one another and working together going forwards – p241.

76. One of Mr Garratt's recommendations was mediation between the Claimant and Mr Allen. The Respondent did nothing to further this recommendation.

77. On 12 November 2018, the Respondent sent the Claimant the grievance outcome letter regarding his grievance against Ms Kwok: this too was not upheld. However, criticism was made of the running of the meeting on 6 July 2018 – p231.

Lead up to formal process

78. At the end of October 2018, Mr Allen had been approached by Mr Taylor (Red Watch Station Manager) to discuss an issue between the Claimant and Mr Neal (the Claimant's Watch Manager). Mr Taylor was concerned about the effect that the Claimant's conduct was having on Mr Neal's health. Although the Claimant does not accept the assertion that he had a negative effect on Mr Neal's health, he accepted that he has no evidence to suggest Mr Allen's account of his conversation with Mr Taylor was inaccurate. I therefore accept Mr Allen's evidence on this point.

79. Mr Allen approached Mr Neal for an informal chat on around 26 October 2018. Mr Neal relayed to Mr Allen that his wife was concerned for his health, due to the effect that the Claimant's behaviour was having on him. Mr Neal told Mr Allen that the Claimant was negatively affecting his mental health. Again, the Claimant does not accept this causal link, however cannot dispute the content of this conversation between Mr Neal and Mr Allen. I again therefore accept Mr Allen's evidence as to the fact and content of this discussion with Mr Neal.

80. Shortly after this conversation, Mr Neal went off on sick leave.

81. I pause there to consider the causal link between Mr Neal's ill health and any conduct by the Claimant. On balance, I accept that there was some link between the two, for the following reasons:

81.1 As above, Mr Allen's account of his October conversation with Mr Neal cannot be challenged by the Claimant as he was not party to that discussion;

81.2 The OH report for Mr Neal in November 2018 makes reference to difficulties with another employee;

81.3 Mr Neal latterly provided a note to Mr Allen, stating that he had taken some time off due to stress caused by the situation regarding the Claimant – p411;

81.4 There is a transcript of a conversation between Mr Neal and the Claimant from 6 February 2019, in which Mr Neal stated that his sickness absence was not related to the Claimant. In that conversation, I find that Mr Neal attempted to distance himself from the situation arising around the Claimant (for example, "*I'm not parla [sic] to any of this so…*" and "*I've been kept out of the loop a bit, I know nothing, not a thing*"). I accept the Respondent's submission that it is more likely than not that Mr Neal simply did not wish to engage with the process around the Claimant, instead wishing to distance himself. I find that this was the reason why Mr Neal denied to the Claimant face to face that his sickness absence was for reasons unconnected to the Claimant.

<u>The Formal Process</u>

82. Following Mr Allen's discussion with Mr Neal, he spoke to Mr Thompson and Ms Bradshaw. At this point, Mr Allen still believed he was under investigation regarding the Claimant's grievance against him from August 2018.

83. Mr Allen approached Ms Bradshaw and Mr Thompson due to concerns he held around the Claimant's relationship with the Station Managers, of which the catalyst for him acting was the situation with Mr Neal. The outcome of that meeting was that Mr Allen was to investigate whether the Claimant could move to a different watch. This Mr Allen duly did, by speaking to the Station Managers and asking them to provide something in writing.

84. The process that ultimately led to the Claimant's dismissal was formally commenced by him being invited, without notice, to an impromptu meeting with Mr Thompson and Ms Bradshaw on 19 November 2018. At this meeting, the Claimant was handed an invitation letter, the opening line of which reads "*Invitation to meeting to discuss your potential dismissal*": the letter cited alleged personality clashes and/or irreconcilable differences between colleagues – p246. The letter referenced possible ways of avoiding dismissal including:

a. Redeployment,
b. Changing work patterns;
c. Mediation.

85. Enclosed with the letter were communications from all five Station Managers, and Patricia Kennedy (an external consultant):

    a. Mr Smith's signed, undated note – p248;
    b. Mr Salvage's internal memo dated 29 October 2018 – p249;
    c. Mr Taylor's internal memo dated 31 October 2018 – p250;
    d. Mr Amiss' internal memo of 4 November 2018 – p251;
    e. Ms Kennedy's email to Ms Bradshaw of 14 November 2018;
    f. Mr Inskip's email on 17 November 2018 – p245.

86. The Respondent's Disciplinary Policy was also attached. At this juncture, I note that later, on 12 December 2018, Ms Bradshaw wrote to the Claimant explaining that this was not a disciplinary matter, and yet stated that "*the process will follow the same stages as the disciplinary process with the right of appeal should it be applicable despite it not being a disciplinary matter*" – p264.

87. As a result of receiving this letter, the Claimant was signed off as unfit to work from 21 November 2018 to 17 January 2019, and the process was postponed until he was fit to attend a meeting.

88. In the interim, the Claimant instructed solicitors who wrote to the Respondent several times. Of import is their offer, on behalf of their client, that the Claimant was willing to engage in mediation and relinquish his current rank, so as to disengage with any watch management team – p258 and p267 respectively.

89. Once the Claimant was deemed fit to attend work meetings, by letter of 23 January 2019, he was invited to a formal meeting to take place on 31 January 2019 "*to discuss your potential dismissal*" – p280. In response to this email the Claimant's solicitor replied to Ms Bradshaw, reiterating the offer of mediation and relinquishing a rank, and stating that the Claimant was also happy to undergo coaching – p284. The solicitor also requested the attendance at the 31 January meeting of the six people whose statements the Respondent was relying upon in this formal process. This request was refused by Ms Bradshaw – p286.

    <u>31 January meeting</u>

90. On 31 January 2019, the Claimant attended the formal process meeting with his union representative Simon Easton. The meeting was chaired by Mr Thompson, with Ms Bradshaw providing HR support. The minutes of that meeting were taken by Ms Bradshaw, and appear at p287. The Claimant recorded the meeting without permission of the Respondent; the transcript appears at p293. I will rely upon the transcript as being the complete and accurate document.

91. In advance of that meeting, Mr Thompson had had sight of the following documents:

a. The Claimant's submissions – p350-352;
b. The Station Managers' statements – p248-253.

92. Mr Thompson opened the meeting stating:

> "Yes, we met before Christmas, we haven't had a chance to speak to you since, we've had correspondence from your lawyer as well, which set out your proposals. The purpose of today is to try and understand what those things could be, should you want to come back to work" – p293.

93. Mr Thompson accepted in cross examination that the Claimant was ready to mediate with anyone and had agreed to step down a rank to Fire Fighter. When asked what else the Claimant could have done, Mr Thompson replied that there were other solutions, such as redeployment elsewhere, and maybe changing shift patterns in the Fire Service. Those suggestions were not discussed in the meeting on 31 January 2019. Mr Thompson explained that this was because "*the purpose of the meeting was for [the Claimant] to come up with suggestions*".

94. The Claimant, in this meeting, denied that there was in fact any irreconcilable breakdown in relationships between him and the Station Managers. To this, Mr Thompson stated "*That's down to me and of Fire Service Management to decide that, not for you to tell us what you think, we decide if it is irreparable or not*" – p294. Mr Thompson took it as read that there had in fact been a breakdown in those working relationships.

95. The Claimant, for his part in this meeting, could not see past arguing that it was wrong to state there was an irretrievable breakdown in relationships.

96. The Claimant stated that he was willing to mediate, although did not understand who he should mediate with. At p302, there is a recording that the Claimant stated "*I don't agree there is no point me having mediation with GT, I've never worked with Tanks and I haven't worked with Nick I like 10 years*". He was asked in re-examination to clarify the meaning of this sentence; he answered that he did not think there was any point in mediating with Mr Taylor, and also he had not worked with "Tank" and Mr Inskip for years.

97. In relation to this meeting, I make the following findings:

97.1 On the evidence in front of Mr Thompson, it was not clear at the time of this meeting that none of the Station Managers could work with the Claimant. In the minutes of the 31 January meeting, Mr Thompson is recorded as saying "*we have statements from managers, 3 who will not work with you*" – p288. There were five Station Managers in total. This by implication means that there were two Station Managers whose position regarding working with the Claimant was at least unclear to Mr Thompson.

97.2 Mr Thompson's evidence regarding alternatives to dismissal, and the way in which he opened the meeting, indicates that he placed the onus squarely on the Claimant to provide solutions and demonstrate why he should not be dismissed.

97.3 In the face of Mr Thompson's questions regarding how to prevent personality clashes in the future, the Claimant did not show any insight, and reverted to discussing problems with Mr Allen, or blaming a lack of coaching by the Respondent. On this point, I accept the Claimant's evidence that he may have acted differently in this meeting had it not been framed as being about his potential dismissal.

98. The meeting was adjourned in order for the possibility of mediation as a solution to be discussed with the Station Managers. On 1 February 2019, Mr Allen emailed Ms Bradshaw with the outcome of his discussions with the Station Managers, stating "*as requested just thrown this together*" - p308-310. This attitude does not reflect that Mr Allen was taking his role in what was a potential dismissal process sufficiently seriously.

99. This email, coupled with that from Mr Allen to Mr Amiss on p310(i) shows that a meeting took place on 1 February 2019 between Mr Allen, Ms Bradshaw and Mr Thompson. None of those three witnesses mention this meeting in their witness statements. Mr Allen left that meeting with the impression that the Claimant would, in Mr Allen's words, "*not be returning*" – p310(i).

100. On 4 February 2019, the Claimant was invited to a follow up meeting with Mr Thompson on 7 February 2019.

101. Mr Allen provided further statements from Mr Amiss and Mr Taylor on 5 February 2019, seen at p313/314/314.1. On 6 February 2019, Mr Allen provided his own statement, containing his report of the views of all the Station Managers, that they were averse to mediation – p315/316.

102. On 6 February 2019, Mr Allen sent a statement to Ms Bradshaw, stating that he had spoken personally with the five Station Managers, none of whom considered mediation would be beneficial – p316.

103. None of the documents collated between 31 January 2019 and 7 February 2019 were provided to the Claimant, nor was he told of their existence.

104. On 7 February 2019, the Claimant attended a grievance appeal hearing regarding his grievance against Mr Allen from August 2018 (p317).

Meeting of 7 February 2019

105. The follow-up meeting regarding the Claimant's potential dismissal took place on 7 February 2018, after his grievance appeal hearing. This meeting was incredibly short: a transcript of the Claimant's covert recording appears at p322/323. Mr Thompson's evidence was that he had decided to dismiss

the Claimant before this meeting took place: at the meeting he told the Claimant that he was minded to dismiss him. He did so without speaking directly to any of the authors of the statements at 248-253, and without speaking to Tim Neal.

106. The Claimant was given no opportunity to make further representations, nor was he able to discuss/challenge the documentation that Mr Thompson had received post-31 January 2019.

107. A letter was sent to the Claimant confirming his dismissal on 22 February 2019. He was not required to work his twelve weeks' notice period – p324/325.

108. I note the mention of redeployment in the notice of dismissal at p325. It is common ground between the parties that a list of possible vacancies was supplied to the Claimant with this termination letter. The Claimant did not deem any of those roles suitable; Mr MacPhail on behalf of the Respondent was not willing to concede that none of the roles were objectively suitable. I note in any event that this list of vacancies was supplied after Mr Thompson took the decision to dismiss the Claimant, and not before.

109. Following the Claimant's dismissal, he sent various emails and texts that were ill advised and demonstrative of his anger, for example 400(ii), in which he emails the five Station Managers and stating

> "what really disturbs me about this whole vindictive/bullying saga is that people are willing to ruin my life and that of my families [sic] by assisting in my dismissal. … Ironically, I don't hold any contempt for any of you, but in fact feel sorry that none of you seem to hold me in any regard and appear to be happy being used as puppets, facilitating someone else's agenda/ego/legacy" – p400(iii).

110. I find that this anger arose due to the dismissal process and end result: although aimed at the wrong people, demonstrating a propensity to anger, these examples cannot be relied upon reasonably to be reflective of the Claimant's behaviour going several back years.

Appeal

111. The Claimant appealed his dismissal by letter dated 25 February 2019, attaching various documents – pp328-376. The appeal meeting took place on 12 April 2019 and was chaired by Mr Martin. For the appeal, Mr Martin had the following documents:

    a. The original statements of the five Station Managers – pp248-253;
    b. The Respondent's notes of the 31 January 2019 meeting – p287;
    c. Mr Allen's 1 February and 6 February letters – p309 & 316;
    d. Mr Amiss' email of 1 February 2019 – p314;
    e. Mr Taylor's letter of 4 February 2019 – p314.1.

112. At the hearing, the Claimant maintained the position that there could not be irreconcilable relationships with all Station Managers, as he did not have to

work with them all on a daily basis. He also reiterated his willingness to mediate and step down a rank. He also raised various concerns about the formal process. When given the opportunity to discuss the Station Managers' statements, the Claimant stated that they were trying to ruin his reputation. He also threatened that, if his appeal was not upheld, he would take the matter to a tribunal and cite the appeal as another act of victimisation and bullying.

113. After the appeal hearing, Mr Allen took it upon himself to send further documentation and a cover letter to Mr Martin on 16 April 2019 – pp406-417. I accept Mr Martin's evidence, that the new documents he received from Mr Allen did not impact on his decision; there is no evidence to contradict this position.

114. The appeal outcome letter states "*Mediation would therefore not be a viable route, especially as your colleagues are not prepared to conciliate with you*" – p421. Mr Martin confirmed in evidence that he had placed some reliance on the February statements regarding the Station Managers' willingness to mediate in reaching this conclusion. He told the Tribunal he had no good reason not to rely on them, no reason to believe that the comments had not been relayed truthfully by Mr Allen, and that the statements were clear that the Station Managers were averse to mediation, making it a futile exercise.

115. I find that Mr Martin placed reliance on documents that the Claimant had not seen, and had not had the opportunity to take issue with. He also accepted everything that he read from Mr Allen and the other Station Managers without question, despite the Claimant's protests that there was no irreconcilable relationship.

116. Mr Martin read the character references provided on behalf of the Claimant. I accept that they were irrelevant to Mr Martin's concerns and therefore his decision, as set out in the appeal outcome letter. Those character references dealt with the Claimant's relationship with his peers or subordinates, not his relationship with those at managerial level.

117. Ultimately, the appeal was not upheld. The effective date of the Claimant's termination was 18 May 2019.

CONCLUSIONS

Reason for dismissal – s98(1)/(2) ERA

118. I find that the reason for dismissal was some other substantial reason ("SOSR"), namely personality clashes and/or irreconcilable differences between colleagues.

119. Although the Claimant challenged the reason for dismissal, I find on the balance of probabilities that the Respondent has proven the reason for dismissal as being SOSR for the following reasons:

119.1 The chronology supports the Respondent's case that it was the conversation with Mr Neal that was the catalyst (or final straw) that started the formal process. I do not accept that the Claimant's grievance against Mr Allen was the trigger; the Claimant had brought grievances against Mr Allen before with no such repercussions;

119.2 The lack of any further requirement of evidence from Mr Neal supports the Respondent's position that it was not concerned with whose fault any breakdown in relationship was;

119.3 Even though there was bad blood between Mr Allen and the Claimant, this does not detract from the reasonableness of Mr Allen taking his concerns regarding Mr Neal's health and issues with the Claimant to senior management and HR;

119.4 There is evidence throughout the three years prior to the Claimant's dismissal to demonstrate that issues between him and some Station Managers had been bubbling under the surface for some time;

119.5 I found Mr Inskip's evidence helpful on this issue of reason for dismissal. He struck me as a candid and straight forward witness. His evidence was that the content of his email criticising the Claimant at p253 was his choice, his words; he was not forced into writing the statement by Mr Allen. He also told the tribunal that he had informed Mr Allen that he had had problems with the Claimant in the past. This is consistent with the transcript of a recorded conversation between Mr Inskip and the Claimant over a year after the dismissal, in which Mr Inskip confirms to the Claimant that he could not give a witness statement saying that he had been coerced into writing the email at p253. Mr Inskip has left the employ of the Respondent, and therefore has no reason to be keep up a pretence that he was not pressured by Mr Allen if in fact that were the case.

120. Ultimately, the decision to dismiss rested with Mr Thompson, and then Mr Martin. Both were clear in their evidence that they considered on the evidence in front of them that there were strong feelings amongst the Station Managers that they did not wish to work with the Claimant.

121. SOSR by way of relationship breakdown is a potentially fair reason for dismissal under s98 ERA. I must then consider the reasonableness or otherwise of the Respondent treating this reason as a sufficient reason to dismiss.

Fairness of dismissal – s98(4) ERA

Genuine belief

122. I find that Mr Thompson and Mr Martin held a genuine belief that there were personality clashes and/or irreconcilable differences between the Claimant and his colleagues:

122.1 Their evidence was clear and consistent as to why they dismissed the Claimant: they were of the opinion that the evidence from all five of the Station Managers was compelling;

122.2 Mr Martin gave evidence to the tribunal that is was "*crystal clear*" that the Station Managers did not want to work with the Claimant;

122.3 I accept that there was a genuine belief that the Claimant had demonstrated a lack of insight, empathy and personal responsibility during the formal process, as set out in the dismissal letter. I find that the Claimant did display such qualities as can be seen from the minutes of the 31 January 2019 meeting, and the appeal meeting;

122.4 I accept Mr Martin's evidence, although theoretically employees can be placed on watches against the express wishes of their Station Managers, he would strongly recommend avoiding such a situation.

Reasonable grounds

123. The decision makers had in front of them statements from all Station Managers stating that they did not wish to work with the Claimant.

124. Although I accept that, when studied, the statements do not say that the Station Managers could not manage/work with the Claimant, I find that the statements were written by lay people, without the expectation that their words would be so scrutinised by lawyers nigh on two years after they were written.

125. I find that the Respondent was reasonable in concluding that the Station Managers did not wish to work with the Claimant, and to force them to do so would be sufficient to cause disruption to the Fire Service.

126. On that basis, I find that the decision makers had reasonable grounds upon which to base their genuine belief.

Investigation reasonable in all the circumstances

127. I find that the investigation did not fall within the band of reasonable responses and was flawed in the following ways:

127.1 The dismissing officer, Mr Thompson, did not speak to any of the Station Managers directly, but accepted written statements and second-hand reports from Mr Allen, despite the Claimant challenging the fact of irreconcilable relationships;

127.2 Mr Thompson relied, in part, on an email from Ms Kennedy that was not provided for the purpose of the formal process. It was miscategorised by the Respondent as a "*statement of her analysis*"; it was a short email with second hand information. Although she cites three staff members being adversely affected by the

Claimant's conduct, nothing was done to explore the identity of those three, or gain first-hand evidence from them;

127.3 From Mr Allen's email of 1 February 2019, in which he states that the Claimant "*will not be returning*", it appears that there was an early decision to dismiss by Mr Thompson.

128. Ultimately, although I find that the investigation was not within the band of reasonable responses, I do not conclude that it was so unreasonable as to lead to a lack of reasonable grounds on which to base the decision-makers' genuine belief.

Sanction

129. Starting at the commencement of the formal process, no reasonable employer would have conducted itself as the Respondent did by sending a letter entitled "*Invitation to discuss your potential dismissal*". This in itself placed the Claimant on the defensive, and was hardly conducive to resolving any factions in relationships, nor would it have any positive effect of the relationship between employee and employer.

130. It also demonstrates that, from the commencement of the process, the Respondent's view was that it was for the Claimant to bear the burden as to why he should not be dismissed. This is clearly an approach to such a matter that lies outside the band of reasonable responses when an investigation has the possibility of resulting in dismissal.

131. The Respondent failed to explore all reasonable alternatives to dismissal. Mr Thompson was aware that there were alternatives available, such as redeployment and swapping shifts, and yet these were not discussed with the Claimant, as the burden had been placed on the Claimant to provide the answer to avoid dismissal.

132. Not all reasonable steps were taken to attempt to salvage the broken relationships prior to dismissal, as is required by **Turner**. The suggestions offered by the Claimant were not attempted prior to dismissal. The Respondent failed to:

a. Attempt mediation between the Claimant and any of the Station Managers;
b. Follow its own internal recommendation of mediation between the Claimant and Mr Allen;
c. Try a period of shift swapping;
d. Trial the Claimant under Mr Inskip's watch, who told the Tribunal that he could have worked with the Claimant on his watch.

133. I note Ms Bradshaw's words on 31 January 2019, that Mr Allen and the Station Managers did not "*believe at the moment without intervention that this relationship can continue*" – p300. The point is, there was no intervention, there was no attempt from the Respondent to intervene prior to dismissal.

134. No reasonable employer would have dismissed the Claimant without first giving the Claimant some opportunity to prove that he could work effectively within the Fire Service.

135. Further, and as in **Phoenix House**, Mr Thompson effectively required the Claimant to prove that there was no irretrievable breakdown in relationship, yet did not in fact give him the opportunity to do so. The Claimant was not allowed to question any of the Station Managers.

136. The same is true, to an extent, of Mr Martin: he stated he wanted to hear the Claimant's side of the story, but "*on balance, nothing [the Claimant] told [him] convinced [him] otherwise*". This demonstrates at least some element of a closed mind from both decision makers.

137. Regarding the issue of warnings raised by **Gorfin**, I do not find that the lack of official warnings in this case adds to the unfairness of sanction. The Claimant had been spoken to several times over the years regarding the same issues relating to his conduct and demeanour. He was also in receipt of one verbal warning relating to his language at work: this was imposed on 12 August 2016, lasting until 9 February 2017.

138. I therefore find that the Claimant's dismissal was substantively unfair.

Process

139. Under **Gallacher,** there will be circumstances in which no process is required for an SOSR dismissal to be fair. However, those circumstance will only arise when to follow a process would be futile: I do not find that this is the case in this matter.

140. There was at least a chance that Mr Inskip could have built or rebuilt a working relationship with the Claimant. Mr Inskip, whose evidence I have already stated I found credible, gave evidence as to the steps he would have taken, had the Claimant been swapped to his watch. This indicated that there was the possibility of the Claimant being able to remain employed by the Respondent, on Mr Inskip's watch. It cannot therefore be said that any process would have been futile.

141. I find that the process followed by the Respondent fell outside that which would be adopted by any reasonable employer:

    141.1 No reasonable employer would commence the process with an invitation to discuss potential dismissal;

    141.2 None of the Station Managers were spoken to directly by Mr Thompson or Mr Martin;

    141.3 Mr Allen, the person exploring the alleged breakdown in relationships, was someone who was the subject of the Claimant's live grievance and his involvement was not disclosed to the Claimant;

141.4 The Claimant was not provided with all the documents upon which Mr Thompson and Mr Martin relied in reaching their decisions, and was therefore not given the opportunity to respond to said documents;

141.5 Mr Allen involved himself in the appeal process by providing Mr Martin with more documentation.

142. The Claimant also argued that the lack of context given to the Station Managers' statements was a flaw in the process. I do not accept this submission. No assumptions were made about the context of the statements by the decision-making officers. It was reasonable of them to have taken it as sufficient that the Station Managers did not wish to work with the Claimant: it was not unreasonable to fail to ask the Station Managers whether their position would change if they knew the Claimant was at risk of dismissal.

143. The Claimant also argued that running this process as an SOSR process rather than a conduct/disciplinary process was a failure to follow a fair process. Given I have found that SOSR was the reason for dismissal, I reject this argument.

144. It was also submitted on behalf of the Claimant that Mr Thompson was not an appropriate person to have been the decision maker. I reject that submission. Although Mr Thompson had historically been involved in a disciplinary procedure against C in 2016, this in itself is not sufficient to take his appointment outside the scope of what a reasonable employer would do.

145. I therefore find that the Claimant's dismissal was procedurally unfair.

Polkey

146. It is argued by the Respondent that, if there is procedural unfairness, there is a high chance that the Claimant would have been dismissed or left the Respondent's employ, whether at the same time or a few months later, even if the process had been fair.

147. I find that the language in various emails and texts from the Claimant demonstrates that the reality even before his dismissal was that he would have found it difficult to work with any of the Station Managers. Difficult, but not impossible. For example, there is a text from the Claimant, dated 11 December 2018 that states "*why would I want to work with spineless fucks*" – Supplementary Bundle p34. Further, in the Claimant's statement prepared for the formal process, he states of the Station Managers "*they have issued statements which appear to be [conspiratorial]*" – p351.

148. By the time the Claimant was in his notice period, the relationships may well have been irreconcilable. However, there is uncertainty as to whether this would have been the position had the meetings of 31 January and 7 February been approached in a more conciliatory matter by the Respondent, as opposed to starting from a point of potential dismissal.

149. I accept that a fair process may have uncovered that Mr Inskip would have been prepared to work with the Claimant. I am satisfied that there is a chance that the Claimant could and would have remained employed by the Respondent under Mr Inskip's watch.

150. In regard to the Respondent's failure to provide the Claimant with all the documents, I do not consider that their provision would have increased the chances of the Claimant remaining employed. Had the Claimant been informed that the Station Managers were unwilling to mediate, what could he do to counter that? Further, Mr Martin gave evidence that the new documents provided by Mr Allen on 16 April did not impact his decision: this is corroborated by the fact that those documents are not mentioned within Mr Martin's decision letter.

151. In terms of a reduction to any compensatory award on the basis of a **Polkey** argument, Mr MacPhail asked me to find that, had the Claimant remained employed, he would have remained so for only a further three to six months. I am not sure however that this is a case where the "time period" approach to *Polkey* is helpful. If the process had been approached differently by the Respondent, then the Claimant would possibly not have reached such an entrenched position, and it is more likely than not that he would not have sent all of the unpleasant emails to his Station Managers along the lines that we see arising after his dismissal. I accept that language is industrial at the Respondent, and there was at least a chance that some healing could have taken place, whilst the Claimant worked on Mr Inskip's watch. I therefore consider the "percentage chance" approach to *Polkey* to be the more appropriate route in this matter.

152. As above, I find there was a chance that the Claimant could have remained employed on Mr Inskip's watch. Mr Inskip was balanced in his evidence, on the one hand stating that he had had problems in the past with the Claimant and that he was not forced into writing his statement at p253, whilst on the other stating that there was no irreconcilable breakdown in his relationship with the Claimant. This being an imprecise science with an element of speculation, I therefore consider that there was an even chance that, if the Claimant had been placed on Mr Inskip's watch, relationships would have healed sufficiently to enable the Claimant to remain employed. I find that a reduction of 50% is appropriate.

Contribution

153. Looking at the **Steen** issues:

    a. *Identify the conduct which is said to give rise to possible contributory fault*. There is evidence over several years that the Claimant's demeanour and conduct did contribute to the damage to his relationships with some of the station managers;

    b. *Ask whether that conduct was blameworthy, irrespective of the Respondent's view on the matter*. I find that, in light of being spoken to

about his conduct/demeanour on a few occasions, the Claimant did not seek to rectify his behaviour sufficiently and his conduct was therefore blameworthy;

c. *Ask, for the purposes of s123(6), whether the conduct which is considered blameworthy caused or contributed to the dismissal*. I am satisfied that the Claimant's conduct, in his language and manner of relating to colleagues, did contribute to the breakdown of relationships with some of the Station Managers.

d. Ask to what extent the award should be reduced and to what extent it was just and equitable to reduce it. I am satisfied that there was fault on both sides in terms of the fracturing of working relationships: for example, it was common ground that there was an abrasive relationship between the Claimant and Mr Smith, and there was no love lost between Mr Allen and the Claimant in later years. I therefore find that a reduction to both the basic and compensatory award of 50% is appropriate.

154. In light of my findings and conclusions, this matter will be set down for a remedy hearing, with case management orders to follow.

155. The parties are reminded that the option of settling their differences before the remedy hearing remains open to them.

_____
Employment Judge Shastri-Hurst

Date: …17 December 2020……..

Sent to the parties on:

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For the Tribunal Office