



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr John Sondergaard

**Respondent:** Merseyside Fire and Rescue Authority

**HELD AT:** Liverpool **ON:** 19, 20, 21, 22, 21, 24, 27, 28  
February 2020, 2, 3, 5, 23  
March 2020 (in chambers)

**BEFORE:** Employment Judge Shotter

## REPRESENTATION:

**Claimants:** Mr Weiss, counsel  
**Respondent:** Mr Kenward, counsel

## JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant did not raise a protected disclosure and his claims for detriment brought under section 47B and automatic unfair dismissal under section 103A of the Employment Rights 1996 as amended, are not well-founded and are dismissed.
2. The claimant was not unfairly dismissed and his claim for unfair dismissal brought under section 94 of the Employment Rights Act 1996 is not well-founded and is dismissed.
3. The claimant was found not to be disabled with a mental impairment in accordance with section 6 of the Equality Act 2010 and his claim brought under section 20-21 are not well-founded and dismissed. In the alternative, had the claimant been found to be disabled with a mental impairment the respondent was not in breach of its duty to make reasonable adjustments and the claim brought under section 20-21 of the Equality Act is not well-founded and dismissed.

## REASONS

### Preamble

1. By a claim form received on 4 December 2018 following ACAS Early Conciliation between 15 October to 7 November 2018 the claimant claims he made a protected disclosure at a disciplinary hearing held on the 2 July 2018 that resulted in his dismissal, and the decision to continue to subject him to the disciplinary hearings held on 5 and 12 July 2018 and rejection of his appeal on 13 September 2018 were detriments. The claimant brings a complaint of detriment under section 43B of the Employment Rights Act 1996 as amended (“the ERA”) and automatic unfair dismissal under section 103A. He also brings a claim of ordinary unfair dismissal arising out of his summary dismissal under sections 94 and 98 of the ERA and unlawful disability discrimination under section 20-21 of the Equality Act 2010 (“EqA”).

### Evidence

2. The Tribunal heard evidence from the claimant on his own behalf, and from Les Skarratts, Fire Brigades Union official, on behalf of the claimant. On behalf of the respondent the Tribunal heard from Gary Oakford, investigating officer, Nicholas Mernock, dismissing officer, Philomena Dwyer, professional standards, Ian Woolridge, watch manager, and Nick Searle, the deputy chief fire officer and appeal officer. The conflicts in the evidence have been resolved as set out below, the Tribunal having found on the balance of probabilities that the claimant did not give entirely credible evidence, for the reasons stated.

3. Mr Weiss confirmed to the Tribunal that AB’s allegations of inappropriate conduct raised against claimant were not causally connected to the alleged protected disclosure(s) in direct contrast to the claimant’s oral evidence that she conspired against him because he had raised the protected disclosures, and the illogical position adopted by the claimant raised further issues of credibility given there was no connection whatsoever between the matters on which the claimant allegedly ‘blew the whistle’ and AB’s serious complaint raised against the claimant. There existed no evidence AB conspired with anybody within the respondent to get the claimant into so much trouble dismissal was sure to follow.

### Preliminary issues

4. Oral judgement with reasons was given in respect of two preliminary matters following a closed preliminary hearing, including an anonymity order referring to a person as “AB” throughout these proceedings which will have effect indefinitely, and leave for the claimant to amend his claims. The orders accompanied by reasons have been promulgated separately.

5. Turning to the leave granted to the claimant to amend his claims following an application dated 9 December 2019 the claimant sought to amend his particulars of claim and include two further protected disclosures made on the claimant’s behalf by the FBU. In the original Particulars the claimant alleged the disclosure was made at

his disciplinary hearing and this was the reason or principal reason for his dismissal, the decision to continue to subject him to disciplinary hearings on the 5 & 12 July and rejection of his appeal on 13 September 2018 were detriments that led to his dismissal.

6. Leave was granted for the Amended Grounds to include an alleged protected disclosure made by Kevin Hughes (trade union representative) to Philomena Dwyer on 21 February 2018, pleaded in paragraph 54(1)(vi) and at 54(1) and 1(vii) a third alleged protected disclosure was allegedly made on 1 June 2018 and repeated on 2 June 2018. The protected disclosures referred to the claimant's allegation that his watch manager, Ian Woolridge, had amended a note produced on the 29 September 2017 and emailed to the claimant on the 30 September 2017.

7. It is notable the claimant cannot say when he first received a copy of the email from Kevin Hughes to Philomena Dwyer, in which there is a reference to the note and a call that had taken place between the two concerning it. The claimant relies on a further disclosure made by his union representative, Les Skarratts, in a letter dated 1 June 2018 addressed to Paul Mernock and at a disciplinary hearing on the 2 July 2018. The effect of the amendments will be to expand the dates in which the protected disclosures were allegedly made from 2 July 2018 to 21 February 2018 and the number of alleged detriments that followed.

8. The detriments alleged are the claimant's suspension, the "continued decision" to subject the claimant to disciplinary proceedings and the "lack of empathy and help" with regards to the claimant's alleged disability. Mr Weiss clarified that in respect of the allegations relating to lack of empathy and help, these were essentially a duplication of the failure to make reasonable adjustments already pleaded.

#### Agreed issues

9. The agreed List of Issues to be decided by the Tribunal were discussed and are agreed as follows:

#### Disability

1. Whether the Claimant was a disabled person by reason of the mental impairment of depression?
2. If so, from what point in time was the Claimant a disabled person?
3. If the Claimant was a disabled person, did the Respondent have knowledge, actual or constructive, of the Claimant's disability?
4. Did the Respondent apply the following PCP to the Claimant: a requirement to attend investigation and disciplinary hearings on the Respondent's premises?
5. Did this place the Claimant at a substantial disadvantage in comparison to non-disabled persons?
6. Did the Respondent have knowledge of the substantial disadvantage?

7. Did the Respondent breach any duty to make adjustments by not making the following adjustment(s): conducting the meetings away from the Respondent's premises at a neutral location and/or at premises where the Claimant was unlikely to encounter colleagues.
8. Did the Respondent apply the following PCP to the Claimant: suspending the Claimant from work on 26 February 2018 whilst failing to keep in regular contact with the Claimant during his suspension.
9. Did this place the Claimant at a substantial disadvantage in comparison to non-disabled persons?
10. Did the Respondent have knowledge of the substantial disadvantage?
11. Did the Respondent breach any duty to make adjustments by not making the following adjustment(s): keeping in regular touch with the Claimant via email, calls and/or assigning to the Claimant an individual within the Respondent organisation with whom he would keep in touch during his absence.
12. Did the Respondent apply to the Claimant the following PCP: playing the covert recording of a conversation between the Claimant and AB at hearings, starting with the investigation meeting on 14 May 2018 onwards.
13. Did this place the Claimant at a substantial disadvantage in comparison to non-disabled persons?
14. Did the Respondent have knowledge of the substantial disadvantage?
15. Did the Respondent breach any duty to make adjustments by not making the following adjustment(s): stop playing the recording; produce a transcript of the recording in lieu of playing it; providing the opportunity to take a break.

Whistleblowing detriment and dismissal

16. Did the Claimant make a disclosure(s) of information by way of:
  - a. On or around 19 February 2018, his Union Representative Kevin Hughes disclosing to Philomena Dwyer of the Respondent's Professional Standards, that WM Ian Woolridge had amended the Claimant's Note for File?
  - b. In a letter dated 1 June 2018 addressed to Nicholas Mernock, his Union Representative Les Skarratts disclosing that WM Ian Woolridge had amended the Claimant's Note for File?
  - c. In a disciplinary hearing on 2 July 2018 chaired by Nicholas Mernock, his Union Representative Les Skarratts disclosing that WM Ian Woolridge had amended the Claimant's Note for File?

17. Did the disclosure of information did tend to show, in the reasonable belief of the Claimant, that there had been:
- a. A breach of a legal obligation; and/or
  - b. A miscarriage of justice; and/or
  - c. That information tending to show any matter falling within any of the above, had been or was likely to be deliberately concealed.
18. Did the Claimant have a reasonable belief that the disclosure was in the public interest.
19. Did the Respondent subject the Claimant to any of the following detriments on the ground that he had made any such protected disclosure:
- a. Suspending him from work on or around 26 February 2018.
  - b. Thereafter, subjecting him to a disciplinary investigation concerning allegations raised by AB.
  - c. Thereafter, continuing to subject the Claimant to disciplinary proceedings including rejecting his appeal by letter dated 13 September 2018.
  - d. Subjecting the Claimant to an unfair process in respect of the disciplinary proceedings.
  - e. Conducting the disciplinary proceedings with a lack of empathy towards the Claimant's health by:
    - (i) Not providing the Claimant with a neutral venue for hearings/not holding hearings at a location at which he was unlikely to encounter colleagues.
    - (ii) Playing the covert recording at disciplinary hearings.
    - (iii) Not keeping in regular touch with the Claimant via email, calls and/or assigning to the Claimant an individual within the Respondent organisation with whom he would keep in touch during his suspension.
20. Are the allegations of detriment within time?
21. If not, were they brought within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months beginning with the date of the act or failure to act, or, where that act or failure to act is part of a series of acts, the last of them.

22. Was the reason, or principal reason for the Claimant's dismissal, any such protected disclosure(s)?

Ordinary unfair dismissal

23. What was the reason for the Claimant's dismissal?

24. If the reason for the dismissal was conduct, did the Respondent:

- a. Have a belief in the Claimant's misconduct?
- b. Have reasonable grounds upon which to sustain that belief?
- c. Carry out as much investigation into the matter as was reasonable in all the circumstances of the case.

25. Was dismissal within the range of reasonable responses?

26. Was the dismissal procedurally fair?

27. Was the dismissal in all the circumstances fair pursuant to section 98(4)?

Remedy issues (subject to liability)

28. Whether the Claimant's employment might or would have ceased anyway and/or that the Claimant might or would have been fairly dismissed anyway.

29. Whether the Claimant contributed to his own dismissal.

30. Whether the Claimant unreasonably failed to comply with the ACAS Code of Practice.

31. Whether the Respondent unreasonably failed to comply with the ACAS Code of Practice.

14 The Tribunal was referred to an agreed bundle of documents that consisted of four lever arch files, a witness statement file, and a non-agreed bundle produced by the claimant, various other documents duly marked produced during the hearing, witness statements, and lengthy skeleton arguments and closing submissions of the parties, which the Tribunal does not intend to repeat and has attempted to incorporate into this Judgment with Reasons.

The Facts

15 The Claimant was employed by the respondent as a firefighter from 7 April 1997, a period of some twenty-years, until his employment was terminated on the ground of gross misconduct on 13 September 2018. Breathing Apparatus was key to the claimant's safety and that of his colleagues, he was an experienced firefighter fully, received regular training and was fully aware and capable of carrying out the

necessary tests as required by the respondent in respect of breathing apparatus, referred to as AB in the papers and these reasons. In submissions Mr Weiss referred to the claimant's "confusion" as regards the BA test evidenced by the fact that he had been to see WM Pollack after the disciplinary investigation had commenced against him. Given the fact the claimant had 21-years' experience, and had not consulted with WM Pollock prior to the commencement of the disciplinary process, it was not unreasonable for the respondent to take the view that following regular training and carrying out the tests, there was no genuine confusion on the claimant's part and so the Tribunal found.

16 From 29 January 2016 the claimant moved from being "wholetime firefighter" to the role of retained firefighter which meant he worked a four-day on and four-day off shift, residing in accommodation providing by the respondent during the shift or alternatively, within a maximum radius of the fire station in order to mobilise and board the fire engine appliance within the set response time via the use of pagers.

National Joint Council (NJC) for Local Authority Fire & Rescue Services Scheme of Conditions of Service – Sixth Edition

17 One of the unions recognised by the respondent is the Fire Brigades Union ("FBU") who had entered into many collective agreements including the National Joint Council (NJC) for Local Authority Fire & Rescue Services Scheme of Conditions of Service – Sixth Edition, that had contractual effect. The following are relevant clauses:

17.1 Section 2 if employees have "clear responsibilities in supporting fairness and dignity at work...in providing a working environment free from bullying, harassment and victimisation."

17.2 Part B sets out the general principles relating to supporting employees who have medical conditions.

17.3 Section 6 sets out the grievance and disciplinary policy which provides for an informal stage described as "an informal discussion with the line manager. The separate formal stages of initiating action, investigation, hearing and decision are not relevant at this stage. The initial approach means that minor problems will be dealt with quickly and confidentially. The line manager will speak to the employee about their conduct...any may put this in writing although it will not form part of the disciplinary record." A manager at watch manager level and above may initiate the disciplinary process leading to the first, second or third formal stage and gross misconduct described as acts "resulting in a serious breach of contractual terms and thus potentially liable for summary dismissal."

17.4 Examples of gross misconduct include "physical violence or bullying...unlawful discrimination or harassment...a serious breach of health and safety rules and time limits for various stages "can be varied by agreement."

17.5 Clause 1.7 provides "the timing and location of the hearing should where practicable be agreed with the employee and/or their representative. The length of time between the written notification and the hearing varies increasing to twenty-one days for the third stage.

17.6 Clause 3.5 provides that an employee can be suspended on full pay pending investigation.

#### Bullying and Harassment Policy

18 The respondent issued a Bullying and Harassment Policy reviewed on 1 April 2012 that set out a number of core values including not using offensive language. Harassment was defined as “unwanted conduct relating to one of the defined protected characteristic which had the purpose and effect of violating a person’s dignity or creating an offensive, degrading, humiliating, intimidating or hostile environment for him and her. Examples of unacceptable behaviour were listed including “unnecessary and unwanted physical contact ranging from touching to serious assault...unwelcome advances, attention...many of the examples listed may be categorised in other ways such as general misconduct or inappropriate behaviour and may not always be viewed as bullying and harassment by the parties involved as this is often about perceptions that differ from one person to another.”

19 Under this Policy it was provided “management may also initiate a disciplinary investigation under the terms of this policy where they have reasonable grounds to suspect that bullying and harassment has or is occurring...Where an issue was raised that could have disciplinary implications then the dismissal...will be decided by the Assistant Chief Fire Officer who is the Service’s Distillery Officer.” In submissions Mr Weiss asserted the respondent had “by-passed” its own bullying and Harassment Policy by investigating AB’s allegation in breach of the Policy as a disciplinary and not grievance matters in the first instance, and this amounted to an unfairness in the process. The Tribunal did not agree; the respondent was not in breach of contract when it initiated an investigation into AB’s allegations and disciplinary action resulted when it became apparent the claimant had a case to answer.

#### The medical evidence regarding the claimant’s alleged disability

20 With reference to the relevant medical evidence, the Tribunal has used Mr Kenward’s written chronology and included a number of observations made by Mr Weiss, in addition to re-reading the original records and the claimant’s witness statement that deals with impact. Based on the evidence before it the Tribunal made a number of findings.

#### 1992

21 The 10.9.92 entry in the GP records contain an entry in respect of Claimant’s past medical history noting “*Depressed.*” And no further information was set out.

22 The 11.09.92 entry in the GP records in respect of Claimant’s past medical history record “*Emotional problem*” and “*Refer to Counsellor*”.

23 The 18.09.92 entry in the GP recorded “*Emotional problem.*”

24 Mr Kenward submitted that in contrast to the claimant’s evidence that he continued to suffer from low mood and anxiety there is nothing of relevance in the medical records for ten years. The Tribunal agreed on the evidence before it, concluding the claimant was exaggerating his evidence as he had later in respect of



time taken off work, with a view to bolstering his claim that he had an ongoing disability and/or was susceptible to depression. Following the short medical history in 1992 five years passed and during this period the claimant had not suffered from depression or any other mental health condition. There were no GP entries until August 2002.

### 1997

25 By April 1997, when the claimant commenced his employment with the respondent, the claimant was fit to work as a firefighter and there was nothing to put the respondent on notice that the claimant may be prone to depression.

### 2002

26 The 02.08.02 entry in the GP record recorded "*Emotional problem*". The Claimant was prescribed Fluoxetine Hydrochloride capsules. This is the first reference to anti-depressant medication and the claimant confirmed in oral evidence his Mother was unwell during this period and this understandably had an effect on him.

27 The 12.08.02 entry is the first reference in GP records to "*Stress related problem*" and the Claimant was noted to be "*improving*".

28 The 14.08.02 entry in the GP records stated "*Stress related problem feels tired and pacified suddenly at night but anxious during the day. Wonder if this will pass – On SSRI...sees counsellor tomorrow*". There is a reference to the Claimant seeing "*Counsellor tomorrow*". Mr Kenward questioned whether the claimant saw a counsellor or not, and Tribunal took the view that on the balance of probabilities, he had. The claimant gave clear evidence that he had undertaken counselling organised by the respondent through the Employee Assistance Programme and it had been helpful to him.

29 The 30.08.02 entry in GP records state "*Stress related problem*" and the Claimant was "*better on Fluoxetine*." The Tribunal concludes on balance the claimant had taken Fluoxetine in the month of August 2002.

30 In 2002 the claimant had no stress/depression related time off work. The records show that the last prescription of Fluoxetine was the 2 August 2002, there are no further references in the medical records to any medication being taken by the claimant and the Tribunal finds the claimant was not taking any medication for depression in contrast to Mr Weiss' submission that throughout 2002 to 2003 the claimant's symptoms of depression were severe enough to warrant treatment with fluoxetine.

### The 2003 absence

31 On the 22.07.03 the GP records state "*Stress related problem (New)...Mother under investigation*" {the Tribunal's emphasis}. The claimant's Mother was being investigated for cancer and the Claimant was prescribed Fluoxetine Hydrochloride. A MED3 was issued, the claimant was signed off work until 04.08.03 and Fluoxetine was prescribed.

32 The claimant took 4-days off work in total between 22 to 29 July 2003 suffering from stress according to the respondent's sickness record, and it is possible the claimant was not on shift for the remaining days covered by the sick note. The claimant worked a four-day on and four days off shift, and the Tribunal was satisfied on the balance of probabilities, that the claimant had been absent from work due to sickness 4-days in direct contrast the claimant's evidence and pleaded case,

33 In the claim form at paragraph 4(1) the claimant pleaded he took a few months off in or around 2003 when his Mother was diagnosed with cancer, which was not supported by the contemporaneous evidence that the claimant took 4-days off, and the Tribunal concluded he had exaggerated his evidence to support the proposition that his depression was such that cumulatively it fell under section 6 of the EqA. His pleading further clarified the claimant "took the news of his Mother's illness badly which resulted in him taking a few months off work to allow him to manage his depression..." The medical evidence does not reflect the claimant's case; at its highest the claimant had been signed off work for 2-weeks and absent from work due to sickness 4-days within that period.

#### Respondent's knowledge

34 The 06.11.03 Health Screening report records that the Claimant was passed fit for full duties. On cross-examination the claimant disputed he had been asked any questions about his health other than the physical test. Nick Mernock gave oral evidence that health screening was a physical but at the end involved question being asked about medication and when the firefighter last saw a doctor. Given the claimant's incorrect recollection of the time he had off work in 2003, it is doubtful he could recall what questions he had been asked in that year. The Tribunal concluded on the balance of probabilities that given the lack of contemporaneous documentation on this point, it is more likely than not the claimant did not raise his mental health issue and the fact he had been prescribed Fluoxetine on 22 July 2003, with the result that at this point the respondent did not possess any knowledge and nor could it have reasonably have known the claimant was suffering from a mental health condition.

35 There is no evidence of a repeat prescription of Fluoxetine since 22 July 2003. The claimant's oral evidence was that he continued to be prescribed and take anti-depressant medication during this period. The GP records do not support the claimant's case; the records are silent for a period of approximately 3-years when the Tribunal would expect the GP records to reflect (a) the medication prescribed and (b) medical reviews for the claimant with specific reference to the medication.

36 The medical records are silent until the 22 October 2006, a period of just under 3-years when the claimant experienced no mental health issues that required medical intervention. The Tribunal accepts that the claimant would have felt concern over the health of his Mother, and it has sympathy for the claimant in this regard.

#### 2006

37 The claimant's Mother died of cancer on 13 October 2006 and understandably he was very upset and grieving for her.

38 On the 22 October 2006 the claimant notified the respondent that he is off sick “estimated 2-nights for the reason of stress – grieving.” There was no reference to depression until the GP’s certificate.

39 The claimant attended his GP on 30 October 2006 and obtained a back-dated note confirming he was unable to attend work on the 22 and 23 October 2006. The note gave the reason for absence “*stress – grieving*.” The sickness history report records a two-day absence from 22.10.06 due to stress and the sick note issued by his GP recorded the claimant was suffering from depression/bereavement.” Due to the claimant’s shift pattern it is not clear when the claimant returned to work.

40 In the claim form the claimant pleaded the death of his Mother “exacerbated his depression. The claimant continued to be under the supervision of his GP and was prescribed medication”. The GP records do not show the “continued to be under the supervision of his GP” and there is no record of any anti-depressant medication being prescribed. From this point the next GP attendance was in 2007 and the Tribunal concludes, preferring to rely on the contemporaneous GP records rather than the claimant’s less than credible recollection, that he did not visit his GP and no medication was prescribed for a period of approximately 10 months.

#### 2007

41 In or around August 2007 the claimant underwent a self-assessment interview with a manager which he was upset over. The claimant was absent from work 31 August 2007 to 31 October 2007. The 31.08.07 entry in the respondent’s Sickness History Report recorded sickness absence due to stress resulting in 17 working days absence.

42 The 04.09.07 entry in GP records “*stress related problem (New)*” and “*first day off sick Fri 31/8/07: wants to stay off to 7/10/07. Sleeping well; appetite ok; wt loss; tearful last Friday*” [the Tribunal’s emphasis]. The GP did not record depression, and given the record that this was a “new problem” the inference to be drawn was that the claimant was managing between late 2006 until after the self-assessment interview in August 2007, a period of approximately 9-10 months with no evidence of any medication being prescribed and no visits to the GP. The 06.09.07 referral for medical opinion made by the respondent records that the Claimant had been “*upset over S/A interview*”.

43 The 06.09.07 occupational health confidential clinical notes record attendance and referenced the Claimant being upset over sickness absence interview on the basis that he had been “*put on stage one because of two days he had off following mother’s death*”. This had “*brought all the horrible details of her death back to him*”. The Claimant had seen his GP “*who had suggested some time off work and counselling*.”

44 On the 7 September 2007 the claimant was issued with a MED3 for 4-weeks citing “Stress-related problem.” There was no reference to depression.

45 The 02.10.07 review appointment recorded in the occupational health clinical notes confirm the Claimant was “much better” and feels “*he has come to terms with what has happened*.” A return to work on the 7 October 2007 was agreed, the last

day of sickness recorded in sickness history was the 2 October 2007 and the claimant had been absent 17-days in total.

46 The 07.10.07 absence monitoring informal interview recorded that as *“a result of structured counselling during this period of absence he has fully recovered,”* and there is no reason for the Tribunal to look behind the medical evidence that the claimant had indeed *“fully recovered.”* An 08.11.07 exemption request made under the respondent’s Absence and Attendance Policy records that Claimant *“has availed himself of counselling offered through the Service and has stated on his AM2 that as a result of this he feels he has resolved the underlying causes of the stress which precipitated his absence”*.

#### Late 2007-early 2013

47 From late 2007 through to early 2013, there were no issues with the claimant’s health, a period of 6 years, underlining that he had indeed resolved the underlying causes of stress as predicted.

#### 2013

##### Joint Secretaries Process Agreement

48 Breathing apparatus referred to as “BA” by firefighters enable them to work in dangerous smoke-filled or other hazardous environments where assisted breathing is required. The equipment is key to safety not only of the firefighter but also is work colleagues who may have to rescue him or her if equipment is defective. When on duty a firefighter at the outset is allocated BA equipment and it is his or her duty to carry out the essential health and safety checks, which are then logged. Firefighters are regularly trained and re-trained to undertake the necessary health and safety checks and the claimant raised no issue with his ability to test and nor did he indicate aspects of the testing confused him until the incident which gave rise, in part, to these proceedings.

49 In February 2013 two ‘Joint Secretaries’ agreements was entered into, Nicholas Mernock and Les Skerrett’s were signatories to one of the agreements dated 12 February 2013. The agreement arose as a result of an audit identifying non-compliance by firefighters, a “significant number of cases” who failed to carry out BA testing. The number of employees facing disciplinary/dismissal as a result varied throughout this hearing, and the Tribunal concluded more than one hundred firefighters were affected, not including the claimant. Firefighters who carried out part-tests did not get a warning as an agreement was reached that their omission would be dealt with as training.

50 The relevance of the Joint Secretaries Agreement to this case, was that it underlined *“the gravity of the situation...in no way does this set a precedent and any subsequent omission would be dealt with as a serious health and safety breach with adherence to the association disciplinary procedures and sanctions.”* The Tribunal was satisfied the claimant would have understood the seriousness of not carrying out BA testing in whole or in part, and until he faced disciplinary investigation for failing to carry out the whole test, raised no issue with his inability and/or confusion as to the BA tests which he had previously regularly carried out.

51 In oral and written evidence Les Skarretts' gave disputed evidence that in addition to the Joint Secretaries Agreement an oral agreement had been reached whereby no firefighter would be dismissed for failing to comply with BA testing. This evidence was disputed by Nicholas Mernock who maintained it was a one-off agreement and the agreement was "constructed specific to these circumstances only" and so the Tribunal found on the contemporaneous evidence before it. The Joint Secretaries dated 12 February 2013 was clear in its effect, and it did not include any agreement that no firefighter would be dismissed, on the contrary, it made it clear that firefighters would face disciplinary investigation, and it was understood dismissal could result in the future the effect of the agreement having been to avoid dismissal in 2013 given the number of firefighters involved. In short, the Tribunal preferred Nicholas Mernock's evidence on the balance of probabilities supported by contemporaneous evidence, and it concluded the claimant and the FBU were aware of the fact that failure to carry out BA testing in whole or in part was a serious health and safety breach that would result in disciplinary proceedings and could result in dismissal.

52 The 06.03.13: Occupational health clinical notes record the claimant was referred by management due to "*worrying uncharacteristic behaviour*" and a concern that Claimant "*has home stress*". "The occupational health note reflects "John is *at a loss as to why I was asked to see him*" and complained of bullying and harassment by his manager over a two-year period. Mr Kenward recorded that the OH records record that the Claimant would be seen again "*if needed*."

53 The claimant's brother committed suicide in May 2013. On the 28 May the claimant went off sick until 26 July 2013 identified as "other psychological bereavement."

54 The 28.05.13 entry in GP records following the claimant's brother's suicide recorded the claimant was "feeling low, has had previous depression, having morbid thoughts...unable to go into work." This resulted in an appointment on the following day. The claimant attended at his GP's practice. The 29.05.13 entry in GP records in respect of bereavement with Claimant "finding hard to consider going to work as fire fighter as often sees suicide cases...not as bad as previous episode. Using alcohol as a coping mechanism". It was noted that "previous depression – Fluoxetine helped, requesting to try again can receive counselling through work." Fluoxetine was prescribed for 28 days; the Claimant was signed off work for 2 weeks. The respondent's sickness absence records record an absence of 32 working days from 28.05.13 to 26.07.13 with the reason given as "Other Pyschol bereavement". The doctors certificate stated; "bereavement low mood" and there was no reference to depression.

55 The 05.06.13: GP records record the claimant having completed a Patient Health Questionnaire with a score of 13/27. The 10.06.13 GP records note in respect of "bereavement" the Claimant was "slowly improving.". By the 12.06.13 under the heading "Bereavement" the GP notes record the claimant was "feeling a little better, having some tough days when remembers brother's face and nightmares but mainly better days". On examination, speech normal and looks brighter. Patient health questionnaire score 11/27. Fluoxetine was prescribed.

56 The 24.06.13 Occupational health clinical notes recorded it was a "new referral." The handwritten notes are difficult to decipher and appears to note

“depression in past – number of years ago...Reason for absence given as bereavement. Medication recorded as Fluoxetine for “28 days now”. It recorded that the Claimant was complaining of poor sleep, poor appetite and concentration and panic attacks. Details of the employee assistance programme (“EAP”) were given.

24 June 2013 occupational health report

57 An Occupational health report dated 24.06.13 was provided to Respondent in respect of the claimant’s long-term sickness review. The report recorded the diagnosis on the GP certificate as bereavement / low mood, and confirmed that the death of the claimant’s brother had had a “significant psychological impact on him. He is unfit for all work.”

58 The claimant was examined by his GP on 01.07.13. The notes record “Bereavement...feeling much better but still not sleeping well...not ready to return in case has to witness a suicide attempt in his job...seems much better...MED3 issued 1-month bereavement.”

59 The 22.07.13 Occupational health clinical notes recorded the claimant was “feeling a little better”. He was “trying to maintain a routine re day to day activities starts laughing a bit more” and playing golf. He had decided not to contact the EAP and was fit for a return to work on other duties from 29.07.13.

60 The 22.07.13 Occupational health report to Respondent records sickness notification reason for absence as “Bereavement (brother)”. The 22.07.13 Form in respect of Other Duties Restrictions recorded that the Claimant was capable of all of the capacities listed on the form, including communication.

61 In the 09.08.13 Occupational health report sent to the Respondent the claimant was found to be “improving day by day. Good and bad days. Playing golf. Sleep not good at times.” The claimant was certified fit for full operational duties and he returned to work. The 01.09.13 Return to work interview form recorded the cause for the claimant’s absence as stress following bereavement.

Stage 2 formal interview under the Absence and Attendance Policy 9 September 2013.

62 The record of the 09.09.13 Stage 2 formal interview under the Respondent’s Absence and Attendance Policy confirmed that “John told me that the days off related to his brother passing away.” The outcome letter following the claimant’s interview under the respondent’s Absence and Attendance Policy hearing confirmed discretion was exercised not to issue the Claimant with a warning under the policy with the reason being that a “bereavement within the family and the effect that this has had on you and then you helping the rest of your immediate family coping with the loss of your brother.”

63 The claimant returned to work and unfortunately there was an incident with a suicide in the city centre of Liverpool which upset the claimant who was reminded of his brother, and he requested a transfer to the outskirts of the city where there would be less of a chance of him having to deal with a similar incident. There was no reference to any depression, past or present, and the Tribunal concluded that there

was no evidence the claimant's mental health had an adverse and long-term impact on his normal day-to-day activities.

2014: the claimant's transfer

64 On the 07.01.14 the claimant submitted a transfer request form "to limit the chance of having to deal with an incident of an attempted suicide" as "I lost my brother earlier in the year who did take his own life". It stated that he had recently been called to such an incident and "I have to say it affected me. As station manager Elliot had warned me it might".

65 In a 08.01.14 e-mail sent from David Elliot, the station manager, to Occupational Health which attached the transfer request form confirming the claimant "stated to me yesterday during a recent incident he had a mild panic attack and said he wasn't 100% during the incident and had a difficult Christmas period."

Occupational health report 23 January 2014

66 Occupational health reported to Respondent on 23.01.14 certifying that the Claimant was fit for full operational duties, had "recently requested a Station move because of a recent bereavement...I feel John will benefit from this move and have advised him to contact OH if he is having any problems." The claimant was found to be fit for "full operational duties." There was no reference to any mental health issues and the claimant did not contact occupational health until he was referred by the respondent 3-months later after the claimant had attended two incidents which upset him.

67 The claimant was transferred, and worked from a number of different stations the last being Newton-Le Willows, and on 23 April 2014 was referred to occupational health following attending an attempted suicide and a suspicious river death which upset him and according to the 22.04.14 e-mail from Watch Manager Ian Pollock to OH the incidents "had some effect on John and I would be grateful if you could arrange an appointment for him to see if there is any assistance we can provide for him."

68 The claimant was examined and the 08.05.2014: occupational health clinical notes recorded the Claimant "is still having some emotional issues regarding his brother's death," is "not sleeping well" and "doesn't eat very well – forgets at times and has noticed change in bowel habits". The Claimant was advised to see his GP for advice and referred for counselling. The claimant did not follow up on this advice, he gave evidence that his bowel movements had improved and there was no need.

69 The OH note records "He is still taking the Fluoxetine he says that helps." There is no evidence OH had the claimant's medical/GP records, and on balance the Tribunal found it is unlikely occupational health had accessed the GP records which confirmed the claimant the last occasion the claimant saw his GP was 1 July 2013, 10 months ago. When he attended his GP in October 2014 the entries had been redacted as not relevant to this case. The claimant indicated his bowel condition had cleared up. The contemporaneous evidence before the Tribunal was Fluoxetine was last prescribed in June 2013 for a short period of time. There was no supporting medical evidence that the claimant was prescribed and had been taking anti-depressant medication for a lengthy period of time according to the claimant. The

Tribunal is unable to accept the claimant's recollection, his evidence was unreliable and he has a tendency to exaggerate. The Tribunal spent a great deal of time looking at this issue, closely studying the medical records and other contemporaneous documents which points to the claimant understandably being upset over his brother's death and not informing the respondent managers, he was or had taken anti-depressant medication, and there was no reference to this in the occupational health reports as opposed to the occupational health clinical notes which were not before the respondent.

#### 8 May 2014 occupational health report

70 The 08.05.14: Occupational Health report certified the Claimant fit for full operational duties noting that "he is still experiencing some emotional difficulties and isn't sleeping very well causing him to feel tired at times...I have referred him to Jo Forde for CBT.". There was no reference to the claimant taking Fluoxetine, and had he been taking medication it is more likely than not it would have been mentioned. The CBT referral was not taken up, and the claimant gave evidence that he did not like CBT having attended "a few sessions."

71 The 09.06.14 Occupational health report to Respondent in relation to health screening confirmed the claimant had "no health issues" and the Tribunal took the view that had the claimant been taking prescribed medication reference would have been made in the medical report, which was silent on this point, the Tribunal concluded the claimant was not taking the medication, contrary to his oral evidence.

72 From June 2014 onwards, there are no occupational health entries or GP entries, the claimant having managed to deal with his brother's death although understandably he found it difficult at times. On the balance of probabilities, the Tribunal found, taking into account all of the evidence before it, there was a period of over three years when the claimant had no issues with his mental health and no satisfactory evidence the claimant's mental health had a long-term and adverse effect on his ability to carry out normal day-to-day activities. Over three years past without any medical problems relating to mental health and the claimant carried out his duties as a firefighter without any difficulties, undertaking the necessary BA tests.

#### 2017

##### The informal discipline and note: 29 September 2017

73 On the 29 September 2017 Ian Wooldridge, watch manager, criticised the claimant for wearing a T-shirt on audit day and not wearing a more formal shirt as required under the rules. The claimant's reaction was confrontation and he was called into the office, an order which the claimant reluctantly obeyed. In the office Ian Wooldridge raised the issue of the claimant leaving work early on the 23/24 September 2017 and on 23 September 2017 he had failed to write his name of the breathing apparatus tally and the last name written on it was another firefighter, in breach of the respondent's policies and procedures. There was an issue as to whether the claimant had made arrangement for cover the rest of his shift with another firefighter in order that he could leave work early to drop his girlfriend and/or play golf and/or drop off daughter's girlfriend, the three reasons given by the claimant over a period of time.



74 The claimant apologised for his behaviour and Ian Wooldridge dealt with the matter on an informal basis. The position was confirmed in a note for file prepared by Ian Wooldridge dated 29 September 2017 that dealt with the T-shirt incident, absence without leave and the BA tally not having the claimant's name on it. The note recorded "this matter has been resolved informally" and the claimant had apologised for his actions. Understandably, the claimant was under the impression that all of the matters raised were closed. Ian Wooldridge reported the outcome to the respondent's standards department headed by Philomena Dwyer who line managed Liam Williamson.

75 Liam Williamson requested Ian Wooldridge forwarded the 29.9.2017 note for file to professional standards. Ian Wooldridge's power was limited to informally deal with the issues, the absence without leave and BA tally were potentially serious matters and he did not inform professional standards until much later of the fact all the issues had been dealt with informally by him. The note for file provided to the claimant by email was different to that Ian Wooldridge sent to professional standards, having delated the reference to it being dealt with informally and adding many notes marked as "NB." The claimant was unaware of the differences at the time.

76 It is notable the claimant's copy included the reference "I am satisfied we were able to settle the various issue informally" when the note for file sent to Professional Standards made no such reference. The upshot was that professional standards were unaware that Ian Wooldridge had dealt with all the allegations informally, and an investigation into the claimant's behaviour was commenced.

77 The Tribunal was concerned with the behaviour of Ian Wooldridge, who seemed unable to explain his actions and the Tribunal did not find him an entirely credible witness. It understands why the claimant was upset and annoyed with the fact that three matters had been dealt with informally and then reactivated by professional standards for investigation and discipline. Unfortunately, this muddied the waters in respect of the more serious allegations facing the claimant which had not been dealt with by Ian Wooldridge, namely, the claimant's failure to check breathing equipment on three separate occasions and his behaviour towards AB. It is irrelevant to the issues in this case whether Ian Wooldridge wanted to get the claimant into trouble or not, or hide the fact that he had acted outside his powers when dealing with the claimant on an informal basis. Philomena Dwyer took the view Ian Wooldridge had acted beyond his remit in the way he had dealt with the claimant, except for the shirt issue which would not have been pursued had she known it had been informally resolved, which she did not until much later as Ian Wooldridge had kept this fact hidden from professional standards. The other two issues she believed were too serious for Ian Wooldridge to deal with informally given the health and safety implications to the claimant and his firefighter colleagues. It is notable that ultimately all of the matters dealt with by Ian Wooldridge on an informal basis were discounted at the disciplinary hearing, however the claimant had to undergo the stress of them being investigated.

78 The claimant's evidence before this Tribunal was that disciplinary investigation and his interviews exacerbated his depression. The Tribunal accepts the claimant was annoyed and concerned, however, there was no satisfactory evidence of any exacerbation of a pre-existing mental health condition. Disciplinary investigations are by their nature stressful and worrying for employees, and it is

understandable the claimant was worried especially when the more serious allegations involving three failures to check BA and the AB allegations (which included a covert recording) that had not previously been dealt with were investigated.

#### The investigation

79 Philomena Dwyer wrote to the claimant on 13 October 2017 inviting him to a disciplinary investigation into “a serious breach of health and safety rules in that you failed to test your respiratory protections – breathing apparatus set on more than one occasion...failed to comply with service instruction 223 breathing apparatus/standard test and service organisation...on Saturday 23 September 2017 you were absent without leave...failed to comply with service instruction 0202 standards of dress and your actions of behaviours was not those expected of an employee of Merseyside Fire and Rescue authority and are no in accordance with the service aims and values and could directly impact on your role and responsibilities in the service.” The claimant was upset and angry when he read the letter, and his stress levels went up, as they would for any employee facing such allegations.

80 The respondent also incorrectly issued a letter dated 18 October 2017 from HR to the claimant regarding his poor attendance record, which the claimant provided an explanation for and that was the end of the matter.

#### First investigation meeting 2 November 2017: Newton-Le-Willows Fire Station

81 The first investigation meeting took place in Newton-Le-Willows Fire Station without any complaint being raised by the claimant concerning venue.

82 Gary Oakford was the investigating officer and the claimant was accompanied by Kevin Hughes, his union representative. Kevin Hughes stated the “points on the standards of dress and the AWOL had been resolved locally.” The record of the meeting confirmed he made reference to a note for case provided to the claimant by Ian Wooldridge, asking Gary Oakford if he had a copy. Gary Oakford said he had the notes for file and would interview Ian Wooldridge. Both were talking at cross-purpose as neither were aware the notes of case provided to the claimant and professional standards were different in content. However, it was made clear by Kevin Hughes on the 2 November 2017 that the Ian Wooldridge had resolved the issues informally; what was not clear was the extent of the issues resolved.

83 In his written statement the claimant confirmed this was the first time he was made aware of the three days when he had not completed the tally or the BA checks and the analytical evidence of this. The claimant was provided with a copy of the analytics at the investigation and the notes of meeting recorded, “GO confirmed the requirement of the full tests and what it looks like...then noted the difference with the part test on the three dates in question.” The notes record the claimant’s response “I can’t say why it’s not correct but accepted the evidence been presented and **understand the severity of the allegation** [the Tribunal’s emphasis]. I recognised I hadn’t done it in line with the service instruction and that he hasn’t done it right and apologised for that. I was confused with the process sometimes and had asked Ian Pollock to go over it with him.” The claimant was asked whether he had any barriers to learning as a reasonable adjustment may be necessary if he had difficulties carrying out the BA test; he took umbrage at the suggestion, and meeting notes

record his response that “he was perturbed by the question. He had been a firefighter for over twenty years and would have realised by now if he had any learning difficulties.”

84 Gary Oakford interviewed Ian Wooldridge on 17 November 2017 and no further steps were taken until the second interview of the claimant on 19 January 2018, a delay of two-months. Mr Weiss criticised the respondent for the time it took to investigate the alleged allegations, and the Tribunal concluded that there was a delay and this was down to the professional standards department who arranged the interviews and failed to prioritise the investigation, despite the fact the investigation was hanging over the claimant who continued to attend work without experiencing any difficulties. The claimant had returned to work as “normal” after the investigation meeting confident the investigation would go no further, and the delay would have reinforced this view. Mr Weiss submitted the delay resulted in an unfairness, the Tribunal did not agree as events were overtaken by the serious allegations raised by AB.

### 2018

85 A second investigation meeting took place with Gary Oakford. The claimant was accompanied by Mr Hughes on 19 January 2018, which was largely concerned with the AWOL allegation which had most definitely been informally dealt with by Ian Wooldridge earlier, and it appears that nobody investigated whether this allegation had been resolved as confirmed by Kevin Hughes at the 2 November 2017 investigation meeting that had taken place two months previously, which the Tribunal found was inexcusable on the part of the respondent particularly Gary Oakford and Philomena Dwyer. Philomena Dwyer may have been satisfied that it made no difference whether a local resolution had been reached or not given the seriousness of the BA and AWOL allegations, nevertheless, the possibility that it had should have been investigated and it was not.

### Disciplinary invite letter 6 February 2018

86 The claimant received a letter dated 6 February 2018 from L Liam Williamson, professional standards, alleging the following; “A serious breach of health and safety rules in that you failed to test your respiratory protection – Breathing Apparatus (BA) set on more than one occasion, failed to comply with Service Instruction 0223 Breathing Apparatus – Standard Tests and Service Organisation.” the remaining allegations referenced the absence without leave and standards of dress. The disciplinary pack was attached that included the amended note for file sent by Ian Wooldridge to professional standards and by this date the claimant and his union representatives were aware Ian Woodridge had provided two different notes for file; one for the claimant the other for professional standards hiding the fact that three of the disciplinary matters had been informally dealt with, two of them possibly when they should not have been.

### On or around 19 February 2018 the first alleged protected disclosure was made

87 The claimant relies on an alleged disclosure made in or around 19 February 2018. The claimant alleges Kevin Hughes disclosed to Philomena Dwyer that Ian Wooldridge had amended the original note for file. Philomena Dwyer referred to as “Phil” in the email, did not recollect the discussion or the email sent 21 February

2028, but it was possible it took place as the original note for file was received by her the next morning, she compared it to the one held by professional standards and felt there was “clearly” an issue that needed looking into. The 21 February 2018 email sent to professional standards by Kevin Hughes stated; “Hi Phil, as previously discussed I will supply you with the original Notes for File...that were provided to... [the claimant] tomorrow morning (as we only have a hard copy present.)”

88 The Tribunal finds on balance a discussion took place as per the email sent on 21 February 2018 to Philomena Dwyer and a copy of the note for file provided the day after. Kevin Hughes had already brought up the note for file and informal resolution by Ian Wooldridge earlier at the first investigation meeting. There was no suggestion at this stage made by Kevin Hughes Ian Wooldridge had fraudulently produced a note for file; all that had been raised was the need to look into it the differences. There was no evidence Kevin Hughes had any public interest in mind and the Tribunal is satisfied his concern was to ensure Professional Standards took into account the fact that Ian Wooldridge had already dealt with three of the matters included within the disciplinary invite letter informally.

89 The claimant was unaware off the conversation between Kevin Hughes and Philomena Dwyer.

90 Philomena Dwyer compared the notes for file, noted the differences and took the view that the matter should be left to the disciplinary hearing. At some stage either Philomena Dwyer or Liam Williamson appraised Nicholas Mernock of the existence of the second note, which could either have been at the disciplinary hearing or before, and the Tribunal took the view that Philomena Dwyer was largely unconcerned with the fact that there were two different notes for file; in her view the allegations were proceeding to a disciplinary hearing including allegations which could potentially amount to gross misconduct that Ian Wooldridge had not dealt with informally.

91 Kevin Hughes’ email of 21 February 2018 referred to above provided a list of witnesses the union intended to call at the disciplinary hearing which totalled six, included Ian Wooldridge and it referenced “there may now be a need for a postponement whilst the witnesses are contacted and therefore I will follow [with] any written submissions necessary.” The claimant and his union representative were fully aware that they could ask for witnesses to be called and call witnesses themselves to give evidence at the disciplinary hearing.

#### 23 February 2018 allegations involving AB

92 Sara Garside, hub manager and the line manager of AB, emailed Philomena Dwyer on the 23 February 2018 a Note for Case. In that note she recorded “Apprentice [AB] has informed me this afternoon that FF Sondergaard has been intimidating her the last 3 weeks...whilst detached into Prescott he has made inappropriate comments and advances...approximately 2 weeks ago...he proceeded to lean into the vehicle and pinch her cheeks and touch her face...on 16.2.18 he came into the Prevention office, checking that she was alone. He then told her to go downstairs for a cigarette with him and then attempted to hug her and kiss her face when they returned upstairs.... the last incident occurred...22.2.18 in the pm when John was in the office telling AB about his disciplinary. He proceeded to twirl her hair around his finger and attempted to hug her whilst standing behind her...she is

frightened of him coming into the office again when she is alone...I am going to investigate this further.”

93 AB was a civilian apprentice employed by the respondent aged between 19/20 at the time of the alleged incidents. She worked in the Prevention office at Prescott. The claimant was a 50-year old male professional firefighter of twenty-year's experience. The Tribunal heard evidence to the effect that the respondent was aiming to change the culture of its organisation where predominately male firefighters had difficulties accepting female civilians wearing the same uniform in the workplace.

94 AB was interviewed on the 26 February 2018. The notes taken at the interview did not appear to contradict the note provided by Sara Garside in any way. Gary Oakford, the investigator, listened to the recording taken by AB on her phone without the claimant's knowledge. AB explained that she had been left alone and “I was worried it would be his word against mine and who would believe an apprentice above a firefighter...you don't expect to be scared in work...I started to panic because the language and touching had got worse.” A copy of AB's interview was provided to the claimant and it was made clear that she was making the following allegations against him:

#### Incident 1: first meeting between AB and the claimant

94.1 “JS said to me ‘you're not fucking going around there. What are you doing in the Fire Service. Came across as intimidating and angry”.

94.2 “JS said' Prevention is horrible you are depressed.”

94.3 JS questioned why “Sara Garside wore a white shirt and why have you got the same fucking uniform as me.”

94.4 “I shook his hand and he said his name was John”. The CCTV evidence later revealed AB had shaken the claimant's hand as this was their first meeting.”

#### Incident 2 at second meeting

94.5 “JS was staring directly at me from his appliance, he came over to the vehicle and I wound down the window as he wanted to speak to me. When he got to the vehicle, he put his head through the open window and was grabbing my cheeks. This made me feel uncomfortable.”

94.6 David Welsh had witnessed the incident.

#### Incident 3 at third meeting

94.7 AB described this as “a little bit scarier, it was too much. I was on my own in the Prevention office...heard the fob in the door, but it was JS. He asked ‘what are you doing here is anyone else in? He then checked the store room and Sara Garside's office.”

94.8 He then kneeled by my desk and touched my arm and twirled my hair.

- 94.9 He said, 'I know you are depressed and not happy, let's go for a smoke.' JS then pulled the chair away from the desk and I felt I had no choice other than to go for a smoke with him.'
- 94.10 As we walked down the corridor he was so close behind me twirling my hair around his fingers."
- 94.11 "He said 'that slag Steph, you're all better off without her'...JS then made a personal insulting remark about SG. He then said, 'don't trust SG or any of the prevention team, they are all snakes.'
- 94.12 JS stated how much do you earn. I responded £650 per month, he stated he earned £3000 per month.
- 94.13 JS had been shouting in my face almost touching mine, so I didn't say anything else as I felt it may have made him worse. I was worried for my safety.
- 94.14 He was touching my arm and said, 'give us a hug.' I just stood there sideways and he came over and hugged me. JS then said, 'I bet you would be a lot of fun outside work.'"
- 94.15 AB referred to the claimant asking her how she got home, but the date of this comment was not specified,

Incident 4 fourth meeting

- 94.16 AB referred to witnesses David Welsh and Stephen Pruden ("SP"). In respect of the latter she reports that he witnessed the claimant "...saw me and got in my face.' I walked back to the station with SP who said, 'he was a bit forward.'" AB related how she had started to panic because the claimant was about and she was going on her own, and set the recorder going on her mobile phone.
- 94.17 "JS came in and was checking the rooms, you can hear this on the recording."
- 94.18 "JS asked who was in and went on to tell me that 'they've got all these charges against me but I'll get away with it.'
- 94.19 "He was kneeling and banging his fists against the desk" [the Tribunal found this could be heard clearly on the recording].
- 94.20 "As it continued JS came up behind me, grabbed me and lifted me up and that was when the recording stopped."
- 94.21 AB confirmed she had no problems with anybody else. "DW did see him in my face. I told DW I was scared, but thought I could get through until the end of the apprenticeship and that I may only have to see him another few times. I was even too scared to go to the toilet" as they were unisex. The respondent confirmed to the Tribunal that the toilets was unisex.
- 94.22 Reference was made to AB reporting a previous matter to the police "2-years ago." This was unconnected with the respondent or the claimant, however it was a matter pickup up on by the claimant and Les Skarratts who took the view this

was evidence that AB serially complained about sexual harassment describing her as a “serial complainant.”

26 February 2018: the claimant’s first occupational health attendance since 2014 and report dated 26.02.18

95 On the 26 February 2018 the claimant was examined by Occupational Health, which the Claimant said in evidence he had arranged but nothing hangs on this.

96 The 26.02.18 Occupational health clinical notes recorded “he has times he gets a black mood usually around this time or anniversary of his brother committing suicide. Feels vulnerable at these times. The Claimant did not want counselling and was advised “he can phone at any time if he needs help”.

97 The 26.02.18 Occupational Health report to Respondent recorded the Claimant was fit for operational duties. He was “experiencing stress due to a disciplinary issue which has been on-going for a few months”. Reference was made to the Claimant having “had treatment for depression in the past and has learned to control some of his symptoms”. He was fit to attend the disciplinary meeting. He was advised “if he needs any counselling etc. he can contact me for this.”

The respondent’s lack of knowledge of disability

98 Occupational health emailed professional standards on 26 February 2018 confirming the claimant was fit for full operational duties and there was no reference to the claimant. The medical information before the respondent was that the claimant was experiencing stress attributable to the disciplinary, there was no reference to current depression by either the medical professionals or the claimant, and the Tribunal finds the respondent was not put on notice that the claimant was or could have been disabled by depression in the period leading to 26 February 2018.

Suspension on 26 February 2018

99 Following AB’s interview managers visited the claimant at home on the 26 February 2018 and handed him two letters, including the suspension letter written by Philomena Dwyer dated 26 February 2018. The claimant was informed he had been suspended and he responded that he could not read the letter or speak to them as he had depression. The claimant was informed of the respondent’s support line and a support card was provided.

100 The letter referred to the need to investigate further allegations “that on various dates at station 43 and station 51 you inappropriately came into physical contact with a female colleague on station and that you used inappropriate language to that individual...this suspension is not disciplinary action and does not imply an indication of guilt, or prejudgment...during the suspension it may be necessary for me to contact you.” Philomena Dwyer was the nominated independent contact and the suspension letter confirmed that she was his contact. In submissions Mr Kenward stated it was a nonsense for the claimant to suggest the suspension letter prevented him from making contact with anybody, including occupational health as suggested. No issue was raised with the suspension letter either by the claimant or the FBU, and it is apparent from the Tribunal that the claimant must have had

some form of contact because he was aware there were rumours about his behaviour towards AB.

101 In the second letter the claimant was informed that the disciplinary hearing due to take place on 1 March 2018 was adjourned pending further investigation.

#### Investigation into AB's allegations

102 A number of people, including David Welsh, were interviewed regarding AB's allegations on 26 February 2018, and he confirmed the following:

102.1 "AB told me about a chat (did not say who) saying a firefighter had shouted at her complaining about why we [prevention staff] were wearing their uniform, but she didn't appear too worried..."

102.2 He made insulting comments about SG and Steph.

102.3 I observed JS was leaning inside the car was very close to AB...I thought it was unusual seeing somebody standing so close to the car. JS went on to state 'keep an eye on her and she should do a cv and send it to an agency because his daughter had done it...' I said to AB as we left the station that he did get a bit close, at one point I thought he was going to jump in.

102.4 AB told me a few days later than the Firefighter at station 51 was the same person who had been coming into the office when she was alone. She did not tell me the exact details but said that he was very close and intimidating and touching her and twirling her hair. I said she needs to speak to SG, but she said she did not want to cause any problems. It was after the third time she decided to go to SG. She was scared to come in and be alone on station...I've been driving her home for the last two weeks and it was only after that she told me she was too scared to walk home, so I decided to provide a lift. AB didn't want anyone else to know, but when he started hugging her and grabbing her cheek and he was asking where she lived...she got nervous because he knew she walked home."

102.5 David Walsh described how the claimant would come in looking for his friend knowing he was not at work, and then later the same day he "opened the door, saw me and left without saying anything. All in all, he has probably done this about four times to my knowledge."

102.6 David Welsh described AB as being "visibly upset" when the incidents happened on his return to the station.

103 The claimant was understandably worried about the AB allegations. He telephoned his GP, and the 28.02.18 GP record recorded "Sleeping problem." The GP record entered for 05.03.18 recorded "Low mood." Following the history given by the Claimant recorded; "Lots going on. Been suspended from work – under investigation...feels he is being unfairly persecuted as he challenged a senior...feels evidence has been altered to target him, and that his union is in on it too as they are not being supportive...had previous courses of Fluoxetine and found them very helpful" and being keen "to try this again...review 2 weeks."



104 The Tribunal found it had been nearly 5-years (the last date being 12 June 2013) since Fluoxetine was prescribed. On the balance of probabilities, the Tribunal did not accept the claimant's evidence that he had been taking Fluoxetine on repeat prescription as alleged; the Tribunal is aware that a GP is required to record on the patients records repeat prescriptions and the reviews necessary when anti-depressants were prescribed and taken. It is notable that the claimant's GP records set references to Fluoxetine, and when the records are silent the Tribunal infers the medication was not prescribed or taken.

105 On 9 March 2018 the claimant was invited by Philomena Dwyer to a disciplinary investigation at Service Headquarters to view the video footage. The venue was changed at the request of Kevin Hughes as the claimant wished the meeting to be held away from the respondent's premises because he believed there were false rumours about him and did not want to meet colleagues. There was no suggestion he was seeking reasonable adjustments because of depression, the reason provided was clear, he wanted to avoid meeting staff and the "false rumours."

Claimant's second investigation interview 21 March 2018 held at River Alt Resource Centre, Huyton which was not fire service premises.

106 The claimant was represented by Kevin Hughes and from the notes of the meeting, which the Tribunal does not intend to rehearse, the meeting took 1.35 hours during which the claimant/Kevin Hughes were able to deal with the allegations. The claimant answered the questions put to him, and it is notable that unlike the disciplinary hearing when Les Skarratts put the claimant case forward and answered questions, Kevin Hughes did not answer on behalf of the claimant.

107 The claimant accepted he had contact with AB three to four times, and during the first meeting he had discussed salaries and leant over and hugged AB. With reference to the second incident the claimant accepted he had spoken with AB when she was in the car, but could not remember "grabbing her cheek." With reference to the third incident the CCTV showed the claimant touching AB on the face and arm. The note of the investigation hearing record the claimant saying "I am flabbergasted and at no point did she say she felt uncomfortable...At no point did she say I was being inappropriate. She reminds me of a 16-year-old girl I brought up in a previous relationship. I'm a bit bemused."

108 Kevin Hughes at the end of interview stated "for the record JS is under the doctor and suffering from anxiety and depression. JS is on prescribed medication for this and it may affect the interview process at this or a future date in time." This was said at the end and not the beginning of the interview, and no reference was made to any venue being inappropriate. Kevin Hughes also stated earlier in the meeting they did not want the recording played because of legal implications and objections, he did not mention the claimant might be too unwell to hear it. Technical difficulties were experienced with playback and Gary Oakford stated "can I suggest that given the technical difficulties we have encountered today that we consider any further interviews to be held at service premises (SHQ) so that the CCTV can be reviewed appropriately. Kevin Hughes said "OK. It is more around John's medical condition. We can review if a further meeting is required."

109 The fourth incident was not discussed due to technological problems.

110 In an email sent to Gary Oakford attaching the minutes of the investigation meeting, Kevin Hughes requested any further interview “**is undertaken as soon as possible** due to the detrimental effect that the entire proceedings and the time taken is having on his health which is causing us concern at present” [the Tribunal’s emphasis]. There was no reference to the claimant seeking a neutral location on the grounds of health, and no indication that AB’s recording should not be played to the claimant and a transcript produced in lieu.

22.03.18 GP record confirming the claimant was suffering from depression.

111 The 22.03.18 entry in GP recorded “depression.” The Claimant had been taking Fluoxetine for 2 weeks stating it “felt helpful”. He was advised to “come back if any concern” and “know how to contact crisis team.”

112 Stephen Pruden was interviewed on 4 April 2018 and dealt with the fourth incident. He described the claimant “trying to edge closer to AB and AB looked uncomfortable.” Stephen Pruden did not think AB was fine, and confirmed he left her alone in the office.

113 In a letter dated 10 April 2018 the claimant was invited to a “supplementary interview” by Professional Standards in the Sefton Suite at Service Headquarters and informed no decision had been made on whether or not the matter would progress to a formal hearing.

114 Kevin Hughes responded in an email sent 11 April 2018 requesting an alternative venue and pointing out the claimant was “being treated by his GP for stress and is currently on prescribed medication. What appears to be compounding his levels of stress is the time taken for the entire discipline investigation to date and also that several people have reported to him that there are various unsavoury rumours.... he feels that is he was to attend service premises that he would be the focus of attention and that would make him feel uncomfortable and over anxious to the point where he could not function at a level to properly defend himself.” Liam Williamson, a Professional Standards officer responded “the current venue...is located right next to the entrance to the Building. This will allow Ff Sondergaard to enter the room with minimal contact with others or attention brought on him. The meeting is also scheduled to take place during the lunch period, which will further limit the amount of people around the reception area...the meeting room required Audio Visual Equipment...we feel the current venue...is appropriate and will not look to seek an alternative.”

115 Kevin Hughes replied on 13 April 2018 to the effect that reception area at lunchtime was busy, the claimant had recently requested the assistance of occupational health in the form of stress counselling and “the excessive amount of time that the original investigation had taken and the apparent doctoring of evidence submitted to the discipline bundle coupled with a distinct lack of evidence to substantiate the more recent allegations, something that has still not been fully explained or presented to my member, have only served to exasperate [exacerbate] his condition.” A further request for a change of venue was made,

116 The venue was changed to Vesty Road on the basis that an earlier meeting with the claimant had taken place there without issue. Philomena Dwyer did not think a fire station was an appropriate venue on the basis that she could not be sure

people would be out all day, if there was a call out incident the firefighters would be back in. The venue also required access to IT equipment in order that the recording taken by AB and CCTV could be played back to the claimant. The Tribunal, who heard oral evidence from Philomena Dwyer concerning the change in venue, considered her mental process and concluded that the fact Kevin Hughes had referred earlier to the changes made in Ian Woolridge's original note for file was not in her contemplation and played no part in her decision-making process. In short, even had the claimant raised a protected disclosure as alleged, there was no causal nexus between the decision to allocate a specific venue for the investigation and disciplinary hearings and the alleged protected disclosure and so the Tribunal found on the balance of probabilities. It is notable that the reference made by Kevin Hughes to the "apparent doctoring of evidence" did not specify what that evidence was or who doctored it.

The claimant's second investigation interview held at Vesty Road dealing with AB allegations on 16 April 2018

117 The claimant was accompanied by Kevin Hughes and shown the CCTV evidence, which the respondent had been unable to play at the last meeting due to technical difficulties. The claimant and his union representative were given sufficient information and time to explore all the evidence and give answers to the questions asked and so the Tribunal found.

118 Kevin Hughes objected to AB's recording being played on the basis that it was illegal. Gary Oakford indicated his understanding was that it could be played; it was not and he indicated there were "at present allegations...that there has been a series of contacts between JS and [AB] on the 2<sup>nd</sup>, 12<sup>th</sup>, 16<sup>th</sup> and 23<sup>rd</sup> February which has finalised in the young person involved feeling scared and intimidated."

119 The claimant stated he was taking anti-depressants, pointing out "it has taken four weeks to get to this stage and it is not an appropriate amount of time." Kevin Hughes indicated he would be making representations for the suspension to be lifted. There was no reference to Vesty Road being an inappropriate venue at any stage during the investigation until Les Skarratts became involved. Les Skarratts was and remains an FBU official on the executive council of the FBU, joint secretary and more senior to Kevin Hughes.

120 On the 19 April 2018 AB was interviewed with Philomena Dwyer as her chaperone, and the CCTV was viewed. AB agreed she initiated a handshake and the claimant had not asked whether she needed a hug on the day he said he had. She confirmed he had "grabbed" her left cheek in the second incident, making her feel uncomfortable and intimidated. On the 3<sup>rd</sup> incident she described how he was close behind and twirled her pony tail, that he leant over and touched her cheek, having a "rant" about how much he earned, he hugged her and she was scared. She described how she felt the claimant had "become more controlling and the touching was getting worse...I felt I couldn't challenge him, so I took it to my manager."

121 Les Skarratts requested that the investigation meeting took place in a private room at Belle Vale Fire Station. Unlike River Alt Resource which was not fire service premises, Belle Vale Fire Station clearly was and as a matter of logic the claimant was at risk of coming across work colleagues. Les Skarratts wrote on the 10 May 2018 to Philomena Dwyer that he was "mindful" of the claimant's health and that was

the only reason given, Philomena Dwyer responded on 10 May 2018 refusing the request, the sole reason given was Gary Oakford's diary commitments. The Tribunal accepted Philomena Dwyer's evidence that she did not want to delay the meeting as requested by the claimant's union representatives previously, credible. Contrary to the view taken by Les Skarratts, she believed Belle Vale Fire Station was not appropriate as it could not be guaranteed the claimant would not come across colleagues. Philomena Dwyer concluded Vesty Road near HQ was more suitable, and she was not prepared to adjourn the meeting to accommodate the request.

The claimant's third investigation interview at Vesty Road on 14 May 2018.

122 The claimant was represented by Les Skarratts. Les Skarratts before he had heard the recording, requested specifics of the allegation of inappropriate behaviour, remarking "was it rubbing up against her, touching her breasts" suggesting by this question that the claimant's behaviour would have to be that extreme for it to be deemed inappropriate. The Tribunal found Les Skerrett's comment was in keeping with his attitude at the disciplinary hearing and at this liability hearing. He deemed it appropriate for AB to be cross-examined by him about sex abuse that had allegedly occurred when she was twelve years old reported to the police when she was 17/19 years old, on the basis that she was a "serial complainer," not telling the truth about the claimant. Les Skarratts argued that the respondent, who had contacts with the police, should access their records to see if AB was telling the truth about the previous police complaint involving child sex abuse.

123 AB's recording was listened to and the claimant was asked about the background noises on the recording which AB had described as the claimant checking rooms. Gary Oakford put to the claimant the impact of his aggressive tone on AB, which the claimant did not have an answer to, and he agreed he was probably banging his fists on the desk, (which he then disputed at the disciplinary hearing changing evidence on this point to typing on an imaginary typewriter). Reference was made to the inappropriate language used, which the claimant described as "industrial language" acceptable in the workplace, believing it was normal to address a female colleague as "Babe" depending on his relationship with the person; he considered AB to be his friend even though they had met on a maximum of 4 occasions. The claimant denied lifting AB up from behind, which is what AB said caused the recording to stop. The claimant's response was "not that I can remember" and the noise of him grabbing AB he described to be waving his arms in the air saying, "I am celebrating."

124 It is not disputed the claimant became upset when he heard the recording, putting his hands over his ears and the hearing was adjourned for a short period. After that, the claimant has always been allowed to leave the room when the recording was played, including at this liability hearing when the Tribunal listened to it. The claimant's response to the recording underlines that there were real issues with his behaviour; he found listening to it uncomfortable and hummed to block it out. The claimant's reaction emphasises his inappropriate behaviour, and its effect on AB. It was clear to the Tribunal when it listened to the tape the claimant's attitude and speech were aggressive, albeit not directed at AB, it is not difficult to comprehend how his manner and actions would have worried a lone young female apprentice who had reported abuse in the past outside her employment with the respondent.

125 Gary Oakford asked the claimant if he wanted the tape playing a second time to which he responded that he did not, because it was uncomfortable. The investigation proceeded without issue. Towards the end of the hearing Les Skerrett's referred the claimant in the following terms; "JS is incredibly stressed and I'm not sure what steps have been taken in respect of JS positive health and welfare, this is someone crying for help. I am concerned that the convenience of your diary is more important than JS welfare." Gary Oakford responded; "I understand the impact of this on JS and we have arranged a neutral environment for the first interview, unfortunately we did have technical issues at the first venue and have held the 2<sup>nd</sup> and 3<sup>rd</sup> interviews here at Vesty Road." There was no evidence before the Tribunal that the meetings in Vesty Road resulted in the claimant meeting any of his colleagues and they were without incident.

126 The claimant was referred to occupational health for a report, and examined on the 24 May 2018.

#### Occupational Health Report

127 The occupational health notes referred to "previous episodes of depression...emotional reaction/anxiety/depression feels unreasonably treated by work, not sleeping, low mood...having counselling...Fluoxetine...feels harassed/intimidated/bullied by work, being supported by FBU, fit to attend hearing..." The report confirmed the Claimant was "**experiencing an emotional reaction to his situation with symptoms of anxiety and depression**" but was "**being appropriately supported**" [the Tribunal's emphasis]. The report confirmed that the Claimant was "reluctant to come onto Brigade premises and he doesn't want to meet other officers who may have heard false rumours of the allegations against him" but it does not say that he cannot or that this will adversely affect his health. Occupational health confirmed "...**He is unlikely to improve until his disciplinary issues have been resolved and an outcome he finds acceptable.**" Occupational health's advice was, in short, that the respondent should deal with the disciplinary and resolution to the claimant's medical condition was linked to the disciplinary process. The report did not recommend the claimant required a neutral venue.

128 This was the last relevant entry in any of the medical records prior to the termination of the claimant's employment, and the Tribunal found there was no satisfactory evidence to the effect that the claimant was vulnerable to depression, including the deduced effects, and during the relevant period he had not satisfied the Tribunal that the mental impairment had a substantial and long-term effect on his ability to carry out normal day-to-day activities.

#### Protected disclosure 2

129 In a letter dated 1 June 2018 addressed to Nicholas Mernock, Les Skerrett provided information that WM Ian Waldrige had amended the claimant's Note for File and the Tribunal found this amounted to a disclosure of information for the purpose of section 43B of the ERA taking into account the case law cited below. At paragraph 7 of the 1 June 2018 letter the issue was described as follows; "one fundamentally important issue...the item is described by a note for file authored by WM Waldrige...WM Waldrige or another member of your team has either willfully misrepresented the evidence or tampered with it. I understand the severity of the allegation I am making." Reference as made to the differences in notes, Les

Skarratts concluding “this is more than typographical error, some person within the investigatory process has altered the note for file to exaggerate the case against my member and remove the obvious evidence of this issue having been dealt with. Double jeopardy being the issue that has vexed a member of your staff and acted in a manner that intentionally detracts my member...I am sure that you will agree that this is an appalling state of affairs and I seek that you investigate this matter thoroughly and **take immediate steps to remove all allegations that have previously dealt with by the employer via its agent WM Waldrige**” [the Tribunal’s emphasis]. The Tribunal found there was no reference to any other person or public interest in the notes for file being investigated; the thrust of the complaint was that allegations had previously been dealt with should be dropped against the claimant.

130 Nicholas Mernock in a letter dated 6 June 2018 replied, “the issue of a potential discrepancy by Mr. Waldrige had already been raised by Mr. Hughes...those discrepancies I’m sure will form part of your presentation at the hearing and at that time as chair I envisage I will have to reach a decision in relation to what validity or not I place on the evidence.”

Disciplinary hearing 29 June, reconvened 2 July & 5 July 2018

131 The claimant was invited to a re-scheduled disciplinary hearing combining all five allegations by a letter dated 18 June 2018 to be held over two days, 29 June and 2 July 2018. The allegations included; “a serious breach of Health & safety rules in that you failed to test your respiratory protection – Breathing Apparatus (BA) set on more than one occasion” and “that on various dates at Station 43 and Station 51 you inappropriately came into physical contact with a female colleague on station and also that you used offensive and inappropriate language to that individual.”

132 The claimant was represented by Les Skarratts and Mark Rowe, FBU official. The claimant and Les Skarratts had agreed a number of witnesses would not be called and their statements taken as read, with the exception of Ian Wooldridge and AB who was to be cross-examined by Les Skarratts, and this was accepted by Nicholas Mernock. Philomena Dwyer accompanied AB providing support, which Les Skarratts raised no issue with at the time.

133 The claimant and Les Skarratts approached the hearing on the basis that the claimant would not give evidence until the end of the hearing when he would answer questions raised on points of clarification by Nicholas Mernock. All questions fielded to Les Skarratts, he answered. It was undisputed evidence that when questions were asked during the hearing and Les Skarratts’ presentation, Les Skarratts spoke without reference to the claimant. It is notable to the Tribunal Les Skarratt’s answered questions about events which he had no personal knowledge of, and yet he was in a position to respond to specific questions about events without recourse to the claimant, maintaining AB was not telling the truth, she was a “serial liar” and had edited the covert recording.

134 The format included questions being asked about the CCTV footage, the audio recording being played, which Nicholas Mernock requested was played in its entirety as he had only heard parts before. The audio recording started to be played and the hearing adjourned when the claimant became distressed.

Alleged protected disclosure 3 at reconvened hearing 2 July 2018

135 In a reconvened disciplinary hearing held on 2 July 2018 chaired by Nicholas Mernock, Les Skarratts referred to the fact that that WM Ian Wooldrige had amended the Claimant's Note for File. As Nicholas Mernock had anticipated, Les Skarratts produced the original note for file and cross-examined Ian Wooldrige on it, putting to him that he had "tampered" with the evidence, which Ian Wooldrige disputed. Ian Wooldrige confirmed he was aware of the seriousness of the BA tally at the time, data would need to be downloaded and had no awareness of the full extent of the BA issue, which was accepted by Les Skarratts.

136 During the hearing Les Skarratts confirmed the claimant carried out a "part-test" and relied upon the Joint Secretaries' Statement included in the disciplinary pack to justify no action being taken other than training the claimant. He accepted the claimant had not signed the book and then not done the test stating "JS did the test but did not go on to do the telemetry test."

137 The allegations raised by AB were discussed in detail and CCTV evidence viewed with various comments being made by Les Skarratts, who requested parts be re-played again. Nicholas Mernock asked to hear the audio clip taken by AB, as he had only heard sections and at that point the hearing was adjourned due to the claimant becoming distressed at the prospect of listening to the recording. The recording was discussed in detail.

The adjourned disciplinary hearing 5 July 2018.

138 The hearing was adjourned to the 5 July 2018. At the outset Les Skarratts confirmed the claimant was not intending to call any witnesses and it was agreed that statements would be taken as read and the witnesses, who were present in a separate room, were released. The Tribunal heard oral evidence from Philomena Dwyer that the hearing was held in the members suite at service headquarters to facilitate the need for two separate witness rooms for those who had given their evidence and witnesses who had yet to give it, thus keeping them apart. Given past technological failures there was a need for dependable access to technology i.e. video and CCTV playback, The Tribunal accepted Philomena Dwyer's explanation that service headquarters was believed to be the most suitable venue and the claimant was unlikely to come across fellow colleagues when he attended the disciplinary hearing in the members suite, which was indeed the case as the claimant did not come across colleagues and the disciplinary hearings took place without incident.

139 As AB had recorded the claimant on her mobile phone Les Skarratts wanted to check to see if there was any video footage. He needed to "see the first couple of minutes" and the recording was played at Les Skarratt's request. The claimant became distressed on hearing the recording, it was stopped and he left the room with Mark Rowe. The recording then continued to be played in the claimant's absence and Les Skarratts confirmed he was "happy that it's a video clip." When the recording stopped the claimant returned and both sides summed up. Les Skarratts argued that the "covert recording ended conveniently. I feel that it has been turned off and edited...she lied to you..." Nicholas Mernock responded "I will look at all the evidence in the case. I have the option to call witnesses back if necessary." Les Skarratts response pointed away from the claimant's case that he was caused

detriments as a result from whistleblowing, suggesting that the respondent had “bought” AB’s evidence “completely...the employer has essentially said you are a bad one for this” and the claimant had not been assisted by the respondent. There was no suggestion Nicholas Mernock’s treatment of AB’s recording and the way he conducted the disciplinary hearings were in any way causally connected to whistleblowing, and the Tribunal found the fact that Les Skarratts had reiterated the complaint raised about Ian Wooldridge’s note for file, had no bearing on Nicholas Mernock’s thought process when he came to consider whether the claimant had committed the alleged offences or not. In short, the Tribunal found the claimant’s claim of detriment and automatic unfair dismissal fell at the causation hurdle, having carefully considered the thought processes and motivation of Nicholas Mernock when he conducted the disciplinary hearing and reached his conclusions concerning the claimant’s guilt on the balance of probabilities.

140 In his presentation Les Skarratts accused AB of lying to everyone, including the police, and he raised a number of issues concerning her evidence including a discrepancy of time when AB accused the claimant of twirling her pony tail when there was no internal CCTV to catch it, arguing that when she left the building the external CCTV revealed there was a 21 second difference between AB leaving and the claimant following. Les Skarratts suggested “maybe she’s was a serial complainer. Maybe she’s a habitual liar, we don’t know...when someone uses their gender for nefarious reasons...that is sexist.” He referred to the claimant not sleeping for 6-months having been “left to hang by his employer. He’s had no assistance. The complainant on the other hand has been cossetted...its entrapment, this is vengeful.” Previous cases were referred to when it was alleged the claimant was treated differently.

141 Nicholas Mernock indicated he would speak to AB (who had given evidence at the hearing and been cross-examined by Les Skarratts) and ask her to “re-explain to me what she said. I will share as much of what she says as I can.” Nicholas Mernock asked questions of the claimant for clarification purposes stating “these are not meant to be challenging.” The claimant denied making the comment to AB about the uniform and did not given a straight answer to whether he had made the comment about her being depressed, until he was pushed and then denied making it. The claimant accepted he had touched AB’s face as shown on the CCTV explaining “I am a tactile person.” He explained the recording taken by AB was “of me having the start of a breakdown. It’s quite clear that I was all over the place. I’m 50 and having a breakdown in front of a twenty-year-old kid. It hard to listen to...at the end I say I’m celebrating. Knowing me I’d have my arms above my head. How could I have hugged her?”

142 The claimant admitted a total contact time with AB of 40 minutes and was asked how he felt a friendship had existed with AB when she denied it. The claimant’s response was that he had offered AB “help and advice...I just got sucked in and thought she wanted to listen.” Les Skarratts in submissions conceded there were “only 4 periods of contact” and the banging on the table was the claimant “pretending to use a typewriter.” The Tribunal noted that the claimant had previously denied banging the table at the investigation hearing, and yet when it listened to the recording there was loud banging on the table as the claimant emphasised his words and Les Skarratt’s explanation put forward on behalf of the claimant, made no sense. The Tribunal found the claimant’s behavior evidenced in the recording sounded



extremely aggressive and the responses made by AB were low in tone and monosyllabic, even taking account of the fact that she, unlike the claimant, was aware the recording was running. The claimant and Les Skarratts were oblivious to the effect the claimant had on AB, and the language used, aggression and swearing in a raised/shouting tone by a male much older than AB who held a position of authority, this being the fourth time they had ever met.

143 The hearing was adjourned and Nicholas Mernock as promised spoke to AB and produced a confidential note a copy of which he provided to Les Skarratts and the claimant on the understanding that it would be shredded and not divulged to anyone as the note included sensitive information unconnected to the claimant in any way. It is undisputed evidence Nicholas Mernock shredded the note in his possession, Les Skarratts and the claimant did not. Instead, they chose to include the note in the trial bundle. For the record, the Tribunal refused to read the confidential note as it had no relevance to these proceedings, and it was taken out of the bundle. Mr. Kenward submitted that Les Skarratts' explanation given on cross-examination for not having destroyed the document was "obviously untruthful in that he sought to suggest that he was not aware that such a document could not be deleted." The Tribunal took the view that the explanation given by Les Skarratts was not a credible one, concluding AB's note was not destroyed in order that it could be used in this litigation to somehow prove AB was not telling the truth about the claimant. The issue concerning AB reporting previous alleged abuse to the police and the use made of this information by Les Skarratts when acting on behalf of the claimant and presumably with the claimant's consent, underlines their general insensitive attitude towards AB and her allegations which could have resulted in the respondent facing proceedings for unlawful sex discrimination.

#### Disciplinary hearing: the outcome 12 July 2018

144 Nicholas Mernock read out his conclusion at a hearing convened on 12 July 2018, indicating "I have had to take some considerable time due not only to the complexity the issues, but also the severity of the allegations." The evidence before the Tribunal was that this had indeed been the case, and Nicholas Mernock held a genuine belief the claimant was guilty of gross misconduct about the BA health and safety breaches and AB's allegations. He accepted Ian Wooldridge had informally dealt with the claimant's failure to comply with service instruction 0202 standards of dress and the absent without leave allegation, although he took the view the claimant had behaved in a "extremely poor and dismissive way...his actions demonstrated to me he was ultimately not concerned about whether FF McCann turned up to cover his shift or not..."

145 Reference was made to Ian Wooldridge's decision in his notes for case and the fact that enquiries were then made by Ian Wooldridge which led to the discovery that the BA equipment had not been checked. Nicholas Mernock did not specifically state that the AWOL allegation was proven or not, and the Tribunal accepted on the balance of probabilities his oral evidence that whilst he was unhappy with the claimant's behavior, he did not take it into account when making the decision to dismiss. In reaching this decision the Tribunal took into account Mr Weiss' submission that the dismissal letter did not make it clear this allegation had not been taken into account, concluding that Nicholas Mernock could have been clearer in his communications when confirming which of the four allegations he found against the claimant and those already dealt with by Ian Wooldridge informally.

146 Nicholas Mernock made it very clear the third allegation, not checking BA, was a “very serious breach of health and safety legislation,” referred to the Joint Secretaries’ Agreement reached in 2013 and read part out emphasizing the seriousness of not checking BA and the addendum making it clear that no precedent was set. He found the claimant had not checked his BA equipment on the three consecutive occasions, and the fact the claimant was arguing a part-test had been carried out was “immaterial...it was not tested in line with the requirements of the authority...and the repercussions of that in the event of an emergency call are life threatening.” The Tribunal accepted Nicholas Mernock held a genuine belief that a half test was as serious as no test, and this belief was reasonable given it was a potential risk to the personal safety of the claimant and his colleagues, who may be at risk if they try and find him when the BA equipment was not working. Nicholas Mernock gave oral evidence that the claimant’s failure to test his BA equipment was by itself sufficient to warrant a summary dismissal on the grounds of gross misconduct, and contrary to argument presented by Les Skarratts he did not accept the Joint Secretaries Agreement assisted the claimant in any way. Taking into account Nicholas Mernock’s motivation and thought processes, the Tribunal found there was no causal link between the disclosures made and the decision to dismiss the claimant for failing to check his BA equipment. His decision that failing to carry out the BA checks on three occasions was an act of gross misconduct, the consequences were potentially serious, and the claimant was an experienced firefighter who had received regular training and was aware of the consequences. The decision to dismiss the claimant fell within the band of reasonable responses open to a reasonable employer and so the Tribunal found.

147 Nicholas Mernock found allegation 4 concerning AB’s allegations of inappropriate language and touching “exceptionally serious...I have spent an immense amount of time on, looking at all the evidence presented, and weighing up the implications.” The care in which Nicholas Mernock had approached this allegation was borne out by the evidence before the Tribunal. He referred to Les Skarratts making “great play” over AB’s credibility “to the point of calling her a liar”, the two confidential conversations he had with AB “to address those concerns” and “bore both perspectives into consideration.” He found AB’s evidence consistent and went through a number of allegations point by point starting with the uniform comment, describing the claimant’s behavior by the time of the third incident as “a little sinister.” He had serious concerns about the claimant “malining” officers with whom AB works, particularly using terminology such as “slag” about SC” and concluded AB was frightened of him. He accepted the claimant continued to check to see if she was on her own “so nobody could witness what was happening.” He believed the claimant put his arms around her without permission or approval and the noise “prior to termination on the recording backs this up.” He recognized that AB and the claimant had a different version of events and confirmed “I have had to come to a decision on the balance of probabilities after considering all the witness statements. After doing this I am minded that AB is telling the truth, as her perception is validated in other witness statements.” Nick Mernock was referencing Dave Welsh, Carol Pinney, Stephen Pruden and Sara Garside, who all provided a statement.

148 Nicholas Mernock took into account the claimant’s argument “that the fundamental reason for your contact with AB was that you were seeking to help her with her CV, but disregarded this as I believe you may offer once or twice but not

keep perusing someone to complete a CV on four occasions. The fact that you checked AB was alone (which is captured on the tape) is sinister as why would it be an issue if you were only discussing a CV? Another witness describes you entering the protection room on many occasions and then leaving without saying anything. This is again strange behavior if there is a simple reason for your visit.”

149 Nicholas Mernock preferred the evidence of AB to that of the claimant, and it was not unreasonable for him to do so. At the disciplinary outcome hearing mitigation was not explored or discussed, and it was not referred to in the outcome letter. Nick Mernock had before him the claimant’s personnel file and he was aware the claimant had a clean employment record. He had looked at the file of previous cases raised by Les Skarratts and took the view that there were no similar cases and there was no mitigation for the claimant’s behavior in respect of both allegations, for which cumulatively the claimant was dismissed. Nicholas Mernock did not consider the claimant’s health other than to satisfy himself he was well-enough to attend the disciplinary hearings. Nicholas Mernock was entitled to take into account the occupational health evidence to the effect that the claimant was experiencing an emotional reaction to his situation, he was being “adequately supported” and his health was unlikely to be resolved until a disciplinary outcome reached. The Tribunal found there was no causal connection between the disclosures and Nicholas Mernock’s decision making process culminating in him believing AB as opposed to the claimant, and dismissing for gross misconduct. There was no evidence whatsoever of any conspiracy with Nicholas Mernock being part of it aimed at dismissing the claimant motivated by the disclosures made earlier.

150 The outcome was confirmed in a letter dated 16 July 2018. The Tribunal finds the ACAS Code of Practice was complied with. In oral submissions Mr Weiss drew the Tribunal’s attention to the conclusions reached by Nicholas Mernock with regard to the second allegations and it considered the manner in which he couched his criticism of the claimant as follows; “I remained greatly concerned at the approach you took in arranging cover that morning.” Mr Weiss argued that Nicholas Mernock had taken the AWOL allegation into account when he came to dismiss the claimant; Nicholas Mernock disputed this was the case and he accepted allegations 1 and 2 had been previously informally dealt with. It is notable the outcome letter concludes “I feel your actions throughout demonstrate a lack of the appropriate values to operate within this Fire and Rescue Service, you show disregard for process and acceptable protocol, an aggressive disregard for work colleagues and an acceptance to be able to describe people as ‘slag’ whilst also showing a disregard for your own personal safety in relation to BA equipment. Your behavior towards AB I believe was totally unacceptable, and clearly caused a young employee to be scared and frightened and so desperate to make it stop that she recorded one of your visits to ensure people believed her.”

### Appeal

151 The claimant appealed, Les Skarratts submitted a letter dated 24 August 2018. The grounds included (a) a defect in the procedure, (issue not proven on the balance of probabilities) and (c) disciplinary sanction too severe. The Tribunal notes that there was no reference to disability discrimination and an alleged failure on the part of the respondent to make reasonable adjustments, and no hint of any protected disclosures having been made or detriments caused to the claimant as a result, including dismissal for whistleblowing.

The appeal hearing 7 September 2018

152 The appeal was held before deputy chief fire officer Nick Searle by way of a review, the claimant was accompanied by Les Skarratts, and it was heard over a period of approximately 3 hours. Nicholas Mernock was in attendance.

153 Les Skarratts criticized the respondent for failing to provide a copy of the “subjective report from the investigating officer to professional standards...this is more of a learning point for the future and we don’t think that rendered the process unsafe.” The thrust of the appeal was that Nicholas Mernock had believed AB, whom Les Skarratts and the claimant were convinced was lying, and he should have believed the claimant, a long-serving firefighter. It is notable an allegation of “unconscious bias” was levied against Nicholas Mernock, and there was no reference to him being motivated by whistleblowing. Similar arguments were put forward as those previously explored at the disciplinary hearing, for example, that firefighters who part tested had not been disciplined when a first written warning were issued to over one hundred people who “failed to test once or twice.”

154 Les Skarratts referred to the two notes for file, alleging Ian Wooldridge had “lied” at the hearing and “falsified and tampered with the evidence.” Nicholas Mernock indicated “that was presented on the day and I accepted it as evidence to be considered.” Nicholas Mernock confirmed the allegations had been disregarded in the light of the notes, underlining the fact that he accepted Ian Wooldridge had made informal decisions with reference to uniform and AWOL. The notes of the hearing record Nicholas Mernock confirming to Les Skarratts “You did persuade me on that point...the allegation was disregarded.”

155 Les Skarratts repeated his concern that the respondent had allowed AB’s covert recording to be used admitting “this recording is embarrassing to JS, to the union and to the employer. But that is the nature of a private conversation” repeating the evidence he gave earlier that the banging on the table was the claimant demonstrating typing on a keyboard. AB’s allegations and the evidence produced was discussed in detail. The 20 second gap between AB and the claimant leaving the building was explored which Les Skarratts believed was evidence AB had lied. He stated that “one of the most serious issues for us was that AB gave evidence that she had been to the police over a similar incident and it was 2 years ago. I wanted to ask a line of questioning on that and was stopped by NM...we wanted the employer to contact the police.” When Nicholas Mernock responded “at LS’s request I re-contacted [AB] and the explanation given to me was that she went to the police 2 years ago but the events happened when she was 12 over a prolonged period,” Les Skarratt’s accused AB of lying to the police over allegations of child sex abuse stating; “we wanted the employer to contact the police.” He also alleged that the respondent had “sided” with AB because she was accompanied/chaperoned at the disciplinary hearing by Philomena Dwyer who played a “significant role” and was the disciplinary manager.

156 With reference to the CCTV evidence that the claimant, who was described by Les Skarratts as a tactile person, had touched AB on the cheek that resulted in the claimant’s admission. Les Skarratts admitted the claimant had touched AB’s cheek and it “would have stopped it had it been addressed, that is in line with procedure,” in other words, it was appropriate for the claimant to touch AB’s cheek until she told him not to disregarding the inequality of their age, position and the possibility that

touching anyone on the cheek goes beyond the boundaries of expected social behavior between junior and senior co-workers whether they were a tactile person or not.

157 The appeal notes reflect the claimant put forward fully his grounds of appeal, and it is noticeable there was no reference at any stage to the claimant's alleged disability linking it to the claimant's behavior or the way he had been treated in respect of venue and reasonable adjustment. There no reference to the disclosures amounting to protected disclosures made in the public interest and detriments, and there was no linking the dismissal with the protected disclosures.

158 Nicholas Mernock responded to Les Skarratts; his response was that with reference to BA testing "I unfortunately got the impression that Mr Skarratts did not view this allegation with the same level of severity as I clearly see it." His reasoning in relation to AB's credibility was identical to the reasons given at the disciplinary hearing outcome. It is notable Nicholas Mernock dealt with the AWOL issue at length, and confusingly the allegation appears to have been resurrected despite Nicholas Mernock making it clear that this allegation has been disregarded by him, at the appeal hearing when Les Skarratt's raised the issue. The appeal notes record Nicholas Mernock saying "You did persuade me on that point and I referred to that in my response. My consideration was more on the provision of coverage. The allegation was disregarded."

#### The appeal outcome

159 The claimant's appeal was unsuccessful, and in an outcome letter dated 13 September 2018 Nick Searle referred to the AWOL allegation in detail and appeared to link the dismissal with that allegation in addition to the breathing apparatus allegations and AB. He was confused over the AWOL incident, and following submissions made by Mr Weiss on this point, had this been the only allegation on which the claimant was dismissed, the Tribunal found it may have been the case that the dismissal would have been found unfair with a substantial contribution element. However, this was clearly not the case and the claimant was dismissed for two very serious matters, namely allegations three "BA" and four "AB" which Nicholas Mernock found were "not actions and behaviors expected" of a firefighter...not in accordance with the Service aims and Values."

160 The next GP entry is after dismissal and an unsuccessful appeal following an appeal hearing held on 20 September 2018.

#### Backdated MED3 20 September 2018

161 A MED3 was issued backdated to 12 July until 19 November 2018. The diagnosis was "depression work related" and there is a reference to "Fluoxetine seems helping with mood". There appears to have been no prescription of Fluoxetine issued between the 22 March and the 20 September 2018 reflected in the GP records and the Tribunal concluded on the balance of probabilities medication was not prescribed; had it been the records would have said so. It would have been a relatively straightforward matter for the claimant to have obtained confirmation from the GP as to when medication was prescribed and taken, but this was not done and if the claimant continued to be prescribed anti-depressant medication during the

relevant period as he maintains, evidence other than the claimant's oral confirmation, should have been adduced given his unreliability on other matters.

162 The effective date of termination was 13 September 2018.

### The Law and submissions

#### Disability status – applying the law to the facts

163 Mr Kenward set out the undisputed case law in the respondent's chronology and submissions which the Tribunal considered and took into account including the legal principles set out below as provided by Mr Kenward.

164 Section 6 EqA requires the Tribunal to consider whether (a) the claimant has a "mental impairment, and (b) the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities" with reference to the "Guidance on matters to be taken into account in determining questions relating to the definition of disability" issued by the Secretary of State under the Equality Act 2010 section 6 (5) (the "Guidance").

165 Mr Weiss referred the Tribunal to Paragraphs B12, C5 and C56 found in the 2011 guidance on the definition of disability and 6.21 of the Code of Practice on Employment to the effect that the claimant's impairment was being treated, it was likely to reoccur, OH were aware and thus the respondent had knowledge of the claimant's disability.

166 An impairment will also be treated as having a long-term effect if the period for which it lasts is likely to be at least 12 months, or, despite the fact that an impairment has ceased to have a substantial adverse effect on a person's ability to carry-out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur. On the evidence before the Tribunal, it did not accept on the balance of probabilities the claimant had a long-term impairment that had a substantial adverse effect on day-to-day activities that was being treated, and nor did it accept the claimant had an underlying tendency to depression that had lasted at least 12-months in the past, was likely to re-cur and had re-occurred at the start of 2018.

167 As submitted by Mr Kenward the time at which to assess the disability (i.e. whether there is an impairment which has a substantial adverse effect on normal day-to-day activities) is the date of the alleged discriminatory act (see Cruickshank v VAW Motorcast Limited [2002] ICR 729, EAT) rather than retrospectively on the basis of what actually happened or subsequent medical evidence or the Claimant's present condition. If the Claimant's condition(s) would be likely to have a substantial adverse effect, but for any treatment in question, then the treatment in question is to be disregarded (see Equality Act 2010 Schedule 1 paragraph 5). As indicated earlier, there is no satisfactory evidence of the Claimant having had any treatment for a long period prior to February 2018. Given the factual matrix set out above, the Tribunal agreed with Mr Kenward.

168 For current impairments (as at the date of the alleged discriminatory act in question) that have not lasted 12 months, the Tribunal will have to decide if the substantial adverse effects of the condition were likely to last for at least twelve

months. The word “*likely*” means “*could well happen*” (see paragraph C3 of the Guidance and the House of Lords' decision in SCA Packaging Limited v Boyle [2009] ICR 1056, HL).

169 The **onus** is on the Claimant to prove that he is a disabled person within the meaning of the Equality Act 2010: Royal Bank of Scotland plc v Morris [2012] Eq LR 406, EAT “The burden of proving disability lies on the claimant. There is no rule of law that that burden can only be discharged by adducing first-hand expert evidence, but difficult questions frequently arise in relation to mental impairment”. In the case of Mr Sondergaard, the Tribunal took the view that difficult questions did arise concerning when the claimant was prescribed and took anti-depressant medication, and it did not find the claimant’s account of his medical condition entirely credible. As indicated earlier, he had exaggerated the length of time he was absent from work and his evidence concerning when anti-depressants had been prescribed over a substantial period of time was not reflected in the GP medical records. The Tribunal preferred to rely upon the contemporaneous written records made by the claimant’s GP rather than the claimant’s recollection unsubstantiated by any contemporaneous evidence.

170 The Tribunal was referred to Morgan v Staffordshire University [2002] ICR 475 Lindsay P presiding, who observed that “the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion” (see para. 20 (5), at p. 485 A-B). The Tribunal accepts Mr Weiss’ submission that expert medical evidence is not always necessary in order to establish a mental impairment, however, some form of medical evidence corroborating the claimant’s position can be necessary, especially in cases where the claimant is relying on a recurring mental impairment over a period of years when he was symptom free for much of that time and according to the GP records, no medication was being prescribed. It appears to the Tribunal that on the evidence before it the claimant had suffered from short periods of stress/depression at different separate times (including following from his Mother’s cancer diagnosis and death and the death of his brother) as a result of life’s adversities and without some form of supporting medical evidence, cannot be described as being vulnerable to depression. In short, the Tribunal found on balance there was no satisfactory evidence before it, supporting the diagnosis of a mental health condition producing recurrent symptomatic episodes sufficient for it to conclude the claimant was disabled under section 6 of the EqA during the relevant period taking into account the caselaw it was referred to.

171 The Tribunal was referred to J v DLA Piper UK LLP [2010] ICR 1052, EAT in which examples were given as follows; “We proceed by considering two extreme examples. Take first the case of a woman who suffers a depressive illness in her early twenties. The illness lasts for over a year and has a serious impact on her ability to carry out normal day-to-day activities. But she makes a complete recovery and is thereafter symptom-free for 30 years, at which point she suffers a second depressive illness. It appears to be the case that statistically the fact of the earlier illness means that she was more likely than a person without such a history to suffer a further episode of depression. Nevertheless, it does not seem to us that for that reason alone she can be said during the intervening 30 years to be suffering from a mental impairment (presumably to be characterised as “vulnerability to depression” or something of that kind): rather the model is of someone who has suffered two distinct illnesses, or impairments, at different points in her life. Our second example

is of a woman who over, say, a five-year period suffers several short episodes of depression which have a substantial adverse impact on her ability to carry out normal day-to-day activities but who between those episodes is symptom-free and does not require treatment. In such a case it may be appropriate, **though the question is one on which medical evidence would be required**, [the Tribunal's emphasis] to regard her as suffering from a mental impairment throughout the period in question, i.e. even between episodes: the model would be not of a number of discrete illnesses but of a single condition producing recurrent symptomatic episodes. **In the former case, the issue of whether the second illness amounted to a disability would fall to be answered simply by reference to the degree and duration of the adverse effects of that illness. But in the latter, the woman could, if the medical evidence supported the diagnosis of a condition producing recurrent symptomatic episodes, properly claim to be disabled throughout the period: even if each individual episode were too short for its adverse effects (including "deduced effects") to be regarded as "long-term"** she could invoke paragraph 2(2) of Schedule 1 (provided she could show that the effects were "likely" to recur)—see para 8(2) above" (Underhill J at paragraph 45).

172 Mr Weiss submitted that there was no rule of law requiring the claimant to produce expert medical evidence, which the Tribunal accepted, however, as indicated earlier some form of medical evidence was necessary in respect of medication taken and deduced effects but there was none. The Tribunal accepted Mr Kenward's submissions that there was no medical evidence relating to the claimant on or around August 2017 the effect that he had experienced a "further bout of depression" as alleged. Mr Kenward was correct in his submission that there had been no relevant entries in the medical records between 2014 and February 2018 at which point the medical evidence was to the effect that the Claimant had had three episodes of stress related illness in 20 years with these being linked to his mother's illness and death and his brother's death. The Tribunal accepted Mr Kenward's submission that the claimant's medical records do not suggest a continuing mental health problem or long-term adverse effect on the claimant's normal day to day activities. Mr Kenward reminded the Tribunal that the claimant in cross-examination agreed that his case was his situation had got worse since dismissal, and this was supported by the medical evidence as set out above. In short, on the balance of probabilities, the Tribunal was not persuaded the claimant was disabled during the relevant period leading up to his dismissal as there was no satisfactory evidence that his mental health was impaired to such an extent that it had a substantial and long-term effect on his ability to carry out normal day-to-day activities with reference to the Guidance referred to above, taking into account the arguments on deduced effect and the Tribunal's findings in relation to the short periods in which the claimant was prescribed and took ant-depressant medication..

173 Mr Kenward submitted the claimant was well enough to carry out the demanding role of a firefighter and found fit for full operational duties, and discounting any absences for physical reasons, the claimant was absent for four days due to stress in July 2003, two days due to stress in October 2006, seventeen days due to stress between August and October 2007 and 32 days due to bereavement in 2013. On the date of suspension, the claimant was considered operationally fit to carry out his full duties and attend disciplinary hearings with the recommendation that they should be dealt with "sooner" for the claimant's mental well-being. The Tribunal is fully aware of how stressful and upsetting disciplinary



proceedings can be for employees. It is unusual for an employee facing serious allegations that could result in his or her dismissal not to feel stress; and the claimant's reaction to the disciplinary process, particularly his concern regarding the rumours between colleagues around AB's allegations, did not denote he was suffering from depression of sufficient duration to fall under section 6 of the EqA. He was understandably experiencing stress, and in the opinion of occupational health (occupational health report dated 24<sup>th</sup> May 2018) the Claimant was found to be "experiencing an emotional reaction to his situation with symptoms of anxiety and depression" but "is being appropriately supported" and he was "unlikely to improve until his disciplinary issues have been resolved and an outcome reached he finds acceptable." The disciplinary issues were dealt with, but the outcome was not acceptable to the claimant.

174 Turning to the remaining issues and applying the law to the facts the Tribunal reached a number of conclusion as set out below.

#### The first issue

175 With reference to the first issue, namely, whether the Claimant was a disabled person by reason of the mental impairment of depression, the Tribunal found he was not. There was a short period in July 2003 when his Mother was ill and the claimant prescribed anti-depressants, in October 2006 a very short period when his Mother died and no medication prescribed. In 2007 by November 2007 he had counselling and felt the causes of stress were resolved. In March 2013 the claimant was referred to occupational health with stress and by 28 May 2013 he attended the GP because of bereavement following his brother's suicide, signed off work for 32-days and anti-depressants were described. In September the claimant had returned work, but by 8 May 2014, 6-months later, occupational health notes confirmed the claimant was still having issues concerning his brother's death and "still taking Fluoxetine." The fact the claimant was taking anti-depressant medication was not reflected in the GP records. Occupational Health noted no health issues in June 2014 and there was no reference to any issues until 26 February 2018, the morning of the claimant's suspension following AB's allegations. Occupational health noted the claimant experienced "Black moods around anniversary of suicide, stress due to disciplinary issue. treatment for depression in the past, has learnt to control some of his symptoms." By 22 March 2018 the claimant had taken Fluoxetine for 2-weeks and it was not taken again until after the claimant's dismissal and appeal. The Tribunal concluded there was no satisfactory evidence of a long-term depressive illness.

176 It is the case that life's events affected the claimant and there is no satisfactory evidence day-to-day normal activities had been substantially adversely affected in the long-term. The Tribunal noted in May 2013 to 24 June 2013 Fluoxetine was taken. The medical records do not suggest the claimant was prescribed anti-depressants through to 2014 as suggested by the claimant, and had that been the case, the Tribunal would have expected the medication and medical reviews to be reflected in the GP records. The Tribunal did not accept the claimant's recollection that he was on medication as credible, and it found on balance, medication was not prescribed and there was no deduced effect. The claimant's evidence could not be relied upon; it is apparent he had exaggerated the time off from work and the amount of medication he had taken.

177 The claimant, over a number of years, took very little time off work for stress/depression/anxiety, and took anti-depressant medication for a limited time in July 2003, 13 May 2013 and 24 June 2013 and 5 March 201, following which there was a gap until September 2018 with no reference to medication in the intervening period within the GP records. In conclusion, the onus is on the claimant to prove that he was a disabled person within the meaning of section 6 of the EqA in the relevant period prior to his dismissal, and on the balance of probabilities the Tribunal concludes the claimant has failed to discharge that burden on the basis that his reaction to the disciplinary process was not supported by any evidence or diagnosis that the claimant was “vulnerable to depression” over a period of many years, or in the alternative, had suffered a mental impairment throughout a lengthy period of time. To be clear, the Tribunal was not satisfied as indicated earlier with the claimant’s account of the anti-depressant medication he had taken which was not reflected in the GP evidence, and it was unable to conclude that had it not been for the medication the effect on the claimant’s ordinary day-to-day activities would have been substantially impaired (the “deduced effect.”)

178 As the claimant was not found to have been disabled under section 6 of the EqA, there is no requirement for the Tribunal to consider the remaining issues. However, in the alternative, if the Tribunal is wrong in its analysis of the claimant’s disability status, it has briefly dealt with the issue of knowledge and reasonable adjustments below taking into account the legal principles set out below.

#### The law: Disability discrimination – failure to make reasonable adjustments

179 The duty to make reasonable adjustments is set out in S 20 of the Equality Act 2010 (“EqA”). Section 20(3) sets out the first requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

180 Mr Kenward referred the Tribunal to the three cases set out below including the EAT decision in Environment Agency v. Rowan [2008] ICR 218, IRLR 20, EAT; “In our opinion an employment tribunal ... must identify: (a) the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer, (c) the identity of non-disabled comparators (where appropriate) and (d) the nature and extent of the substantial disadvantage suffered by the claimant.... Unless the employment tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage”.

181 In Project Management Institute v Latif [2007] IRLR 579, the EAT held “The ... claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it

would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not” (Elias P).

182 Finally, the Tribunal was referred to the EAT decision in Royal Bank of Scotland v Ashton [2011] ICR 632, EAT. The duty to make reasonable adjustments is cast in terms of ‘steps’ that would have an efficacious practical benefit in terms of relieving the substantial disadvantage to which the claimant is subjected by the PCP. “It is not — and it is an error — for the focus to be upon the process of reasoning by which a possible adjustment was considered... It is irrelevant to consider the employer’s thought processes or other processes leading to the making or failure to make a reasonable adjustment.’ This essentially brings us back to the fact that the duty to make reasonable adjustments is cast in terms of ‘steps’ that would have an efficacious practical benefit in terms of relieving the substantial disadvantage to which the claimant is subjected by the PCP”.

183 In the well-known case Secretary of State for Work and Pensions (Job Centre Plus) v Higgins [2013] UKEAT/0579/12 the EAT held at paragraphs 29 and 31 of the HHJ David Richardson’s judgment that the Tribunal should identify (1) the employer’s PCP at issue, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, (3) the nature and extent of the substantial disadvantage suffered by the employee, and (4) identify the step or steps which it is reasonable for the employer to have to take and assess the extent to what extent the adjustment would be effective to avoid the disadvantage.

184 Mr Kenward reminded the Tribunal that the Equality Act 2010 Schedule 8 paragraph 20(1) provides that a person is not subject to the duty to make reasonable adjustments if he or she does not know, and could not reasonably be expected to know that an interested disabled person has a disability and is likely to be placed at a disadvantage by the employer’s provision, criterion or practice (PCP) in issue. He referred to the EAT decision in Secretary of State for Work and Pensions v Alam [2010] ICR 665, EAT), that a Tribunal should approach this aspect of a reasonable adjustments complaint by considering two questions:

(1) did the employer know both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially; and

(2) if not, ought the employer to have known both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially.

#### Burden of proof: disability discrimination

185 Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.”

186 In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and

Igen Limited and others v Wong [2005] IRLR 258 apply. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that he did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondents and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability], failing which the claim succeeds.

#### The law: PIDA: Protected disclosure

187 Section 43B (1) ERA requires that, in order for any disclosure to qualify for protection, the person making it must have a 'reasonable belief' that the disclosure 'is made in the public interest'. This requirement applies to all cases where the disclosures were made on or after 25 June 2013 and applied to Mr Sondergaard's case where the Tribunal found the disclosure was not made in the public interest but with a view to persuading the respondent agreeing to drop the disciplinary charges brought against the claimant.

188 Mr Kenward referred the Tribunal to a number of cases which it has taken into account including the Court of Appeal decision in Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) [2018] ICR 731, CA, which concerned a number of disclosures about accounting practices at CG Ltd. The EAT observed that the words 'in the public interest' were introduced to do no more than prevent a worker from relying on a breach of his or her own contract of employment **where the breach is of a personal nature and there are no wider public interest implications** [the Tribunal's emphasis]. In the EAT's view, a relatively small group may be sufficient to satisfy the public interest test — this is a necessarily fact-sensitive question. The Court of Appeal dismissed CG Ltd's further appeal rejecting the argument that, for a disclosure to be in the public interest, it must serve the interests of persons outside the workplace, and that mere multiplicity of workers sharing the same interest was not enough. In the Court's view, even where the disclosure relates to a breach of the worker's own contract of employment (or some other matter where the interest in question is personal in character) there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest, as well as in the personal interest of the worker. In this regard, the following factors were suggested as possibly relevant:

- (1) the numbers in the group whose interests the disclosure served,
- (2) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed,
- (3) the nature of the wrongdoing disclosed, and
- (4) the identity of the alleged wrongdoer.

189 The Court of Appeal was not prepared to discount the possibility that the disclosure of a breach of a worker's contract 'of the Parkins v Sodexho kind' may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. Tribunals were warned that they "should, however, be cautious about reaching such a conclusion — the broad intent behind the 2013 statutory amendment was that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers, even where more than one worker is involved". In the present case, the Tribunal concluded only one person was involved, Mr Sondergaard, and he and his union representatives were exclusively concerned about fighting the claimant's corner in respect of the disciplinary charges brought against him.

190 In Underwood v Wincanton plc EAT 0163/15 the EAT held that it was arguable that the 'public interest' test was satisfied by a group of employees raising a matter specific to their terms of employment. The EAT took too narrow a view of the term 'public', failing to recognise that it can refer to a subset of the public, even one composed solely of employees of the same employer, and disputes about terms and conditions of employment could not constitute matters in the public interest.

#### Disclosure of information

191 Section 43B ERA defines a qualifying disclosure as 'any disclosure of information' relating to one of the specified categories of relevant failure.

192 What amounts to a 'disclosure of information' for the purposes of S.43B was explored by the EAT in Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325, EAT. The EAT noted the lack of any previous appellate authority on the meaning of 'disclosure of information', and observed that S.43F, which concerns disclosure to a prescribed person (draws a distinction between 'information' and the making of an 'allegation'. In its view, the ordinary meaning of giving 'information' is 'conveying facts'. The solicitor's letter had not conveyed any facts; it simply expressed dissatisfaction with G's treatment. For that reason, it did not amount to a disclosure of information and could not be a protected disclosure.

193 Mr Kenward referred the Tribunal to Kilraine v London Borough of Wandsworth [2018] ICR 1850, CA, the Court of Appeal held that 'information' in the context of S.43B is capable of covering statements which might also be characterised as allegations. **Thus, 'information' and 'allegation' are not mutually exclusive categories of communication — rather, the key point to take away from Cavendish Munro (above) was that a statement which is general and devoid of specific factual content cannot be said to be a disclosure of information tending to show a relevant failure** [the Tribunal's emphasis underlining the view it took of Kevin Hughes' alleged disclosures]. The Court in Kilraine endorsed observations made by Mr Justice Langstaff when that case was before the EAT — Kilraine v London Borough of Wandsworth [2016] IRLR 422, EAT — that 'the dichotomy between "information" and "allegation" is not one that is made by the statute itself' and that 'it would be a pity if tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined.'

194 The Court of Appeal in Kilraine went on to stress that the word ‘information’ in S.43B(1) has to be read with the qualifying phrase ‘tends to show’ — i.e. the worker must reasonably believe that the information ‘tends to show’ that one of the relevant failures has occurred, is occurring or is likely to occur. Accordingly, for a statement or disclosure to be a qualifying disclosure, **it must have sufficient factual content to be capable of tending to show one of the matters listed in S.43B(1)(a)–(f)**. It is a question that is likely to be closely aligned with the issue of whether the worker making the disclosure had the reasonable belief that the information he or she disclosed tends to show one of the six relevant failures. Furthermore, as explained by Lord Justice Underhill in Chesterton Global Ltd cited above, this has both a subjective and an objective element. If the worker subjectively believes that the information he or she discloses does tend to show one of the listed matters, and the statement or disclosure he or she makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his or her belief will be a reasonable belief.

195 The context of any putative disclosure is also highly relevant. The Court of Appeal in Kilraine adapted the example given in Cavendish Munro of a hospital worker informing his or her employer that sharps had been left lying around on a hospital ward. The Court explained that if instead the worker had brought his or her manager to the ward and pointed to the abandoned sharps, and then said ‘you are not complying with health and safety requirements’, the oral statement would derive force from the context in which it was made and would constitute a qualifying disclosure. The statement would clearly have been made with reference to the factual matters being indicated by the worker at the time. In bringing a whistleblowing claim in reliance on the disclosure, the worker’s claim form and evidence would then need to set out the meaning of the statement *as derived from its context*. The employer would then have a fair opportunity to dispute the context relied upon, or whether the oral statement could really be said to incorporate by reference any part of the factual background as claimed.

### Time limits

196 Section 48 of the ERA provides;

“(3) An employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the “date of the act” means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on; and, in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done”.

197 Mr Kenward referred to Flynn v Warrior Square Recoveries Ltd [2014] EWCA Civ 68, CA in which the Court of Appeal stressed the need for Tribunals to identify with precision the act or deliberate failure to act that is alleged to have caused detriment when considering whether an act / omission extended over a period for the purposes of S.48(4)(a). It is a mistake in law to focus on the detriment and whether the detriment continued.

#### PIDA - detriment

198 Section 47B gives a worker the right not to be subject to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure.

199 Section 48(2) provides that on a complaint under certain subsections, including that concerned with detriment on the ground of having made a protected disclosure: "... it is for the employer to show the ground on which any act or deliberate failure to act was done."

200 Section 43A ERA 1996 provides that a protected disclosure is a qualifying disclosure as defined by Section 43B, which is made by a worker in accordance with any of Sections 43C to 43H. In the present case Mr Sondergaard relies on section 43B(a) and (c) "...that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur and (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

201 The Tribunal was referred by Mr Kenward to the EAT decision in London Borough of Harrow v Knight [2002] EAT/0790/2001 "The authorities clearly establish that the question of the "ground" on which an employer acted in victimisation cases **requires an analysis of the mental processes (conscious or unconscious) which caused him to so act**" (paragraph 17) [the Tribunal's emphasis]. The point was made that "on the ground of" is equivalent to the test of victimisation in the context of a discrimination claim, and therefore consideration of it requires an analysis of the mental processes, conscious or unconscious, which caused the individual concerned to have acted as they did. The Tribunal in the case of Mr Sondergaard carefully analysed the mental processes of the main players in this litigation, particularly Philomena Dwyer in her handling of arrangements and venue, Nicholas Mernock when he came to his decision that dismissal was appropriate and Nick Searle when he rejected the claimant's appeal.

202 In the well-known case of Blackbay Ventures Ltd v Gahir [2014] IRLR 416 where there is a dispute about whether the complainant has done sufficient to make a qualifying disclosure, the ET should ask itself a series of discrete questions in respect of each claimed disclosure, in order to establish whether all the elements of the definition are satisfied. Paragraph 98 sets out the following:

98. "It may be helpful if we suggest the approach that should be taken by Employment Tribunals considering claims by employees for victimisation for having made protected disclosures.

1. Each disclosure should be identified by reference to date and content.

2. The alleged failure or likely failure to comply with a legal obligation...should be identified.
3. The basis upon which the disclosure is said to be protected and qualifying should be addressed.
4. Each failure or likely failure should be separately identified.
5. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the Employment Tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations.
6. The Employment Tribunal should then determine whether or not the Claimant had the reasonable belief referred to in S43 B1 and under the 'old law' whether each disclosure was made in good faith; and under the 'new' law whether it was made in the public interest.
7. Where it is alleged that the Claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the Claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the Respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.
8. The Employment Tribunal under the 'old law' should then determine whether or not the Claimant acted in good faith and under the 'new' law whether the disclosure was made in the public interest.

203 In Fecitt & Ors v NHS Manchester [2012] ICR 372, the Court of Appeal, Elias LJ giving the main speech, Davis and Mummery LJJ concurring, held that the correct test, in relation to a detriment claim, **is whether the protected disclosure materially influenced, in the sense of being more than a trivial influence upon, the employer's treatment of the whistle-blower, as opposed to the test being the one that would apply in the unfair dismissal context, of whether the protected disclosure was the sole or principal reason for the dismissal** [the Tribunal's emphasis] See paragraph 45. The Court of Appeal considered the question of whether such a claim must succeed if the treatment complained of was found to be "related to" the disclosure, or whether it was possible on appropriate facts for the Tribunal to distinguish, for example, between the fact of the disclosure and the way it was made. The Court of Appeal accepted that in an appropriate case such a distinction should be drawn, although caution was required - paragraph 51. In the case of Mr Sondergaard the Tribunal found that the decisions made by Philomena Dwyer, Nicholas Mernock and Nick Searle were not influenced in any way by the fact that the claimant's union representatives had raised the issue of the differences set out in two notes for file and Ian Wooldridge failing to inform Professional Standards that he had informally dealt with three of the five allegations of misconduct.



Automatic unfair dismissal section 103A ERA

204 Section 103A of the ERA provides “An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure”.

205 Mr Kenward referred the Tribunal to the Court of Appeal decision in Kuzel v Roche Products Ltd [2008] ICR 799, CA at paragraph 53; “the reason or principal reason for a dismissal is a question of fact for the tribunal. As such it is a matter of either direct evidence or of inference from primary facts established by evidence...the burden of proof issue must be kept in proper perspective. As was observed in Maund v Penwith District Council [1984] ICR 143, when laying down the general approach to the burden of proof in the case of rival reasons for unfair dismissal, only a small number of cases will in practice turn on the burden of proof. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the tribunal to consider the evidence and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.” Mr Kenward submitted that ultimately, the same issues arise as in relation to the detriment part of the case, as in relation to the dismissal part of the victimisation case, including in relation to causation, albeit the legal test is different.

206 Serco Limited v Dahou [2017] IRLR 81 provides that on a complaint under Section 146 “it shall be for the employer to show what was the sole or main purpose for which he acted or failed to act”. In Dahou the EAT overturned a finding in favour of the complainant, because the ET had failed sufficiently to get to grips with the employer’s case as to why it had treated him in the way that it had. That decision, of Simler J as she then was, was upheld by the Court of Appeal [2017] IRLR 81. At paragraphs 29 to 32 the Court (Laws LJ, Longmore and Richards LJJ concurring) said: It is plain that both the purpose of an employer’s act or omission (sections 146 and 148) and the reason for dismissal of an employee (section 152) consist in the factors operating on the mind of the relevant decision-maker: see, for example, Baddeley [2014] EWCA Civ 658, per Underhill LJ at paragraphs 41 and 42. Both under section 146 (see Yewdall) and section 152 (see Kuzel), it is for the employee to raise a *prima facie* case. In the dismissal case it is perhaps more accurate to say that it is for the employee to show “only that there is an issue warranting investigation and capable of establishing the prohibited reason”: Simler J (paragraph 52) referring to Maund [1984] ICR 143... If the *prima facie* case is made out, then it is for the employer to show the purpose of his act or the reason for the dismissal, and therefore to prove what were the factors operating on the mind of the decision-maker.” In the case of Mr Sondergaard the Tribunal considered in detail the factors operating on the mind of Nicholas Mernock when he came to his decision to dismiss as set out in detail within the finding of facts above, concluding that the only reason for the dismissal was his genuine belief based upon reasonable grounds that the claimant had committed acts of gross misconduct for which there was no mitigation. The fact the claimant’s union representatives had brought up the issue of the different notes for file and Ian Wooldridge’s behaviour played no part in Nicholas Mernock’s decision-making process when it came to the dismissal.

207 In the passage in the EAT’s decision in Dahou, which refers to the earlier EAT decision in Yewdall v SSWP, UKEAT/0071/05, Simler J went on to draw

attention to the fact that, unlike the burden of proof provisions in the **EqA** under these provisions of the ERA, a shifting of the burden, and a failure by the employer then to persuade the Tribunal of its innocent explanation does not *automatically* lead to a finding in favour of the employee. In relation to Mr Sondergaard's case the Tribunal considered the motivation of Nicholas Mernock, the dismissing officer, concluding that the disclosures made on behalf of the claimant did not operate on his mind at all and there was no causal connection between his decision to dismiss the claimant for gross misconduct and whistleblowing.

### Unfair dismissal

208 Section 94(1) of the Employment Rights Act 1996 ("the 1996 Act") provides that an employee has the right not to be unfairly dismissed by his or her employer. Section 98(1) of the 1996 Act provides that in determining whether the dismissal is fair or unfair, it is for the employer to show the reasons for the dismissal, and that it is a reason falling within section 98 (2) of the 1996 Act. Section 98(2) includes conduct of the employee as being a potentially fair reason for dismissal.

209 Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

210 Where the reason for dismissal is based upon the employee's conduct, the employer must show that this conduct was the reason for dismissal. For a dismissal to be procedurally fair in a case where the alleged reason for dismissal is misconduct, Lord Bridge in Polkey –v- A E Dayton Services Limited [1981] ICR (142) HL said that the procedural steps necessary in the great majority of cases of misconduct is a full investigation of the conduct and a fair hearing to hear what the employee has to say in explanation or mitigation. It is the employer who must show that misconduct was the reason for the dismissal, and must establish a genuine belief based upon reasonable grounds after a reasonable investigation that the employee was guilty of misconduct – British Home Stores Ltd v Burchell [1980] CA affirmed in Post Office v Foley [2000] ICR 1283 and J Sainsbury v Hitt [2003] C11: "In terms of the extent of the investigation required, the Court of Appeal held (at paragraph 30) that the band of reasonable responses test applies as much to the question of whether the investigation into the suspected misconduct was reasonable in the circumstances, as it does to the reasonableness of the decision to dismiss".

211 In short, the Tribunal is required to conduct an objective assessment of the entire dismissal process, including the investigation, without substituting itself for the employer.

212 Mr Kenward referred the Tribunal to Iceland Frozen Foods Limited v Jones [1982] IRLR 43; In applying the test in Burchell, cited above, the Tribunal must not substitute its decision as to what was the right course for the Respondent to adopt. It must ask itself whether the decision to dismiss the Claimant fell within the band of reasonable responses which a reasonable employer might have adopted.

213 In Whitbread plc v. Hall [2001] EWCA Civ 268, CA the Court of Appeal confirmed that the “band of reasonable responses test” applied to the issue of procedural fairness, as set out below. “Section 98(4) of the 1996 Act requires the Tribunal to determine whether the employer ‘acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee’ and further to determine this in accordance with the ‘equity and the substantial merits of the case’. This suggests that there are both substantive and procedural elements to the decision to both of which the ‘band of reasonable responses’ test should be applied” (paragraph 16 per Hale LJ).

214 In Taylor v OCS Group Limited [2006] ICR 1602, CA the Court of Appeal stressed that the Tribunal’s task under ERA 1996 section 98(4) is to assess the fairness of the disciplinary process. Boys and Girls Welfare Society v McDonald [1996] IRLR 129. There is always an area of discretion within which management may decide on a range of disciplinary sanctions, all of which might be considered reasonable. It is not for the Tribunal to ask whether a lesser sanction would have been reasonable, but if dismissal was within the range of reasonable responses open to employers. The Court of Appeal in British Leyland (UK) Ltd v Swift [1981] IRLR 91 set out the correct approach: “If no reasonable employer would have dismissed him then the dismissal was fair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair...in all these cases there is a band of reasonableness, within which one employer might reasonably take one view and another reasonably take a different view. In between extreme cases of misconduct there will be cases where there is room for reasonable disagreement amongst reasonable employers as to whether dismissal for the misconduct is a reasonable or unreasonable response: LJ Mummery in HSBC Bank Plc v Madden [2000] ICT 1283. In relation to Mr Sondergaard, the Tribunal took the view that the acts of misconduct found by Nicholas Mernock following an exhaustive and procedurally fair disciplinary process, were extremely serious according to the conduct expected of a serving fire fighter taking into account the fact the claimant’s considerable experience.

215 Mr Weiss referred the Tribunal to Chamberlain Vinyl Products Ltd v Patel [1996] ICR 113 EAT submitting a reasonable investigation can extend to mitigation raised by the claimant including his confusion over the BA tests and consultation with WM Pollock, his mental health and tactile personality.

216 The Tribunal was also referred by Mr Weiss to Khanum v Mid-Glamorgan Health Authority [1978] IRLR 215 in which the EAT held in a domestic Tribunal such as that a disciplinary hearing, all that is required is that the three basic requirements of natural justice be fulfilled; namely:

217 (1) that the person should know the nature of the accusation against him or her;

218 (2) that he should be given an opportunity to state his case; and

219 (3) the Tribunal should act in good faith.

220 In Mr Sondergaard’s case the Tribunal took the view that natural justice and the three basic requirements had been fulfilled at the three disciplinary hearings, which included the cross-examination of AB, and it did not accept Mr Weiss’ submissions to the contrary. The testing regime in respect of the BA equipment was

explored and the allegations raised by AB may have been viewed as “highly subjective” by the claimant, his union representatives and Mr Weiss, however, when all of the evidence was put before the claimant he was under no illusion as to the seriousness of the allegations, and the inappropriate nature of the “industrial language” the claimant admitted using. Contrary to Mr Weiss’ submission the allegations raised by AB were put to the claimant in considerable detail, the rhetorical question asked by Mr Weiss concerning which elements did the respondent consider inappropriate and which were not was clear and the claimant questioned on them. It is notable that Nicholas Mernock questioned AB a number of times to satisfy himself that she was telling the truth, and given the questions covered very sensitive information at the request of the claimant and Les Skarratts the conversation must have been most uncomfortable with AB answering intimate questions, it appears to the Tribunal that Nicholas Mernock approached the question of the claimant’s guilt or innocence with an open mind, contrary to the claimant’s belief and Mr Weiss’ submissions.

#### Disparity of treatment

221 Mr Kenward referred the Tribunal to Harvey on Industrial Relations and Employment Law which sets out “four notes of caution” at paragraphs DI [1040] to [1044], as below.

221.1 “First, although the employer should consider how previous similar situations have been dealt with, the allegedly similar situations must truly be similar (Hadjiioannou v Coral Casinos Ltd [1981] IRLR 352 followed in Procter v British Gypsum Ltd [1992] IRLR 7). In practice this is likely to set significant limitations on the circumstances in which alleged inequitable or disparate treatment can render an otherwise fair dismissal unfair. The point is emphasised by the decision of the Court of Appeal in Paul v East Surrey District Health Authority [1995] IRLR 305”. In relation to this point the Tribunal found taking into account the fact the claimant was dismissed for two serious allegations; failing to test breathing apparatus on three occasions and his behaviour towards AB, there were no similar situations where firefighters were not dismissed for cumulative acts of gross misconduct in truly similar situations.

221.2 “Second, an employer cannot be considered to have treated other employees differently if he was unaware of their conduct” “

221.3 Third, if an employer consciously distinguishes between two cases, the dismissal can be successfully challenged only if there is no rational basis for the distinction made; Securicor Ltd v Smith [1989] IRLR 356, CA, an approach also reflected in the East Surrey District Health Authority case referred to above and in Harrow London Borough v Cunningham [1996] IRLR 256”.

221.4 “Fourth, even if there is clear inconsistency, this is only a factor which may have to give way to flexibility. Accordingly, if, say, an employer has been unduly lenient in the past, he will be able to dismiss fairly in future notwithstanding the inconsistent treatment. This is in essence the reasoning of the Scottish EAT in United Distillers v Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540”.

222 The question for the Tribunal is the reasonableness of the decision to dismiss in the circumstances of the case, having regard to equity and the substantial merits of the case. The Tribunal will not substitute its own view for that of the respondent. In order for the dismissal to be fair, all that is required is that it falls within the band of reasonable responses open to employer. It is necessary to apply the objective standards of the reasonable employer – the “band of reasonable responses” test – to all aspects of the question of whether the employee had been fairly dismissed, including whether the dismissal of an employee was reasonable in all the circumstances of the case.

223 The test remains whether the dismissal was within the range of reasonable responses and whether a fair procedure was followed. Section 98 (4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent’s undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

Conclusion: applying the facts to the law

Knowledge of disability- first, second and third issues

224 As indicated above, the Tribunal decided on the balance of probabilities that the claimant was not disabled for the purpose of section 6 EqA. In the alternative, it has dealt with the remaining issues of knowledge and reasonable adjustments connected to the disability discrimination claim.

225 With reference to the third issue, namely, if the Claimant was a disabled person, did the Respondent have knowledge, actual or constructive, of the Claimant’s disability, the Tribunal found that it did not. Reference to stress and depression in notes was insufficient to fix the respondent with knowledge, the occupational health references to depression are historic, specifically pinpointed to bereavement and unfortunate life events, including the disciplinary investigation and hearing. It is notable the disciplinary investigation had been going on for some time before the claimant self-referred to occupational health on the day he was suspended, and contacted his GP 2-days later.

Fourth issue: PCP1

226 With reference to the fourth issue, namely, did the Respondent apply the following PCP to the Claimant: a requirement to attend investigation and disciplinary hearings on the Respondent’s premises, the Tribunal found that it did not as the first interview in connection with AB was held at River Alt Resource Centre, which was not fire service premises. The Tribunal found holding the disciplinary hearing at headquarters was a PCP; and apart from this the respondent was flexible when it came to venues for the investigation meeting providing the necessary technology was available.

Fifth issue: substantial disadvantage

227 With reference to the fifth issue, namely did the requirement to hold the disciplinary hearing at fire service premises place the Claimant at a substantial disadvantage in comparison to non-disabled persons, because he worried that he might come across a colleague given the AB rumors, and this in turn, on the claimant's case, exacerbated his ill-health, the Tribunal found the claimant was not placed at a substantial disadvantage on the balance of probabilities, and there was no satisfactory medical evidence supporting the claimant's contention that his ill-health had been exacerbated by disciplinary hearings being conducted on fire services premises. It is notable that on the 10 May 2018 Let Skarratts requested Belle Vale Fire Station as a venue, thus contradicting the claimant's case that he was worried he may come across colleagues at headquarters given the likelihood that he would come across firefighters in a fire station.

228 With reference to the sixth and seventh issue, namely, had the respondent knowledge of the claimant's disability (which it did not) the Tribunal found it would have not have possessed actual or constructive knowledge of the substantial disadvantage based on what the union representatives were saying about the claimant at the time, and it did not breach its duty by failing to conduct the meetings away from the Respondent's premises at a neutral location in order that the Claimant was unlikely to encounter colleagues. He was concerned with colleagues gossiping about him in relation to AB, and coming across colleagues who had heard the rumours. The claimant was not concerned with a neutral venue. He had requested one hearing at Belle Vale Fire station which was not a neutral venue, and the respondent could not guarantee that no firefighters would turn up at the premises, which was near to the claimant's home and it suited his purpose at the time.

Eighth issue: PCP2

229 With reference to the eighth issue, namely, did the Respondent apply the following PCP to the Claimant: suspend the Claimant from work on 26 February 2018 whilst failing to keep in regular contact with the Claimant during his suspension., the Tribunal found it did not. The claimant was suspended following serious allegations of sexual harassment being made against him, and Philomena Dwyer instructed the claimant to keep away from premises. She made it clear to the claimant if there were any issues, she was his contact but not the only contact. During this period the claimant was in regular communication with his union representatives and Philomena Dwyer gave oral evidence that in these situations contact with individuals was through the union, which the Tribunal accepted as credible and supported by the contemporaneous documentation in the lever arch files where there was a vast array of evidence reflecting the communications that took place ranging from telephone calls, emails, messages left and house calls. Even if the claimant's line manager was not contacting him personally, there was a line of communication between the claimant and very active union representatives who were robust in their support of him.

Ninth, tenth and eleventh issue: substantial disadvantage and duty to make adjustments

230 With reference to the ninth issue, the Tribunal found here was no satisfactory evidence that the claimant was at a substantial disadvantage in comparison to non-

disabled persons. The Tribunal took the view that the respondent could have been criticised either way. Had managers regularly contacted the claimant at home criticisms may have followed, and in any event, it did not possess the requisite knowledge of the substantial disadvantage.

231 With reference to the eleventh issue, namely the alleged breach of the respondent's duty to make adjustments by it not keeping in regular touch with the Claimant via email, calls and/or assigning to the Claimant an individual within the Respondent organisation with whom he could keep in touch during his absence, the Tribunal found the respondent was not in breach on the basis that Philomena Dwyer was the contact and there were numerous communications between the union and the respondent, the former presumably acting on instructions given by the claimant.

Twelfth and thirteenth issue: PCP3

232 With reference to the twelfth issue, namely, did the Respondent apply to the Claimant the following PCP: playing the covert recording of a conversation between the Claimant and AB at hearings, starting with the investigation meeting on 14 May 2018 onwards, the Tribunal found that the PCP was the requirement in accordance with the ACAS Code and natural justice for relevant recordings to be played at investigations and disciplinary hearings in order that an employee facing allegations understands the case and has an opportunity to deal with the evidence against him or her. It was imperative that the claimant had the opportunity to listen to the recording and the respondent would have been criticised had he not.

233 There was no satisfactory evidence it placed the claimant at a substantial disadvantage; he did not like what he was hearing, he was ashamed and upset by his behavior and held his head in his hands. The claimant did not want to listen to the recording more than once, and subsequently he could leave the meeting when it was being played. It was suggested by Mr Weiss that the respondent should have relied upon the transcript produced; the Tribunal disagrees. The recording captures the flavor of the incident in a way the transcript does not, it reflects the angry tone of the claimant, the background noises including the claimant banging on the table and AB's monosyllabic replies that appeared to by-pass the claimant as he was shouting an angry tirade about the respondent and disciplinary proceedings, expressing his belief that he was about to "get away with it" and wanted to celebrate with giving AB a hug albeit his hands "would have been in the air" in an act of celebration according to the claimant, who the Tribunal found was not placed at a substantial disadvantage in comparison to non-disabled persons.

Fourteenth and fifteenth issue: knowledge

234 The respondent had no knowledge at the outset that the claimant would feel distressed when he first listened to the recording, and after that they gave him the facility to take time out and not to listen to it. Had the respondent not attempted to play the recording at the investigation and disciplinary hearing it could have been criticised and would have fallen foul of the ACAS Code, which no doubt the union would have raised as an issue. It is notable Les Skarratts asked for the recording on AB's phone to be played at the adjourned hearing on 5 July 2018 to see if there was any video footage whilst the claimant was present at the meeting and before he became distressed. It was at that point the claimant left the room and the recording

played back in his absence. At no stage during the disciplinary process did the respondent force the claimant to sit there and listen to the recording.

235 The Respondent have no knowledge of the alleged substantial disadvantage, the Tribunal found it did not have any idea the claimant would react as he did prior to the claimant indicating his unhappiness with the recording playback. The evidence before the Tribunal was that if the claimant or his representative requested a break, it was provided. The respondent did not breach its duty to make reasonable adjustments as alleged; it stopped playing the recording when asked; a transcript of the recording was produced but not in lieu of playing it the claimant's own union representative having requested playback and the claimant was provided with the opportunity to take a break and did so as evidenced in the findings of facts above.

Whistleblowing detriment and dismissal  
Sixteenth issue

236 With reference to the sixteenth issue, namely, did the Claimant make a disclosure(s) of information by way of:

- (a) On or around 19 February 2018, his Union Representative, Kevin Hughes, disclosing to Philomena Dwyer of the Respondent's Professional Standards, that WM Ian Woolridge had amended the Claimant's Note for File, the Tribunal found that he raised a question mark over whether the notes of files were different, unbeknown to the claimant.
- (b) In a letter dated 1 June 2018 addressed to Nicholas Mernock, his Union Representative, Les Skarratts, disclosing that WM Ian Woolridge had amended the Claimant's Note for File, the Tribunal found that he did, unbeknown to the claimant, with the sole intention of persuading the respondent to drop all the allegations that had previously been dealt with informally.
- (c) In a disciplinary hearing on 2 July 2018 chaired by Nicholas Mernock, his Union Representative, Les Skarratts, disclosing that WM Ian Woolridge had amended the Claimant's Note for File, the Tribunal found that he did.

Seventeenth issue

237 With reference to the seventeenth issue, namely, did the disclosure of information tend to show, in the reasonable belief of the Claimant, that there had been: a breach of a legal obligation; and/or a miscarriage of justice; and/or that information tending to show any matter falling within any of the above, had been or was likely to be deliberately concealed, the Tribunal found that he had not in respect of the first disclosure, which the claimant was unaware of. There was no evidence that Kevin Hughes held any belief, reasonable or otherwise, that there had been a breach of a legal obligation or a miscarriage of justice and the Tribunal's findings reflect this at paragraph 87 above noting all that had been raised was the need to consider the differences. The Tribunal concluded that this was not a disclosure of



information for the purposes of S.43B taking into account the legal principles set out in Cavendish Munro cited above, and Kilraine as there was no sufficient factual content to be capable of tending to show one of the matters listed in S.43B(1)(a)–(f). There was no evidence Kevin Hughes had the reasonable belief that the information he disclosed tends to show one relevant failures relied upon: Chesterton Global cited above. As the claimant was totally unaware of what Kevin Hughes was saying the claimant's reasonable belief is irrelevant.

238 Turning to the 1 June 2018 referred to in paragraph 129 above, there was evidence that Les Skarratts held a reasonable belief that Ian Waldrige had either "Willfully misrepresented the evidence or tampered with it...altered the note for file to exaggerate the case against my member...". Which was a breach of a legal obligation; and/or a miscarriage of justice and a similar allegation of tampering was made at the 2 July 2018 reconvened disciplinary hearing and the Tribunal concluded had Les Skarratts made the disclosure in the public interest, which he did not, it may well have qualified as a protected disclosure.

#### Eighteenth issue

239 The public interest requirement has not been conceded by the respondent, it applies to all types of relevant failures, including breach of a legal obligation under S.43B(1)(b) and a miscarriage of justice. The requirement was introduced in 2013 excluding private employment disputes from the scope of the protected disclosure provisions. The Tribunal was satisfied, given its findings of facts, that the disclosures in question were part of a series made within a private employment dispute with no thought of any wider public interest involving anybody other than the claimant. Mr Weiss submitted that the claimant in cross-examination made it plain the disclosures of information were in the public interest because "justice needed to be seen to be done to him" and there was wider public interest in a public body being seen to treat its employees fairly. The Tribunal did not agree that either the claimant or his union representatives had this in mind at the time when the disclosures were made or indeed after the claimant was dismissed and appealed, evidenced by the grounds of appeal which omitted any reference to whistleblowing or public interest.

240 With reference to the eighteenth issue, namely, did the Claimant have a reasonable belief that the disclosure was in the public interest, the Tribunal found that he did not, either personally or through his union representatives. In respect of all disclosures the Tribunal concluded on the balance of probabilities there was no thought of any public interest, the concerns of Kevin Hughes and Les Skarratts was to persuade the respondent to drop the charges against the claimant in what was a private employment dispute in which the public would have no interest.

241 In the 1 June 2018 letter Les Skarratts referred to "Double jeopardy being the issue" seeking an investigation and for "immediate steps to remove all allegations that have previously dealt with by the employer via its agent WM Waldrige" to be taken. As found by the Tribunal in above, there was no reference to any other person or public interest in the notes for file being investigated; the thrust of the complaint was that allegations had previously been dealt with should be dropped against the claimant. At the reconvened disciplinary hearing similar points were raised and successfully argued by Les Skarratts which resulted in those allegations previously dealt with by Ian Waldrige informally as per the note for file, being discounted by

Nicholas Mernock and the claimant was neither disciplined or dismissed on that basis. Les Skarratts and the claimant had achieved their true objective.

242 It is notable the Court of Appeal in Chesterton Global rejected the argument that, for a disclosure to be in the public interest, it must serve the interests of persons outside the workplace, and that mere multiplicity of workers sharing the same interest was not enough. In the Court's view, even where the disclosure relates to a breach of the worker's own contract of employment (or some other matter where the interest in question is personal in character) there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest, as well as in the personal interest of the worker including the numbers in the group whose interests the disclosure served (in the claimant's case one person), the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed, the nature of the wrongdoing disclosed, and the identity of the alleged wrongdoer. In the present case, the Tribunal concluded only one person was involved, that being Mr Sondergaard's private interest, and his union representatives were exclusively concerned with fighting the claimant's corner in respect of the disciplinary proceedings, and the Tribunal's view is supported by the fact that the issue of whistleblowing and protected disclosures was an afterthought for the purpose of this litigation, not referenced even in the grounds of appeal during a period when the claimant continued to be represented by the union when one would have expected whistleblowing detriment to have been in the forefront of their minds.

243 The Court of Appeal in Chesterton Global was not prepared to discount the possibility that the disclosure of a breach of a worker's contract 'of the *Parkins v Sodexho* kind' warning Tribunals to be "cautious about reaching such a conclusion — the broad intent behind the 2013 statutory amendment was that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers, even where more than one worker is involved." The Tribunal has taken this warning into account, setting it against the factual matrix set above and concluding the only context in which the disclosures was made was the claimant's private workplace dispute.

#### Nineteenth issue

244 Even had there been protected disclosures made (which for the avoidance of doubt the Tribunal did not find) the detriments relied upon were not on the ground that he had made any such protected disclosure and the claimant's case fell at the causation hurdle.

245 With reference to detriment 19(a) the Tribunal found the claimant was suspended from work on the 26 February 2018 because of serious misconduct allegations involving AB and the respondent was entitled to suspend in the circumstances pending an investigation. There was no other causal link.

246 With reference to detriment 19(b) and (c) the Tribunal found the respondent had a duty to investigate AB's allegations and when it became apparent that there was a case to answer, take the decision to proceed to a disciplinary hearing as opposed to dealing with AB's complaints under the Bullying and Harassment Policy which it should have done as submitted by Mr Weiss. The Tribunal found the respondent, in accordance with its procedures, could proceed immediately to a disciplinary investigation and disciplinary hearing if the complaints were so serious

and it found AB's allegations to fall into this category. There was no causal connection with any whistleblowing.

247 The Tribunal found the claimant and his union representatives understood that seriousness of the two new allegations, particularly the complaints raised by AB. The Tribunal did not find there was any evidence of a conspiracy between Philomena Dwyer and AB, as alleged by the claimant (and not Mr Weiss who had confirmed to the Tribunal the claimant's case was not that AB had raised the allegations against the claimant as a result of the disclosure made on 19 February 2018.) The claimant's case was that there was a number of conspirators whose intention was to cause him to suffer detriments and dismissal, including AB and others. The Tribunal took the view that the claimant fully appreciated the difficult position he was in, bearing in mind the recording supported AB's complaint and the reference to the two versions of the note for file was in part to deflect from the seriousness of the main two allegations for which the claimant had no real defence or mitigation and for which he was dismissed.

248 With reference to 19(d) as indicated below the Tribunal did not find the claimant was subjected to an unfair disciplinary process and he did not suffer a detriment in that respect.

249 With reference to detriment 19(e) (i), (ii) and (iii) the same point applies to all aspects of the disciplinary hearing, including the appeal, the neutral venues, playing covert recordings, not keeping in regular touch or assigning to the claimant an individual with whom he could keep in touch during his suspension, are all matters which have dealt with the Tribunal above. There was no evidence before the Tribunal that the disciplinary proceedings were conducted with a lack of empathy towards the Claimant's health, quite the reverse. There were numerous adjournments when requested and the claimant left the hearing when recordings were being played back; the venues were reasonably private borne out by the fact that no untoward incidents took place involving the claimant or any of his colleagues, who he did not see and occupational health provided a report confirming the claimant was appropriately supported, and his health unlikely to improve until the disciplinary issues had been resolved "and "an outcome he finds acceptable."

#### Issue 20 and 21: Time limits

250 Having found that the claimant did not suffer any of the detriments alleged there is no requirement for the Tribunal to consider time limits.

#### Issue 22: Causation

251 Had the claimant succeeded in establishing that he had made a protected disclosure in the public interest and suffered detriment, which he did not, as indicated earlier the Tribunal would have gone on to find that there was no causal link between the suspension, disciplinary process, disciplinary proceedings, venues and the dismissal having considered the motivation of Philomena Dwyer, Gary Oakford, Nicholas Mernock and Nick Searle. Turning to the act of dismissal, the sole reason for the Claimant's dismissal was that he had committed acts of serious misconduct, and there was no causal link with any of the disclosures.

Ordinary unfair dismissal

252 With reference to issue 23, namely, what was the reason for the Claimant's dismissal, the Tribunal found the claimant was dismissed for misconduct as set out in the outcome letter dated 16 July 2018.

253 With reference to issue 24, namely, if the reason for the dismissal was conduct, did the Respondent have a belief in the Claimant's misconduct, the Tribunal found that Nicholas Mernock held a genuine belief. He had reasonable grounds upon which to sustain that belief, including the claimant's admissions and Gary Oakford had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

254 Nicholas Mernock held a genuine belief the claimant was guilty of gross misconduct of the BA health and safety breaches and AB's allegations. Not checking BA, was a "very serious breach of health and safety legislation," a reference was made to the Joint Secretaries' Agreement reached. The claimant admitted he had not checked his BA equipment on the three consecutive occasions, and the fact the claimant was arguing a part-test had been carried out was considered by Nicholas Mernock whose conclusion that it was "immaterial...it was not tested in line with the requirements of the authority...and the repercussions of that in the event of an emergency call are life threatening" objectively assessed, fell within the band of reasonable responses. Nicholas Mernock held a genuine belief that a half test was as serious as no test, and this belief was reasonable given it was a potential risk to the personal safety of the claimant and his colleagues, and was by itself sufficient to warrant a summary dismissal on the grounds of gross misconduct. The claimant was an experienced firefighter who had received regular training in BA equipment testing, and was aware of the consequences, particularly since some of his colleagues had narrowly avoided dismissal as a result of a one-off Joint Secretaries Agreement reached in 2013 when a number of colleagues, other than the claimant, was found to have not carried out any or full tests. Mr Weiss submitted that the dismissal was unfair on the basis that Nicholas Mernock had not satisfied himself as to the genuineness of the claimant's confusion with the BA testing process by asking WM Pollock.

255 Nicholas Mernock gave credible evidence that given the claimant's experience, his response to the investigator's question concerning whether he had any barriers to learning, and the fact that he was regularly trained to carry out BA checks and had so without any difficulties for a number of years, there was no need for him to speak to WM Pollock whom the claimant had spoken to about his "confusion" after the event. The Tribunal found that Nicholas Mernock's action fell well within the band of reasonable responses open to a reasonable employer conducting a disciplinary hearing. It is notable that the claimant, at the time of the first investigation meeting, fully recognised the "severity of the allegation" in contrast to Mr Weiss who submitted that a part-test should not have resulted in a sanction at all.

256 The Tribunal found the decision to dismiss the claimant for the BA breaches fell well within the band of reasonable responses open to a reasonable employer.

257 Nicholas Mernock found allegation 4 concerning AB's allegations of inappropriate language and touching "exceptionally serious" in marked contrast to

the position adopted by the claimant and Les Skarratts. Nicholas Mernock was entitled to weigh up the evidence and treat the claimant's explanations with a degree of skepticism. A reasonable response of a reasonable employer was to consider with a certain degree of skepticism whether the claimant, who disputed banging the table in the presence of AB, changed his story when the sound of banging could be clearly heard on the recording, explained via Les Skarratt that he was pretending to type on an imaginary typewriter, could be believed.

258 Mr Weiss in oral submissions argued the claimant, who was tactile, does not accept "one always knows where the boundaries are" and it was for the respondent to make it clear precisely what the offensive language and touching the claimant was being criticised for as AB never had a problem with his swearing or calling another female employee a slag, and this was contrary to natural justice with the claimant being given the opportunity to stage his case.

259 The Tribunal did not agree with Mr Weiss' submissions and analysis. The evidence presented to the claimant during the investigation and disciplinary process underlined the seriousness of all the allegations complained of by AB, which covered his general behaviour, and the claimant on three occasions was given the opportunity to state his case in full and did so with Les Skarratts not holding back on AB and her credibility. It does not need the respondent to warn the claimant that referring to female colleagues as "slag," touching AB on the cheek, hugging AB, twirling AB's hair, getting so close to AB that in the words of one witness it looked as if the claimant was going to "jump in" the car, seeking AB out and making reference to her being "a lot of fun outside work" amounts to sexual harassment whether or not the claimant believes his tactile behaviour towards females within the workplace is acceptable unless they say otherwise.

260 Nicholas Mernock found AB's evidence consistent, he found the claimant's behavior by the time of the third incident as "a little sinister" and had serious concerns about the claimant "maligning" female officers using terminology such as "slag". He accepted the claimant continued to check to see if AB was on her own "and believed the claimant put his arms around AB without permission or approval and the noise "prior to termination on the recording backs this up." In short, he believed AB was telling the truth, as were the witnesses Dave Welsh, Carol Pinney, Stephen Pruden and Sara Garside, who all provided witness statements, and he did not believe the claimant. Mr Weiss submitted that the claimant's female colleagues, should have given evidence as to whether the claimant was tactile or not. The Tribunal notes that the claimant and his union representatives had the facility to call such witnesses and consciously chose not to do so. In any event, Nicholas Mernock took the view that the claimant's actions went beyond those of a tactile individual, and he was entitled to reach this conclusion on the evidence before him. The issue was the claimant's behavior towards AB, whether he was tactile with other females within the organisation did not go to the point when it came to considering his behaviour towards a young female apprentice that he had met four times in total.

261 In short, the Tribunal found Nicholas Mernock held a genuine belief based upon a reasonable investigation that included CCTV evidence, a mobile phone recording, corroborative witness statements which had been taken as read, and the claimant's admission that he had part-tested the BA equipment, stroked AB on the cheek and hugged her as recorded on the CCTV evidence. In short, Nicholas

Mernock preferred the evidence of AB to that of the claimant, and it was not unreasonable for him to do so.

262 Nicholas Mernock was aware the claimant had a clean employment record. He had looked at the file of previous cases raised by Les Skarratts and took the view that there were no similar cases and there was no mitigation for the claimant's behavior in respect of both allegations, for which cumulatively the claimant was dismissed. The Tribunal heard evidence about the similar cases which it does not intend to repeat in full and took into account Mr Weiss' submissions; concluding there was no disparity of treatment.

263 Mr Kenward referred the Tribunal to a number of cases which the Tribunal took into account, noting the allegedly similar situations must truly be similar (Hadjioannou, Procter and Paul v East Surrey District Health Authority cited above. In relation to this point the Tribunal found taking into account the fact the claimant was dismissed for two serious allegations, failing to test breathing apparatus on three occasions and his behaviour towards AB, there were no similar situations where firefighters were not dismissed for cumulative acts of gross misconduct in truly similar situations. The claimant has not satisfied the Tribunal that there was any inconsistency of treatment, let alone a "clear inconsistency." Even had there been clear inconsistency, this is only a factor which may have to give way to flexibility. Accordingly, if, say, an employer has been unduly lenient in the past, he will be able to dismiss fairly in future notwithstanding the inconsistent treatment. This is in essence the reasoning of the Scottish EAT in United Distillers v Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540".

264 Turning to Mr Weiss' submission on previous cases having been dealt with more leniently, the problem for the claimant is that no other case has involved two serious acts of gross misconduct taken cumulatively that resulted in dismissal. It is notable that in one of the cases relied upon and on which evidence was heard by the Tribunal, agreement was reached between management and union for the allegations withdrawn, and this was not the case for the claimant. Taking into account the principles set out in United Distillers' cited above, the Tribunal was satisfied that even if it could be said that the respondent was more lenient in the past, (for example, when it had previously refused to listen to a covert recording relating to alleged race discrimination in an earlier complaint, or was lenient when it came to failings to carry out BA prior to the 2013 Joint Secretaries Agreement, or a disciplinary investigation into a firefighter in 2019 regarding the testing of a ratchet mechanism which did not proceed to a disciplinary hearing following investigation when it transpired the instructions requesting the inspection were unclear as corroborated by contemporaneous documents to which the Tribunal was taken) the dismissal of the claimant still fell within the band of reasonable responses. In addition, the claimant relied upon allegations of bullying and harassment involving other firefighters that resulted in the agreement between management and union and the allegations being taken no further, and an incident which resulted in an employee receiving a written warning for kicking a firefighter as a misplaced/misconceived prank for which he apologised, which were not analogous to the reasons for the claimant's dismissal; no agreement between management and the union to drop charges had been reached and the allegations facing the claimant cumulatively, were not comparable with a misplaced/misconceived prank. The respondent was able to dismiss fairly in the future when it came to the claimant, and had the

flexibility, for example, to listen to AB's covert recording despite the claimant and his union representatives attempts at arguing it was illegally produced and should be disregarded. Nicholas Mernock and Nick Searle took the view that AB's recording was clearly relevant and evidence of unlawful activity which was supported by other evidence, including the claimant's admission that he had touched AB (hugged and touched her cheek). Nicholas Mernock and Nick Searle took into account and rejected the evidence provided by the claimant and his union representatives concerning employees who had resigned facing criminal charges, evidence which the Tribunal found confusing on the basis that the claimant could have resigned, there was nothing stopping him and he did not.

265 As indicated earlier the Tribunal found the ACAS Code of Practice was complied with. In oral submissions Mr Weiss drew the Tribunal's attention to the conclusions reached by Nicholas Mernock with regard to the second allegations, and the Tribunal closely considered the manner in which he couched his criticism of the claimant as follows; "I remained greatly concerned at the approach you took in arranging cover that morning." Mr Weiss argued that Nicholas Mernock had taken the AWOL allegation into account when he came to dismiss the claimant. Nicholas Mernock disputed this was the case and he accepted allegations 1 and 2 had been previously informally dealt with. It is notable the outcome letter concludes "I feel your actions throughout demonstrate a lack of the appropriate values to operate within this Fire and Rescue Service, you show disregard for process and acceptable protocol, an aggressive disregard for work colleagues and an acceptance to be able to describe people as 'slag' whilst also showing a disregard for your own personal safety in relation to BA equipment. Your behavior towards AB I believe was totally unacceptable, and clearly caused a young employee to be scared and frightened and so desperate to make it stop that she recorded one of your visits to ensure people believed her." The Tribunal on balance, accepted Nicholas Mernock had not taken into account the AWOL allegation when he came to dismiss the claimant, and based his decision on the two serious allegations of gross misconduct only as found by the Tribunal above.

266 The Tribunal did not accept Mr Weiss' submission relying on Chamberlain Vinyl Products cited above, that more investigations was needed into the claimant's innocence and mitigation he had put forward. The claimant had admitted he had not tested the breathing apparatus on three occasions and Nicholas Mernock was entitled to take the claimant's considerable experience as a firefighter having carried out numerous BA tests into account, and he was entitled to weigh the evidence against the claimant concerning AB and disregard AB's comment that the claimant was having a "mini-breakdown" during the covertly recorded meeting. AB was and is not medically qualified and Nicholas Mernock was in a position to analysis the recording in the light of the medical evidence before him and how the claimant was presenting himself at the disciplinary hearings when the only matter he seemed unable to deal with was listening repeatedly to the playing of the covert recording. Contrary to Mr Weiss' submission, Nicholas Mernock was open-minded in the way he dealt with the claimant's disciplinary, evidenced by his attitude towards obtaining additional information from AB, and he was entitled to reach a view based on all of the evidence before him; there was no medical evidence pointing to the claimant's mental health being a mitigating factor when it came to the claimant failing to carry out the BA tests, or his behaviour towards AB over four separate occasions resulting in the covert recording which revealed the claimant behaving in such a manner that

the allegations of gross misconduct were met. In short, as accepted by the Tribunal, Nicholas Mernock was in a position to assess AB's evidence and balance that against what the claimant (and Les Skarratts) were saying; he believed AB and his decision to do so fell within the band of reasonable responses on the evidence before him.

267 In conclusion, the Tribunal found the dismissal was fair, it was procedurally fair and one that fell well within the band of reasonable responses open to a reasonable employee. The claimant was not unfairly dismissed and his claim for unfair dismissal brought under section 94 of the Employment Rights Act 1996 is not well-founded and is dismissed. The claimant did not raise a protected disclosure and his claims for detriment brought under section 47B and automatic unfair dismissal under section 103A of the Employment Rights 1996 as amended, are not well-founded and are dismissed. The claimant was found not to be disabled with a mental impairment in accordance with section 6 of the Equality Act 2010 and his claim brought under section 20-21 are not well-founded and dismissed. In the alternative, had the claimant been found to be disabled with a mental impairment the respondent was not in breach of its duty to make reasonable adjustments and the claim brought under section 20-21 of the Equality Act is not well-founded and dismissed.

20.4.2020

Employment Judge Shotter

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

7 May 2020

FOR THE TRIBUNAL OFFICE