EMPLOYMENT TRIBUNALS

Claimant: Mr C Bennett

Respondent: Greater Manchester Fire & Rescue Authority

Heard at: Manchester **On:** 22-24 June 2009 & 18-21 September 2009 13 November 2009 (In-Chambers)

Before: Employment Judge Sherratt
Mr McGrath
Mrs E L Rayes

Representation:
Claimant: Mr P Draycott, Counsel
Respondent: Mr L Browne, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the claimant was unfairly dismissed. There will be a remedy hearing at 10.00 am at Alexandra House, 14 – 22 The Parsonage, Manchester, M3 2JA on Friday 22 January 2010.

Issues

1. The claimant was dismissed on the basis of an allegation of gross misconduct. In addition to pleading an ordinary unfair dismissal case, the claimant alleges that the respondent interfered with his human rights under Article 10, the Right to Freedom of Expression.

2. The respondent says that the Human Rights Act is not engaged at all but if it is then the claimant's claim relates to Article 8 the Right to Respect for Private and Family Life and to Correspondence.

Findings of fact

3. The respondent is the Greater Manchester Fire and Rescue Authority which provides fire and rescue services throughout its area. It has 2,500 employees and is a large employer. It is funded by government grant and by precepts made on council tax payers within its area. It is governed by a committee consisting of councillors selected from the various local authorities within the Greater Manchester area.

4. The claimant was employed as a fire fighter and his employment started on 6 September 1982. His terms and conditions of employment were common to the respondent's fire fighters and as well as his individual statement of terms and conditions his employment was subject to the National Joint Council for Local Authority Fire and Rescue Services Scheme of Conditions of Service, 6th Edition 2004.

5. The claimant was subject to the respondent's email policy when using the respondent's email facilities. The claimant confirmed his awareness of the existence of the policy although he was not particularly aware of its contents. He signed to accept the email policy on 18 October 2006 before his email box was enabled. He was not given any formal training but was sufficiently competent to use the system and send emails including attachments.

6. In September 2005, a collective agreement was reached between the Fire Brigades Union (FBU) and the respondent which constituted a variation to the terms and conditions of service of each fire fighter employed by the respondent. In simple terms it involved the removal of beds from the fire stations and their replacement by chairs for use by fire fighters on night shift when resting not sleeping.

7. The respondent purchased a quantity of "Calcot" chairs which had been the subject of extensive risk assessments and ergonomic assessments prior to their introduction. The assessments were based on usage for three hours because that three hour period was the initially anticipated period for their use but in fact some people used them for up to seven hours.

8. The introduction of the chairs and the change in the working practices generally was a time of difficulty for the fire service and it would appear that the chairs were not well-received by some fire fighters. The new terms and conditions took effect from 1 January 2006.

9. Notwithstanding the steps taken by the respondent to provide a chair which was safe and suitable for use by fire fighters of varying gender, height and weight, some of the respondent's fire fighters were not happy with the Calcot chairs. Whether this is because they were unhappy that their beds had been taken away from them, or because they genuinely did not like the Calcot chairs is a matter of conjecture, but the claimant in this case believed that they had adversely affected his back.

10. In a letter sent on 20 January 2007 to his station commander, the claimant sought a change in his working conditions and reasonable adjustments to his night shift conditions. He said he suffered from arthritis of the lower spine and that this was covered by the Disability Discrimination Act ("DDA"). He asked for permission to rest in a horizontal position during his official rest period on the night shift. This would be at no cost to the service as he had been using his own special rest mattress since the previous March. He said that he found it impossible to rest for more than 30-40 minutes at a time in the Calcot chair and if he settled for any longer period it was almost impossible for him to move his back afterwards. When at home he had to stretch and move his spine during the night and he found freedom of movement when horizontal but not when using the Calcot chair. He reminded the respondent of the DDA duty of reasonable adjustments.

11. The claimant was referred to the respondent's occupational health service and the claimant was sent to Mediscreen on 19 February 2007. He was seen by Dr Tok Hussain, a consultant occupational physician who produced a certificate of fitness for the claimant to continue to undertake the duties of an operational fire fighter. Whilst there was some discussion between the claimant and Dr Hussain about the Calcot chair, there were no specific recommendations by Dr Hussain who also confirmed that the DDA did not apply in his opinion. He thought that the claimant's condition was one that would be likely to present with symptoms on an unpredictable and episodic basis but that he was fit to perform all his fire fighting duties.

12. The claimant's request was rejected in a letter dated 8 March 2007 sent by Chris Mycock, station commander at Stockport. In the course of the letter it stated "I acknowledge the point you make that being horizontal allows you free movement, which is not afforded you in the rest facility provided. However, the Calcot chairs have been assessed for their ergonomic design and are considered satisfactory for their purpose of enabling a fire fighter on duty to rest. I remind you that the work schedule for night duties provides time on duty for personnel to rest but not to sleep." In conclusion, Station Commander Mycock was not prepared to accommodate the requested change and said that the claimant was required to stop using the mattress topper as a rest facility and only to use the rest facility provided by the respondent. No other rest facility than the Calcot chair was mentioned in that letter.

13. On 8 March 2007 the claimant raised a grievance again seeking reasonable adjustments to allow him to use his own rest facility and not the Calcot chair. He felt his arthritis was covered by the DDA. The claimant was invited to attend a grievance hearing on 20 March 2007 but for other reasons this was rearranged to 30 April. A further occupational health review was undertaken on 28 March when again the claimant was declared fit for carrying out operational duties. There was a further postponement of the grievance until 17 May and in May, pending the grievance hearing, the claimant was put on days and extra day shifts rather than working nights.

14. On 14 May 2007 Mr Kirkham, Deputy Borough Commander wrote to the claimant in respect of the correspondence concerning his grievance. He referred to the temporary transfer of the claimant to an operational role on regular day duties pending the outcome of the grievance and then he went on to remind the claimant of

letter from Station Commander Mycock by which the claimant was forbidden to use any other rest facilities than those provided by the respondent. These conditions were to remain in effect should the claimant return to a shift system which required him to undertake night duty unless the outcome of the forthcoming grievance dictated otherwise.

15. The claimant agreed to withdraw his grievance which he did in writing on 25 May 2007. He told us that he did this because he would be working on day shifts only. An internal email from the respondent suggests that the shift change would be until further notice or at least until the end of July 2007.

16. On 18 June 2007 the claimant, represented by two FBU officials, met with Mr Kirkham the deputy borough commander. This meeting was summarised in a letter from Mr Kirkham dated 25 June 2007 which recited the factual background and stated that it was the intention of the respondent to return the claimant to operational duties on a normal shift pattern with effect from 9 July 2007. He drew attention to letter from Station Commander Mycock dated 8 March 2007 in regard to the use of rest facilities other than those provided by the respondent and he also referred to his letter dated 14 May 2007 and reaffirmed those matters.

17. On 5 July 2007 the claimant raised a grievance in response to Deputy Borough Commander Kirkham's letter in particular in relation to the instruction to commence normal operational shift duties with effect from 9 July. He raised a reservation that Mr Kirkham was able to deal with this matter in a fair manner and felt that Mr Kirkham was discriminating against him and asked that the grievance be dealt with at a higher level than Mr Kirkham.

18. The claimant was again seen by Dr Hussain by 9 July when a further certificate of fitness was issued and Dr Hussain again gave his opinion that the DDA would not apply.

19. The claimant sent an email to Mr Mycock on 9 July asking what rest facilities were provided by the respondent as he stated as he had no clear guide as to what they were. He said that he had been told by Steven Heath not to use Calcot chairs whereas fire fighters at Bury had been disciplined for using the floor, so he sought clarification. The response to this email was from Nick Hince, the claimant's Watch Manager who had taken advice from the Station Commander. He said "although the Calcot chairs are provided for resting during a night shift, it is not obligatory that you use them. The upholstered bench-type chairs in the snooker room would seem an adequate alternative for you to rest upon, and I recommend that you use the chairs along with the bedding items (pillow and airline blankets) provided by the service. I hope this helps..."

20. The claimant's grievance was considered by Steve Fisher, Borough Commander who wrote to the claimant 13 July 2007 stating that in his view there was no substance in his letter to warrant a grievance. He said he was concerned about the comments made about Mr Kirkham particularly with regard to discrimination and in Mr Fisher's view Mr Kirkham had dealt with matters in a reasonable and fair manner. If, however, the claimant wished to provide specific evidence as to how he had been discriminated against then the Borough

Commander would consider what action needed to be taken. The claimant did not provide any specific evidence as to his allegations against Mr Kirkham notwithstanding reminder letters being sent to him on 7 August and 10 October. On 29 October it was put to the claimant that he had chosen to withdraw his grievance on the basis that he had no evidence in support of it.

21. In a letter dated 28 August 2007 Thompsons Solicitors on behalf of the claimant stated that they were instructed to claim damages in connection with a claim for aggravation/further injury to the claimant's back and shoulders as a result of using Calcot reclining chairs and the bench chairs in the snooker room as opposed to his orthopaedic mattress which he used prior to the introduction of Calcot chairs which he had intermittently used since that time.

22. The claimant raised a further grievance on 31 August 2007 with regard to the respondent still not making reasonable adjustments to his night shift rest facility. He said he was at that time resting on the bench seats in the snooker room but as they were not wide enough from him to rest on his back it was producing complications in his shoulder and hip joints. He claimed to have irrefutable medical evidence that his condition which would qualify under the DDA. The claimant produced a report from a consultant orthopaedic spinal surgeon and this was referred to Dr Hussain. The claimant's consultant found that the claimant suffered from chronic degenerative multilevel lumbar spondylosis/stenosis. The date of onset had been gradual over twenty years, exacerbated by sleeping/resting (when on call) in reclining chair (instead of mattress).

23. Having reviewed the consultant's report, Dr Tok Hussain on 21 September 2007 found it clear that the claimant had long-standing symptoms of back pain but that the specialist did not offer an opinion as to whether or not the claimant would come within the DDA. Dr Hussain still did not think he would come under the DDA. He said that he thought the claimant would benefit from keeping his spine as mobile as possible and if he was having any symptoms from one particular posture, he should alter his body posture frequently and intersperse periods of sitting, standing and walking. If the claimant had to lie down after periods of time at work, he thought this would be important to consider and may have a bearing on his operational fitness but he would review him again to consider whether symptoms had deteriorated since he was seen earlier in the year. This further consultation was on 3 October 2007 when Mr Bennett said that his symptoms had deteriorated although they did vary from day-to-day. Whilst the claimant could perform many normal day-to-day activities, he felt he could only perform them due to him taking medication and having made alterations to his lifestyle. Dr Hussain now felt that this was a borderline case and that it was possible that the DDA could apply. He had some reservations about the claimant performing physically demanding tasks and thought he might be better suited to non-manual work and this was something management could discuss with him. He reported that Mr Bennett felt the use of the Calcot chair was detrimental to his back condition and that he wished to use his foam mattress and perhaps management could discuss that directly with the claimant.

24. The claimant wrote on 4 October asking about his removal from the night shift and asking to go on operational day shifts. He felt he was put in danger when

working a 15-hour night shift with rest periods from midnight to 7:00 am with no adequate rest facilities.

25. The respondent via letter dated 22 October 2007 noted the claimant was fit to undertake non-operational duties and he was told to visit his GP with a view to being signed off as sick for work and then to report to Station Commander Mycock on 29 October at 0900 hours.

26. The claimant was again seen by the occupational health department on 27 November 2007 this time by Dr Forman, a Specialist Registrar in Occupational Medicine. He was told by the claimant that his symptoms had improved and that in the claimant's opinion and he could carry out operational fire fighting duties if not required to rest in the Calcot chair, although issues related to rest facilities had not been resolved. The doctor felt the claimant was fit for protected duties. He thought the claimant would suffer with heavy manual handling or bending activities due to his spinal problem and the certificate was that the claimant was temporarily unfit for operational duties but fit to undertake non-operational duties subject to their being no heavy manual handling, frequent variability of posture and no bending activities.

27. There was an article in the Manchester Evening News dated 29 November 2007 with the headline " Firefighters sue brigade 'after hurting backs on station chairs' " which outlined the background to the introduction of the Calcot chairs with union bosses allegedly saying they were not fit for purpose. Two fire fighters were said to be in the process of making legal claims against the brigade over the use of the chairs. These were people with back injuries. The union source is reported to have said that "senior management have accepted there is a problem with the chairs and have invited us to look at different ways of resting". The Chief Fire Officer was said to have confirmed that two insurance claims were being dealt with but whilst willing to discuss rest facilities there was no place for beds in a modern fire and rescue service.

28. The claimant was again referred to occupational health at the end of December 2007 and this lead to a referral to Leading Rehab who were assessment and rehabilitation specialists. The claimant was seen on 12 February 2008 by Sarah Bell a chartered physiotherapist. The aim of the report was to determine the claimant's current function especially in relation to his ability to return to his own occupation and to give recommendations regarding treatment of/management if appropriate. The report went through the job demands and abilities needed. The functional testing showed the claimant had more than adequate capabilities to carry out the full duties of an operational fire fighter and it was reasonable to conclude there was no clinical or functional reason why he could not make a safe and sustained return to the full duties of an operational fire fighter. There were no specific treatment recommendations but Ms Bell thought the claimant should maintain his levels of fitness. She reported that the claimant had told her that Calcot chairs were not comfortable and he had suggested using a mattress on the floor would be a better option. The report stated that the rest chair as described would appear adequate and appropriate for the claimant's needs provided he was able to support a good posture in relation to his lumbar spine.

29. The report of Leading Rehab went to Dr Tok Hussain who on 20 February gave the opinion that the claimant was fit to undertake or continue duties as an operational fire fighter. A letter was sent to the claimant on 25 February confirming he had been declared fit to resume full operational duties and he was asked to contact Mr Mycock to arrange a period of retraining.

30. There was a welfare meeting on 10 March 2008 attended by the claimant and Station Commander Mycock with an HR advisor. A letter dated 17 March 2008 from the respondent noted that the claimant had more than adequate capabilities to carry out the full role as a fire fighter, that the assessment of the Calcot chair would appear adequate and appropriate for his needs, provided it was able to support a good posture in relation to his lumbar spine, and that if he chose to use the Calcot chair and required a lumber support, then one could be made available. The respondent indicated that regardless of the claimant's DDA status where possible reasonable adjustments would be made, but in conclusion, the matter was considered closed, and the claimant was expected to return as a fully working fire fighter.

31. On 17 April the claimant wrote saying that he had tried three lumbar supports but none of them offered him any comfortable support and he had severe pain in his neck and lower back and he wanted to see the occupational health doctor to discuss stress counselling. He again requested a reasonable adjustment.

32. The response to the this letter, from HR on 24 April, indicated that there were other rest facilities available on the station and as such the claimant was not restricted to having to use the Calcot chair. He was offered the opportunity of a meeting with HR to discuss a stress reduction plan.

33. The matters recited above concerning the claimant's health situation were moving in parallel with other matters. On 4 February 2008 at 16:16 the claimant sent an e-mail to a large number of Watch Officers employed within the respondent authority. Watch Officers are at a junior management level and are responsible on a day-to-day basis for each watch consisting of around ten fire fighters. The subject of the email was "CALCOT CHAIR REST FACILITIES PLEASE PRINT AND SHOW THE OPERATIONAL PERSONNEL." The recipients were asked to print off the attachment and discuss it with their operational fire fighters on the basis that it might be the only chance they would get to achieve a result in getting back their pride and dignity. The claimant gave his word he would not back down from fighting for all of our rights.

34. The attachment on 1.5 pages of A4 stated:

> "Dear colleagues,
>
> I am sure some of you will agree that the current rest facilities afforded to operational fire fighters is far from acceptable. It is impossible to impose a strict one-chair fits all regime. We are all of different heights, weights and physical conditions so how can we be bullied and subjected to what is now recognised by senior management as an unfit for purpose rest facility.

As you may recall these Calcot chairs were designed for a maximum of three hours, this was in the first agreement proposed by management. That was eventually changed and agreed to be a seven hour rest period from midnight to seven in the morning. Unfortunately the Calcot chairs were already agreed and were being implemented.

From day one we have moaned and complained but silently. Now senior management has agreed that the Calcot chairs are not fit for purpose (MEN November 29) yet still we are ordered to rest in these chairs. The majority of fire fighters in GMC have asked in private will admit that they don't use the Calcot chairs. We are forced to rest on the concrete floor or outbuildings or blow up mats. This by its very nature is robbing us of our professional pride, not to mention human dignity. I myself suffer from a medical condition arthritis of the spine yet when this was brought to the attention of the authorities I was still ordered to rest in the Calcot chairs I was then told to use the floor.

I know from speaking to other fire fighters that I am not alone with these sort of medical conditions or even height related problems but find it impossible to rest in the Calcot chairs. I find it unacceptable that you still have to hide and lie about your own rest-making facilities to do your job. We are all supposed to be regarded as important professionals yet we are afforded worse rest facilities than a prisoner. We put our watch officers in constant danger of disciplinary action just because we cannot use these ridiculous chairs. I ask you all as fellow fire fighters to address this issue. If like me you are unable to rest in the Calcot chairs for either medical or physical reasons to fill the form and return it to me for use in an up-and-coming court case. The Fire Brigade Union is finding it impossible to reach any agreement with management so would you urge you all to join me in proving in court that these Calcot chairs are not only unfit for purpose but dangerous to use.

I give my personal pledge that I will not settle out of court and take the easy cash settlement to shut me up. I will pursue GMC Fire Service and its management team all the way to a legal ruling to gain us all a decent rest facility and our human rights.

The information you provide me will be sent direct to Thompson's Solicitors who have asked me to try and find anyone who has a problem with the Calcot chairs so we can add this to our case. If you feel you can help please don't hesitate and return these forms to me.

Yours truly

Chris Bennett."

By way of an appendix to the attachment, there was a form of petition which had as a heading the words "WE ALL AGREE THAT THE CALCOT CHAIRS ARE UNFIT AS A REST FACILITY. THEY CAUSE US VARIOUSE TYPES OF BACK PAIN OR OTHER FORMS OF DISCOMFORT OR INJURY." There was then space for names, addresses, phone numbers and fire station details.

35. A Borough Commander within Wigan borough had the email brought to his attention by a colleague. He forwarded it to Borough Commander Fisher in Stockport where the claimant was based and he consulted human resources department. A meeting was held at 10:00 am on Tuesday 5 February when the claimant was advised that his e-mail had reached management level and given the content of it a formal investigation would be commenced. The email was withdrawn from the respondent's intranet shortly after being discovered

36. There was an initial interview conducted with the claimant, supported by Mr Steven Shelton of the Fire Brigades Union on Friday 15 February 2008. The investigation was carried out by Deputy Borough Commander, Dave Kirkham.

37. In the investigation meeting the claimant accepted that he had sent the email to operational personnel without knowing it could have gone to other people. He believed he had sent it internally. He said he was not aware of the respondent's email policy or at least not particularly aware although he did accept he had signed something relating to it, but could not remember what. He said he had never had any formal training, but had been shown things by people on the station. He had had an email account since October 2006. The claimant was asked what he meant by various parts of the email and he explained. The Manchester Evening News article was referred to and the claimant was asked where in the article it stated senior management had stated the chairs were not fit for purpose. The claimant accepted it did not state this and it was his mis-wording. It did not state anywhere that senior management had said the chairs were not fit for purpose. Mr Shelton, on behalf of the claimant, said he fully accepted that parts of the email were factually incorrect and it might be easier to discuss matters looking at them along with the mitigating circumstances. The claimant is then recorded as having said he misused the email policy and the content just flew out of his head.

38. By way of background to this statement, it came out in cross-examination that he had been thinking about writing such an email for 3-4 weeks. He had shown a copy of a draft to an FBU representative but was told not to do anything with it because there was a pending meeting with the Chief Fire Officer. On the day he sent it he showed a draft to his Watch Officer Nick Hince who advised him not to send the email as the matter was being dealt with by the union. It was some seven hours after his discussion with Mr Hince that the email and attachment were transmitted.

39. Going back to the investigatory meeting, Mr Shelton suggested that the claimant understood he had abused the email policy but he was not in a sound state of mind when he sent the email. There had been a sequence of events and frustrations. After reconvening a lengthy chronological list of events leading up to the sending of the email was read out by the claimant who introduced it by stating he had suffered from arthritis for ten years and he had consulted the Disability Rights Commission. He advised him to consult with his union.

40. He then outlined a series of events from 20 January 2007 to 4 February 2008 in respect of the Calcot chairs and how he had been affected by them and the various grievances he issued, the medical reports obtained, the taking up of his case

by solicitors, the change to day shifts culminating in him contacting the Fire Brigades Union on 4 February for an update and on hearing what they had to say he decided to press the send button to dispatch the email.

41. Mr Kirkham referred to the guidelines for investigations and hearings stating that there was a reference to certain conduct that could be considered serious because it struck at the very heart of the employment relationship. On this occasion he said that relationship may have been breached. Mr Shelton, for the claimant, appreciated what had been said but referred to the Grey Book being the conditions of service. He outlined the options of dropping matters or moving to formal or other stages of disciplinary. He referred to the claimant's Watch Manager (Mr Hince) and read out a brief statement from him then Mr Shelton went on to say that in his opinion the sending of the email by the claimant was a cry for help and it was sent without knowingly understanding that he was breaching policies. He then read out a formal statement from the claimant – "he wants to formally apologise and express sincere regret for his actions. It was never his intention to upset or embarrass anyone or the organisation and he sincerely apologises for everything". On the basis of this, Mr Shelton invited management to deal with the matter on an informal basis and Mr Kirkham said he would take everything into account.

42. The respondent's email policy was issued on 8 March 2000 and the introduction to the policy said it was required to ensure users were fully aware of their responsibilities on the basis that the organisation could be liable for the consequences of email and that the authority and the individual could be sued. The comprehensive and diligently enforced policy was said to be essential to protect both employees and employer.

43. There was reference to training to ensure employees were fully aware of their responsibilities. It would appear the claimant never had this. It was said that prior to the issue of an email account employees must sign to confirm their acceptance of the policy and the claimant did sign to this effect but seemingly without having perused the policy before signing.

44. The policy establishes that email is for fire authority business-related use only. Emails must not be abusive, antisocial, sexually or racially biased and they must not be in any way libellous or contemptuous. Users were held responsible for all emails they sent. The email system belonged to the respondent not the user and the respondent was entitled to scrutinise all emails and to audit the system. In terms of consequences "misuse or abuse of email would be treated seriously and disciplinary action may be taken against offenders". In a section called "Netiquette" users were advised not to send emails rashly or out of anger. There was then a reference to the consequences of sending emails which had lead to companies being taken to court and that abusive email could be contrary to provisions relating to race and sex discrimination. "Such abuse has often led to employees having their employment terminated".

45. There was then an email policy statement which highlighted key elements of the email policy which said that emails must not have any abusive, antisocial, sexually or racially biased content. They must not in any way be libellous or contemptuous. Individuals were held responsible for all emails sent from their

mailbox and "misuse or abuse of email will be treated seriously and disciplinary action may be taken against offenders".

46. The claimant was called in for a further investigatory interview for the 17 March when the same persons were present and Mr Kirkham wanted to clarify some remaining issues. The claimant said the email had not gone anywhere other than within the respondent's fire service. The claimant had sent a copy to his own email address so he had a copy. At the previous interview, the claimant had not said he had sent the email externally. Mr. Kirkham said that the claimant had used the organisation's facilities to gather evidence for a legal case which constituted a breakdown of trust between employer and employee. He said the email was not sent on authority business or in the best interest of the authority, but sent to bolster a legal case against the very authority whose facilities the claimant was using. He said it was the content of the email and the breakdown in trust and the breach of the policy which was why they were at that meeting. The claimant said he did not know how long he had taken to compose the email. He did not know how people would interpret the title being in bold capitals. Mr Shelton said that it was a letter that had gone out as a rant when the claimant was at the end of his tether. This letter had asked if any of the fire fighters had had any problems.

47. Mr Kirkham then considered matters and produced his report and recommendation. The conclusion of his investigation was that the claimant was guilty of gross misconduct on the basis "conduct ... which is extremely serious and which, because it strikes at the very heart of the employment relationship could result in dismissal for just one offence..." and he recommended that the case should be the subject of a formal hearing under stage three of the respondent's Disciplinary Policy and Procedure.

48. The claimant was required to attend a disciplinary interview on Friday 2 May later changed to Wednesday 11 June 2008. The allegation was that "on 4 February 2008 you did send an email, the content of which was in direct contravention of the respondent's email policy dated 8 March 2000. The email contains statements considered to be inflammatory, libellous and in direct breach of the implied term of mutual trust and confidence between employer and employee."

49. The claimant was told that the hearing would be conducted by Mr Andrew Heywood, Borough Commander of Tameside accompanied by someone from HR. The claimant had the right to be accompanied by a work colleague or trade union officer and management documents to be used at the hearing were sent.

50. At the disciplinary hearing the claimant was accompanied by Mr Shelton from the FBU. Mr Kirkham was the investigating officer presenting the case against the claimant to Andrew Heywood. The meeting started at 10 o'clock and after various adjournments concluded at 4 o'clock with Mr Heywood asking whether the parties would prefer to reconvene in two hours at 6:00 pm that day or on the day after at 4:00 pm. It was agreed to reconvene at 6:00 pm that night.

51. During the course of the hearing, the claimant was able to say what he wanted to say and the background was covered in terms of the way he felt about using the Calcot chairs. The claimant was able to call his Watch Officer Nick Hince

as a character witness. At the end of the meeting, Mr Kirkham summarised the management case which was that the issue was misuse of the email policy and the content of the email that amounted to a breach of trust. The claimant was not covered by the DDA and was fit to carry out operational duties and daily activities. Trying to raise the situation as he did when sending the email included items that were factually incorrect, libellous and breached the trust of the employer. He spoke of taking action against the organisation which had provided him with email facilities. He acknowledged the claimant had admitted sending the email and had been very apologetic but it was formulated in the morning and sent at 16:16 so it was not a rant. In his view there was gross misconduct.

52. For the claimant Mr Shelton asked whether the parties would still be there if the claimant had done what he had done by phone, fax, internal mail or Raise an Issue? ("Raise an Issue" is a system whereby fire fighters can post emails on the intranet raising matters of concern.) He referred to the email which was akin to internal mail and there had been matters on raise an issue which had been deemed inappropriate but the makers had not been disciplined. The claimant had apologised. The claimant was given his email account but had not requested it. His only training was being shown how to log on and being given a copy of the policy. He had apologised. The character reference from Nick Hince should be taken into account. The claimant was strained and had domestic pressures when the email was sent. He was at the end of his tether. Issues had still not been finalised. He was not in the right state of mind. It was a cry for help. As a caring employer, please draw matters to a reasonable conclusion.

53. It was after the two-hour break that Mr Heywood came back and gave his conclusions. He said the email did contain statements considered to be inflammatory, libellous and in direct breach of the implied term of mutual trust and confidence. The email was composed and sent by the claimant who had signed the memo accepting the email policy on 18 October 2006. There was misuse of the email system. The email itself appeared to be for the express personal gain of the claimant. The tone was inflammatory intending to incite others to respond with the intention of the organisation being taken to court. This was in contravention of section 2.2 of the policy which stated that the email should not be libellous or contemptuous. In his view it was libellous because of the statement that senior management recognised rest facilities were not fit for purpose and that this was stated in the MEN. The claimant had accepted this was not true. That staff were being bullied by senior management was not substantiated. He then recited the mitigation and referred to the management response to various issues raised by the claimant. In conclusion, he accepted the claimant believed he had a condition that the respondent was not recognising, but having tried to pursue it through Mediscreen in the formal grievance process and having become frustrated with the responses he received, he decided to take matters into his own hands by circulating a personal email to achieve what he deemed to be an appropriate solution. On the balance of probability, Mr Haywood believed that the email was sent with the intention of inciting others to support him in taking action against the respondent. He believed that considerable time was taken to prepare it. It was not a temporary state of mind for the claimant. Although it was according to the claimant a cry for help, the claimant was still pursuing a claim in court despite apologising for the email.

54. On the basis of what he had previously stated, Mr Heywood believed that there was a direct breach of the implied term of mutual trust and confidence between the claimant and the respondent, and therefore he had no alternative than to summarily dismiss for gross misconduct. The claimant was therefore dismissed with immediate effect at 6:20 pm 11 June. This outcome was confirmed in a letter dated 12 June 2008:

> "I refer to the disciplinary hearing held on Wednesday 11th June, 2008, in connection with the allegation that you ... on 4th February 2008 sent an email, the content of which was in direct contravention of GMFRS email policy dated 8th March 2008 and that email contained statements considered to be inflammatory, libellous and in direct breach of the implied term of mutual trust and confidence between an employer and an employee....
>
> It is my opinion that your actions constitute gross misconduct under the terms of the disciplinary procedure. The reason for my decision was conveyed to you at the hearing and is summarised as follows: I believe that you sent the email with intention of inciting other individuals to support you in taking a person action against GMFRS. I believe that some considerable time was taken in preparing the letter and in doing so you counselled other people's opinions one being your Watch Manager, Nicholas Hince, who advised you not to take any such action but to talk to your union instead. On the morning of 4th February 2008 you wrote that letter electronically and some five hours later you selected an extensive list of email recipients. This in combination with the content of that email demonstrates that this was not a temporary state of mind. In your defence you said that this was a cry for help however this is not corroborated as you have led us to believe that you are still considering legal action despite apologising...
>
> In a highly regarded emergency service, there is no place for behaviour such as that which has been demonstrated by you.
>
> I believe that there has been a direct breach of the implied term of mutual trust and confidence between you and GMFRS. Due to the seriousness of this, I therefore write to confirm my decision to summarily dismiss you from your employment ... effective immediately ..."

55. In cross-examination, Mr Heywood was asked whether he had considered alternatives to dismissal for the claimant. He said that he had and that he had ruled them out. The alternative sanctions were a warning, demotion, disciplinary transfer or loss of pay to a maximum of thirteen days. Mr Heywood took the view that a warning was inappropriate, that the claimant as a fire fighter could not be demoted, that disciplinary transfer was inappropriate on the basis that what we were dealing with here was not in relation to the claimant perhaps not getting on with others in his station and/or watch and loss of pay was inappropriate because it again would not deal with the situation appropriately.

56. The claimant appealed by letter dated 18 June 2009 "on the grounds that the disciplinary sanction was too severe".

57. The claimant's appeal was to an appeals sub-committee consisting of members of the Fire Authority. The sub-committee was advised that the appeal was on the ground that the disciplinary action was too severe and that the appeal hearing would be conducted by way of a review.

58. Mr. Shelton from the FBU was again representing the claimant and he spoke on his behalf. There was an initial question as to some documentation but this was resolved and the appeal proceeded. Mr Shelton, for the claimant, said the facts of the case had never been in dispute in that the claimant sent the email and he had not attempted to justify of deny his actions. The decision to dismiss was however an excessive one with much too severe an award for the offence and it could have been dealt with in a more appropriate manner. He did not believe the contents of the email damaged the authority. The sub-committee were asked to take into account twenty-six years of service which would have come up on 6 September 2008, that the claimant had apologised and expressed his regret for his action, he had requested formal training in IT skills. There was personal mitigation. The claimant having realised his actions were wrong had been apologetic, accommodating, open, honest and remorseful. He was at the end of his tether, quoting from Mr Hince the Watch Manager. The actions of the claimant were not normal and his state of mind was reckless rather than normal. At the end of the presentation on behalf of the claimant the claimant's own words were used by his representative and this included a sincere apology to the authority, a realisation that his actions were wrong and regret as to what he did. He honestly never meant to upset anyone and all he ever wanted to be was an operational fire fighter. He asked them to accept his apology.

59. Mr Heywood responded on behalf of the employer, and then both sides answered questions before summarising their cases. The sub-committee considered the position and according to the formal minute resolved that the misconduct which was admitted by the appellant consisting of a breach of the authority's email policy also constituted a breach of the implied term of mutual trust and confidence between the appellant and the authority and that it was sufficiently serious to warrant disciplinary action. The sub-committee considered that the appropriate sanction was dismissal and the appeal be dismissed. Both parties were recalled to the meeting to be informed of this decision which was confirmed in writing by the clerk to the committee in a letter on 9 September 2008.

60. The claimant was a shop steward within his fire station but it was accepted that when he sent the email which is the subject of these proceedings he was not acting in anything other than a personal capacity.

The ET1

61. This case was originally brought as a "normal" unfair dismissal claim and on 20 January 2009 by consent orders were made to allow the lodging of an amended ET1 setting out the Human Rights issue the claimant intended to raise. There was also an order for a response to the amended claim.

Submissions

62. Counsel for the claimant produced written submissions containing 58 paragraphs on 40 pages and made reference to various cases both under the Human Rights Act and the Employment Rights Act.

63. In simple terms he submitted that the respondent is a Core Public Authority for the purposes of section 6 of the Human Rights Act, that article 10 was engaged by the claimant's email, that his dismissal was to his detriment and in breach of his human rights and therefore falls to be declared as unfair.

64. If the Tribunal did not find that the Human Rights Act claim was well-founded then under the ordinary principles of unfair dismissal law the dismissal was unfair for a number of reasons. The respondent's email policy was unclear. There was a failure properly to investigate the issues raised by the claimant, insufficient attention was paid to the claimant's mitigation and Mr Kirkham the Investigating Officer dealt with matters in a prejudicial fashion.

65. Counsel for the respondent prepared written submissions extending to 51 paragraphs over 26 pages. He also referred us to various cases and to some text book authority.

66. In simple terms he conceded, for the purposes of this case only, that the respondent was a Core Public Authority for the purposes of section 6 of the Human Rights Act then he went on to submit why the Human Rights Act was not engaged but if it was then the claimant should be relying on his article 8 right rather than his article 10 right.

67. In unfair dismissal terms the dismissal was for a reason relating to the claimant's conduct and was fair on ordinary unfair dismissal principles. There was in his view a sufficiently clear policy, a proper investigation of all relevant matters and a full and fair disciplinary hearing followed by two appeals. The decision was one that the respondent was entitled to reach and it is not for the Employment Tribunal to substitute itself for the respondent.

The Relevant Law

68. The Human Rights Act 1998 defines a public authority at section 6 (3) (b) as "any person certain of whose functions are functions of a public nature" and provides at 6 (1) that "It is unlawful for a public authority to act in a way which is incompatible with a Convention right".

69. Section 6(5) of the Human Rights Act provides that in relation to a particular act, "a person is not a public authority by virtue only of sub-section (3) (b) if the nature of the act is private".

70. Article 10 provides that everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. However "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the

interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

71. Article 8 deals with the right to respect for private and family life and provides that "Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the rights and freedoms of others".

72. Guidance on the interrelationship of the Human Rights Act and the Employment Rights Act is to be found in the case of X v Y (2004) IRLR625 a case in the court of appeal in which Lord Justice Mummery observed: Whenever Human Rights Act points are raised in unfair dismissal cases an Employment Tribunal should properly consider their relevance, dealing with them in a structured way, even if it is ultimately decided that they do not affect the outcome of the unfair dismissal claims. The following framework was suggested:

(i) Do the circumstances of the dismissal fall within the ambit of one or more of the articles of the Convention? If they do not, the Convention right is not engaged and need not be considered.

(ii) If they do, does the state have a positive obligation to secure enjoyment of the relevant convention right between private persons? If it does not, the Convention right is unlikely to affect the outcome of an unfair dismissal claim against a private employer.

(iii) If it does, is the interference with the employee's Convention right by dismissal justified? If it is, proceed to (v) below.

(iv) If it is not, was there a permissible reason for the dismissal under the Employment Rights Act, which does not involve unjustified interference with a Convention right? If there was not, the dismissal will be unfair for the absence of a permissible reason to justify it.

(v) If there was, is the dismissal fair, tested by the provision of section 98 of the Employment Rights Act, reading and giving effect to them under section 3 of the Human Rights Act so as to be compatible with the convention right?

73. We pause to note that in this case we are dealing with a public authority rather than dealing with rights between private persons but nonetheless, this does not take away from the basis upon which Tribunals should consider unfair dismissal claims involving Core Public Authorities where Human Rights Act points are taken.

74. Under the Employment Rights Act we must consider whether there is a potentially fair reason for dismissal under section 98(2) and, if so, whether in all the circumstances the dismissal was fair.

Discussion and Findings

75. The Tribunal has no hesitation in finding that the dismissal of the claimant was for a reason relating to his conduct which is therefore a potentially fair reason. Do the circumstances of the dismissal fall within the ambit of one or more of the articles of the convention? We started our consideration of this question by looking at section 6 of the Human Rights Act and noting the respondent's concession that it was a public authority, for the purposes of this case. The Tribunal however noted under Section 6(5) that in relation to a particular act, a person is not a public authority by virtue only of subsection (3) (b) if the nature of the act is private. We considered that the claimant's dismissal might have been a private act and so we invited the claimant and respondent to make written submissions on this point. The respondent by letter confirmed that it was not contending that the claimant's dismissal was a private act and so we gave no further consideration to section 6(5).

76. Do the circumstances of the dismissal fall within the ambit of article 10, article 8 or none of the articles? The reported cases cited to us seem to be based either on article 8 or article 10 with none of them seeming to deal with the interrelationship between the two. One of the submissions of Counsel for the respondent was that in the case of Silver –v- UK (1983) 5 EHRR 347 (para 10) the Court held that in the context of correspondence the right to free expression is guaranteed by article 8 and in Campbell –v- UK it suggested that where an interference is alleged in the communication of information by correspondence then article 8 is relevant and no separate issue arises under article 10.

77. Counsel for the claimant referred us to an Austrian case involving the distribution of a magazine to Austrian Soldiers which criticised the military. This case was dealt with under article 10.

78. In our judgment the claimant's e-mail whilst emanating from him as correspondence was not intended to be private correspondence but was always meant for wider publication within the respondent authority's personnel. We also observe that the e-mail was not relevant to the claimant's private and family life or his home. This being the case we take the view that it falls to be considered under article 10 relating to freedom of expression rather than article 8 relating to the right to respect for private and family life including correspondence.

79. The second question set out by Lord Justice Mummery related to the enjoyment of the relevant convention right between private persons. Given the respondent's acceptance of it status as a public authority we can move straight on to consider the third question, if an article is engaged, is the interference with the employee's convention right by dismissal justified? Counsel for the respondent invited us to consider the four broad types of speech identified by Lord Steyn in the case of Simms (2000) 2AC115 HL which were (a) political and public interest speech, (b) hate speech, (c) artistic expression; and (d) commercial speech. In our judgment the type of speech involved here was not (b), (c) or (d) but it was (a) being

of political and public interest with relation to the interests of the general public to have fire fighters who are as alert as necessary and fit to go about their business of fighting fires and effecting rescues. In making this finding the Tribunal does not make any finding to the effect that the fire fighters were not fit. We are merely observing what the political and public interest nature of the respondent's email was.

80. We have in mind article 10(2) and the fact of the exercise of freedom of expression may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

81. We do not consider that national security, territorial integrity, disorder or crime, the protection of health or morals, the prevention of disclosure of information received in confidence or maintaining the authority and impartiality of the judiciary are engaged here. What seem to be relevant are matters of public safety and the reputation or rights of others.

82. In terms of public safety we find that the claimant was seeking, in his own way, to protect public safety and that the respondent's interference with his right was not for the protection of public safety. The interference seems to us to have been rather to protect the reputation and rights of others. In our judgment the claimant's reference in his email to senior management was not specific enough to damage the reputation of any particular member of the respondent's management given that no one individual was mentioned whether by name, title or rank.

83. We therefore conclude that the respondent's interference with the claimant's right to freedom to hold opinions and to impart information was an interference with the claimant's convention right which was not justified in the particular circumstances of the case. We say this even though the claimant has accepted that his statements were factually incorrect but bearing in mind his state of mind at the time of sending the e-mail.

84. Having found the interference was not justified we proceed to question IV and noting that the reason for the dismissal was in connection with the sending of an email, the content of which was in direct contravention of the respondent's email policy, the sending of which was found to constitute gross misconduct and which resulted in the claimant's dismissal we find that there was no permissible reason under the Employment Rights Act which did not involve justified interference with the claimant's convention right. This being the case we find the dismissal unfair for the absence of a permissible reason to justify it.

85. Having found this there will be a remedy hearing on Friday 22 January 2010. The claimant is to provide the respondent with an up to date schedule of loss by Friday 8 January 2010 together with all supporting documentation and four copies are to be brought to the Remedy Hearing.

86. If the respondent wishes to introduce any further documentation in respect of the remedy hearing then it is to provide copies to the claimant by Friday 15 January 2010 and to bring four copies for use at the remedy hearing.

John Sherratt.

Employment Judge Sherratt

JUDGMENT SENT TO THE PARTIES ON

26 November 2009

FOR THE SECRETARY OF THE TRIBUNALS

[KG/JE]