Buckinghamshire & Milton Keynes Fire Authority

MEETING	Fire Authority
DATE OF MEETING	18 September 2019
OFFICER	Graham Britten, Director of Legal & Governance
LEAD MEMBER	
SUBJECT OF THE REPORT	**P Holland v Buckinghamshire and Milton Keynes Fire Authority**
EXECUTIVE SUMMARY	The purpose to this report is to apprise the Authority of the decision of the Employment Tribunal arising from claims brought by its former Area Commander Paul Holland against the Authority following his dismissal on 17 August 2017. The claim, submitted in December 2017, sought declarations that the claimant had been unfairly dismissed and discriminated against; an order for him to be reinstated as Area Commander or re-employed by the Authority; and compensation. The case was heard in Watford before Employment Judge Heal and two lay panel members between 25 and 29 March 2019 after a preliminary hearing held there on 4 May 2018. On 26 March 2019 the claimant dropped his claim for reinstatement or reemployment and sought compensation only. The full decision, comprising 40 pages, was received on 6 August 2019 and published on the gov.uk website on 9 August 2019: Mr P Holland v Buckinghamshire and Milton Keynes Fire Authority In the detailed and well-reasoned judgment the decisions and actions of Kerry McCafferty the, then, Head of HR, the Chief Fire Officer, and the Deputy Chief Fire Officer were found to be proper and correct in every single respect. There is a finding that the claimant was disabled but that any discrimination arising was justified. The reasonable adjustments and victimisation claims failed as did the allegation that his dismissal was unfair. The claimant can appeal on a point of law if he lodges a notice of appeal by 4.00pm on Monday 16 September 2019.
ACTION	Noting
RECOMMENDATIONS	That the report be noted.

RISK MANAGEMENT	It is only in recent years, since 2017, that Employment Tribunal decisions are placed online, prior to this they were only available in hard copy by applying to the Judgment Register in Bury St Edmunds. The increased transparency of an online database with search facilities has increased the awareness of the public and the media of litigated employment disputes. It has once resulted in a previous judgment arising from an unsuccessful claim made against the Authority receiving media attention. At § 172 to 177 of the judgment is a useful synopsis of some of the key events and the decisions taken by Deputy Chief Fire Officer Osborne and Chief Fire Officer Thelwell in considering why it was necessary to dismiss the claimant on the ground of reputational damage: *172. When we look at Mr Osborne's decision to dismiss, we see that he has identified the facts which amount to his reason to dismiss. Those facts are that the claimant chose to drive a vehicle knowingly over the legal alcohol limit, crashing into a ditch. He was then arrested, charged and after a court appearance on 22 May 2017, was fined and banned from driving.* *173. Mr Osborne then placed two labels on this set of facts. The first was that the claimant's behaviour and action fell far below that expected of an employee as detailed in the code of conduct. This is labelling or categorising the facts as misconduct.* *174. Then, Mr Osborne notes that the fire service is a disciplined uniformed organisation with responsibilities that include working closely with other blue light services, health partners, local authorities, councillors and members of Parliament. He notes the claimant's acknowledgement that his actions would be deemed unacceptable by many other staff, members of the public and external partners. He finds as a further element of the set of facts that the claimant's actions had brought the reputation of the respondent into disrepute.* *175. These are additional facts which then cause him to label or categorise the initial set of facts as reputational damage: potentially 'some other substantial reason'.* *176. We find that Mr Osborne genuinely believed in the set of facts which he gave as the reason for his dismissal.* *177. We find that Mr Thelwell genuinely believed in a slightly different set of facts. He did not make a decision about whether the claimant drove wilfully or recklessly, but he did genuinely believe that the claimant drove a vehicle while drunk and was convicted. He also believed (as a fact) that this set of*

	facts brought the reputation of the respondent into disrepute.' **Unfair Dismissal** In finding that the dismissal was not unfair the judge states [§ 198 to 200] as follows: '*198. It was also within the reasonable range of responses for both Mr Osborne and Mr Thelwell to decide that the risk of damage to the respondent's reputation was so great that dismissal was a reasonable sanction. In the case of Mr Osborne, who on the evidence before him reasonably regarded the matter also as one of misconduct this was a more straightforward decision.* *199. The case of Mr Thelwell's decision is less straightforward because there was evidence before him which suggested that there were reasons to do with the claimant's mental health which had overborne his free will so that he did not consciously make a decision to get into the car and drive. Mr Thelwell did not make a clear decision about that medical evidence but he did make a decision that notwithstanding that evidence, the risk of reputational damage was so high that dismissal was appropriate.* *200. We consider that decision was within the reasonable range of responses. We think that because the claimant was a senior fire officer with a public safety role. The respondent liaises regularly with other blue light services. Moreover, the respondent deals with the practical results of drink-driving. The respondent's credibility would be seriously damaged in the circumstances if it continued to employ a senior fire officer who had a conviction of drink-driving. If it continued to employ the claimant, the respondent would risk being in a position repeatedly of having to justify his employment in the circumstances. Moreover, we do not consider it likely that the general public or the other services with which the respondent works, or indeed other firefighters and fire officers, will always look deeply into the detail of the claimant's medical history or make anything other than a surface judgment of his situation. The respondent cannot always control or influence the conclusions that may be drawn. What the public and other services will see is that the claimant has a conviction for drink-driving*.'
FINANCIAL IMPLICATIONS	Provision has been made in the Statement of Accounts based on a potential liability of £255,330. If the claimant were to succeed in his unfair dismissal claim he would be awarded a Basic Award of £9,291 (19 weeks x the, then, statutory maximum of £489) and quite likely to get the maximum compensatory award of one year's gross pay being £73,680 if the Tribunal accept that it was reasonable for him to be out of the

	job market for in excess of a year. This would be a total risk of £78,750. If he also succeeded in the disability discrimination claim the likely award would be between £15k to £25K for injury to feelings. The cap would be lifted from the compensatory award for loss of earnings so the Tribunal could award further sums under this head. In such a scenario (if the claimant provides medical evidence that he is unfit to work for the foreseeable future) a reasonable estimate could be an award of 3 years' gross pay (£221,040) In summary, therefore, the award could be in the region of £255,330. A 'remedies hearing' had been scheduled for 1 and 2 of October 2019 during which claimant may well have argued (and might argue if he successfully appeals) that he should be awarded a greater amount to reflect future loss of earnings, and in particular loss of pension, had he not been dismissed. For example, in a draft 'schedule of loss' served by the claimant after the preliminary hearing he was alleging in excess of £480,000 for lost pension lump sum alone.
LEGAL IMPLICATIONS	Rule 3(3) of the Employment Appeal Tribunal Rules 1993/2854 paragraphs 4.2 and 4.3 of the EAT Practice Direction state that the Notice of Appeal must be filed within 42 days from the date on which the written record of the judgment was sent to the parties. The 42-day time limit starts to run from the date on which the relevant document is "sent" to the parties, not the date on which it is received or deemed to be received. The starting date for this tribunal judgment is 5 August 2019. Monday 5 August is not included in the calculation so the Notice of Appeal must arrive at the Employment Appeal Tribunal before, or **by 4.00pm on 16 September 2019** (i.e. the Monday 6 weeks later) Under rule 37(1) of the EAT Rules, the EAT has a discretion to extend time for a Notice of Appeal to be presented. This has rarely been used. Nevertheless, an application for an extension of time can be made, in accordance with paragraph 4.5 of the EAT Practice Direction, once a Notice of Appeal has been lodged. In J v K [2019] EWCA Civ 5 , the Court of Appeal gave guidance on the factors the EAT should take into account when an appellant claims that their mental ill-health was a factor in their delay in presenting their appeal. If a Notice of Appeal has passed through the initial vetting procedure and has been registered, the

	Registrar seals it with the EAT's seal and serves a copy on the appellant and the respondent. Section 21(1) of the Employment Tribunal Act 1996 (ETA 1996) provides that an appeal from an employment tribunal can only be made on a "question of law". Paragraph 2 of the EAT Practice Direction states: '*Given the requirement for a question of law under the ETA 1996, the parties must expect any decision of fact made by an employment tribunal to be decisive. It is not an error of law for a tribunal or judge to reach a decision which one party to the case thinks should have been made differently. The appeal is not a rehearing of the case. The employment tribunal must be shown to have made an error of law.*' To succeed in an appeal on a point of law, an appellant must be able to establish a misdirection on the law, a misapplication of the law, or a misunderstanding of the law.
CONSISTENCY WITH THE PRINCIPLES OF THE DUTY TO COLLABORATE	In the judgment [§ 167] the letter dated 10 October 2017 from the Chief Fire Officer to Mr Holland confirming the outcome of the internal appeal is quoted follows: *'[…] regardless of any culpability on your part, (i.e. whether it can be said that you acted wilfully or recklessly), I do believe the reputation of the Authority would be completely tarnished if seen to condone the actions of a senior leader, who should be at the forefront of promoting community safety, by continued employment following a conviction for drink driving. As you are aware drink-driving campaigns feature heavily in our road safety work and strategy and I believe this work would be undermined by your continued employment. That, in my view, would be the case in terms of maintaining credibility with colleagues, reports and partners as well as the public. In summary, whatever the circumstances leading to the decision taken to drive, your conviction for drink-driving inevitably discredits the Fire Service and serves to undermine public confidence in us and other blue light services that we have a duty to collaborate with.'* Elsewhere in this report, it will be seen that the Employment Tribunal concurred with the Chief Fire Officer's beliefs.
HEALTH AND SAFETY	Not applicable
EQUALITY AND DIVERSITY	**Discrimination arising from disability** Between the dismissal hearing convened by Mr Osborne and the appeal hearing convened by Mr Thelwell the claimant produced evidence of depression

	and post-traumatic stress disorder ('PTSD') in a report of a medical expert commissioned by his solicitor. These were accepted by Mr Thelwell. At the Tribunal the Authority disputed that these impairments amounted to a disability only in that these did not have a substantial adverse effect on the claimant's day to day activities. (To have a disability (in law) one must suffer an impairment which has a substantial adverse effect on one's ability to carry out 'normal day-to-day activities' over the long term.) The judgment [§ 200] found that the claimant was disabled under the Equality Act 2010. In a joint statement the two experts instructed by the claimant and the Authority accepted that on the balance of probabilities the claimant's actions in getting into his car and driving whilst intoxicated on 5 May 2017 arose in consequence of his depression or post traumatic symptoms. The Employment Judge therefore found that the dismissal for drink driving was because of something arising in consequence of the disability and was therefore discriminatory. However the judgment found [§ 206 -210] that the discrimination was justifiable on the basis that the decision to dismiss was a proportionate means of achieving a legitimate aim: *'206 […] It is of very high importance that the public retain their confidence in the fire service: the public rely upon the fire service to be available in the most extreme circumstances, to enter their premises and homes, to drive fire appliances safely upon the roads especially in emergencies, and to set an example as part of their work in deterring the behaviour which causes significant road accidents.* *207. It is equally of high importance as an aspect of public confidence that the fire service retains the confidence of the other blue light services with which it works. It is of vital importance that when senior fire officers speak in public about the dangers of drink-driving they do so with credibility. The claimant was a senior fire officer with a conviction for drink-driving. Even though there is medical evidence that his actions getting into his car on 5 May 2017 arose in consequence of his depression or PTSD, that is unlikely to be information readily available or accessible to the general public. The readily available information will be that he has a conviction for drink-driving. It is the fact of the drink-driving on 5 May 2017 and the fact of the conviction that will cause critical judgments to be formed and to undermine public confidence in the claimant and the fire service that employs him.* *208. Although the impact on the claimant of his dismissal was of course significant and devastating in*

	personal terms, we consider that the aim of retaining public confidence in the fire service is so important for social reasons and for the purpose of minimising the likelihood of serious road accidents in the future as well as for the purpose of optimising the ability of blue light services to work together, as to substantially outweigh the discriminatory effect on the claimant on the facts of this case. *209. It is impossible to measure or predict the likelihood of a single additional road accident or the impairment of blue light services' ability to respond to a road accident because of the message sent by continuing to employ the claimant. The fact is however that continuing to employ the claimant as a senior fire officer carries a serious risk of sending out a message that drink-driving is acceptable. That carries an inevitable risk of loss of life.* *210. There might indeed be – as the claimant has suggested - imaginative ways of using the claimant as a mental health champion going public as to his disability. However, it is not the primary purpose of the respondent's service to work to promote mental health. It is its primary purpose to save lives and to reduce the risk of loss of life.'* **Reasonable adjustments** The claimant alleged that the Authority failed to make two reasonable adjustments. Mr Holland's medical expert had been instructed by his solicitor to consider whether any reasonable adjustments should be requested for the internal appeal hearing. She said in answer that the claimant was still depressed and suffering from PTSD and as such any situation where he was asked to recount his story would be placed in an unduly stressful situation (including an appeal hearing) should be conducted sensitively. In her opinion this questioning should be undertaken (in the main) by a suitably qualified and competent individual able to interview someone with mental illness. Furthermore, the Authority should permit Mr Holland to be represented by a lawyer. Requests for Mr Holland (1) to be questioned by a suitably competent and qualified individual who was trained in questioning people with mental illness; and (2) for him to be legally represented were both denied by the Head of HR. In respect of (1) the Employment Judge found [§ 216] that: `*This adjustment would not have avoided the alleged disadvantage. The claimant hardly spoke during the appeal hearing. Mr Thelwell did not question him save to ask whether something was also his recollection. Mr Newton* [the claimant's companion at the appeal hearing] *did the majority of the speaking and the*

	claimant voluntarily added points. Even if the claimant needed to be questioned by someone trained in questioning people with mental illness, the fact is that the need did not arise, so the presence of such a qualified individual would not have avoided any disadvantage'. In respect of (2) the Employment Judge found [§ 215] that: *'This would not be a reasonable adjustment. The claimant was represented by Mr Newton, an extremely experienced and able trade union representative. We have already found that there was no disadvantage but even so, we do not think that the presence of a legal representative would have avoided it in circumstances where Mr. Newton himself could not have avoided it.'* **Victimisation** The claimant brought 2 claims alleging that the Chief Fire Officer had victimised him by: (1) writing a letter to High Wycombe magistrates' court dated 1 September 2017 after realising that the magistrates had been misled either by the claimant or by his counsel in that the magistrates had been told that the claimant had been diagnosed with PTSD when at stage there had been no such diagnosis ; and (2) deciding to approve a press release prepared at the conclusion of the internal appeal process which made no mention of the claimant's mental health issues. Both claims were dismissed. In respect of (1) the judgment [§ 219] states: '*The 'reason why' Mr Thelwell wrote this letter was because he felt it was his ethical duty to write that letter, as our findings of fact show*.' In respect of (2) the judgment [[§ 220 - 222] states: '220. *Mr Thelwell did not draft the press release, although he had sight of it and of the claimant's comments on it before it was released. We find that it was drafted as it was because the claimant's mental health was a sensitive issue which a drafter would not have included, as a matter of course. The claimant and his solicitors did not ask for the mental health matter to be included. In those circumstances we think it did not cross Mr Thelwell's mind to include information about the claimant's mental health. It would have been inappropriate to do so. He accepted this statement as it was because he regarded it as factual and fair and accurate.* 221. *There is in any event no evidence from which we could properly and fairly conclude that the press release only included the information it did was*

	because the claimant carried out a protected act. There is no evidence that the respondent reacted negatively or with any hostility to the claimant because he carried out that act. 222. *However that may be, the 'reason why' the wording was as it was, was that Mr Thelwell regarded the statement as factual, fair and accurate, there was no consent to provide mental health information and the claimant did not ask for it.'*
USE OF RESOURCES	At the time of writing and by the time of the Authority meeting it will not be known if the claimant has lodged an appeal at the Employment Appeal Tribunal nor, if lodged, the appeal has been accepted by it. Since the regrettable events of 5 May 2017 considerable resources and time have been expended on this complex matter during the internal and external processes. Mr Glen Ranger, retired Deputy Chief Fire Officer from Bedfordshire Fire and Rescue Service assisted in the internal investigation and as a witness at the Tribunal. As well as the Chief Fire Officer, Deputy Chief Fire Officer and former Head of Human Resources witness evidence was also provided by Julian Parsons, Head of Service Development and Neil Boustred, former Head of Service Delivery. External spend on the solicitors instructed since receipt of the Tribunal Claim in December 2017 (including fees for the Authority's medical expert) has amounted to £75,595.14; with additional fees for Counsel of £22,560.
PROVENANCE SECTION & BACKGROUND PAPERS	Mr P Holland v Buckinghamshire and Milton Keynes Fire Authority: 3329303/2017 Employment Tribunal decision Published 9 August 2019
APPENDICES	None
TIME REQUIRED	10 minutes
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