EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENTS**
MR D PUGH	**V**	**(1) MID &WEST WALES FIRE AND RESCUE SERVICE** **(2) MR EMYR JONES**

HELD AT: **SWANSEA** **ON:** **HEARING**: 26, 27, 28 & 29 MARCH 1, 2 & 3 APRIL 2019
CHAMBERS: 17 MAY 2019

BEFORE:

EMPLOYMENT JUDGE: N W BEARD **MEMBERS: MS WILLIAMS**
MS HURDS

Representation:

For the claimant: Mr Oliver Hyams (Counsel)

For the Respondent: Mr Allan Roberts (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The claimant's claim of disability discrimination pursuant to section 15 of the Equality Act 2010 is made outside the time limits and the tribunal have no jurisdiction to adjudicate upon it.
2. The claimant's claim of disability discrimination pursuant to section 26 of the Equality Act 2010 is made outside the time limits and the tribunal have no jurisdiction to adjudicate upon it.
3. The claimant's claim of victimisation pursuant to section 27 Equality Act 2010 is not well founded and is dismissed.
4. The claimant's claim of detriment pursuant to section 47B of the Employment Rights Act 1996 is not well founded and is dismissed.

REASONS

PRELIMINARIES

1. The claimant is represented by Mr Hyams, the respondents by Mr Roberts both of Counsel. The claimant was a retained firefighter, the first respondent is his employer and the second respondent the officer in charge of the fire station to which the claimant was assigned. The claimant approached ACAS under the early conciliation process on 19 March 2018 in respect of the first respondent and on 23 March 2018 in respect of the second respondent, both conciliation processes were concluded on 11 April 2018. The claimant's claim was presented on 28 April 2018.
2. The tribunal has been provided with a bundle of documents running to three volumes with a separate volume of pleadings a total number of documents just short of 1400 pages. The tribunal made it clear to the parties that the tribunal would not consider or take account of any document which was not specifically referred to in a witness statement, during cross examination or in final submissions. We were asked, during the hearing, to listen to recordings of events involving a call out to the claimant's grandparent's home, which we did.
3. The tribunal heard oral evidence from the claimant; he called, as witnesses on his behalf, Mrs Carys Pugh, his wife, Mr Robert Pugh, his father, Mr Darren Jones, a colleague and Mr Neil Messam a Fire Brigades Union representative. The respondents called Mr Jones the second respondent, Mr Daniel Kempton a crew manager subordinate to Mr Jones but superior to the claimant, Mr C Turner a Station Manager at a different fire station, and Mr Steven Rees a human resources officer.
4. We discussed the issues with the parties at the outset of the hearing and it was thought that they were essentially contained in a document prepared by the claimant and approved by the respondents (although with the respondents' qualification that this was a simplification of the issues). The tribunal used the rest of the first day as a reading day reading witness statements and documents recommended to us by the parties as essential.
5. However, on the second day of the hearing the claimant made an application to amend the claim. The tribunal allowed this application as Mr Roberts conceded it caused no prejudice to the respondents; the necessary witnesses were available to deal with any issues that arose from the amendment. The following are the issues we are now required to consider: disability discrimination pursuant to sections 15 and 26 Equality Act 2010, victimisation pursuant to section 27 EA 2010 and a section 47B Employment Rights Act 1996 claim that the claimant was subjected to a detriment because of making a protected disclosure;

5.1. The claimant complains of disability discrimination pursuant to section 15. He contends that in order for the respondents to agree to employ him on a retained firefighter's contract he was required to be available for a particular number of hours.

5.1.1. There are generally two threshold levels applicable to retained firefighters' available hours: the first is set at 90 hours per week with a rate of pay which remains unchanged up to the second threshold where a higher rate is payable.

5.1.2. The claimant alleges that the hours he was required to contract for were arranged because it was known that the claimant was dyslexic and because it was assumed he would not be able to easily assimilate documents.

5.1.3. It was argued that it was known, because of his dyslexia, that the claimant would remain unaware that if available for just an additional two hours he would be paid at one rate but that on the rate at which he was paid, he could be available for 28 fewer hours.

5.1.4. The claimant contends that this amounted to treatment extending over a period.

5.2. The respondents whilst accepting the claimant is disabled with dyslexia contend that they lacked knowledge of the disability at the relevant times. They further argue that, in any event, the contractual hours were unrelated to the claimant's disability. The respondents also raise time limit and justification issues.

5.3. The section 26 claim is about a training event in January of 2014, the claimant argues that jokes about dyslexia were made at this session. The claimant contends that the jokes had the purpose or effect of creating an environment or having an effect on his dignity as prohibited by statute.

5.3.1. The claimant accepts that the claim is ostensibly out of time but argues that it would be just and equitable for the tribunal to extend time for the presentation of this claim.

5.3.2. The claimant argues he first felt inhibited from bringing a claim and there was thereafter ongoing suppression of evidence relevant to the potential claim.

5.3.3. The respondents deny harassment on the basis that any jokes told neither had the purpose or effect contended for.

5.3.4. Further, the respondents contend, that it would have been unreasonable for the claimant to have treated any jokes as harassment.

5.3.5. The respondents also argue that time limits should not be extended.

5.4. The claimant contends that the following matters are either victimisation or a detriment or both.

5.4.1. The second respondent attending at an emergency call to the claimant's grandparent's property on the 8 September 2016 and remaining there despite objections by the family. Further the second respondent subjecting the claimant (in person and by proxy) to the following treatment:

5.4.2. Saying "hey" in a creepy voice to the claimant's wife in the street:

5.4.3. Standing at the gateway of the school where the claimant's wife works preventing her from driving out of the school gates.

5.4.4. Lingering at the bottle bank close to a reception following the claimant's child's christening long after it was necessary to do so.

5.4.5. Approaching the claimant's employer and referring to an incident involving the claimant.

5.4.6. Asking the claimant's employer what the claimant has been saying about the first respondent.

5.4.7. Attending rugby matches and asking questions of the claimant's employer and the employer's son about the claimant.

5.4.8. Mouthing or saying things to the claimant whilst driving past the claimant.

5.5. The tribunal is required to consider whether any of the acts outlined above occurred, and if so did they individually or cumulatively amount to detriments to the claimant.

5.6. We are required to decide whether if the acts occurred, and they are detriments, that they arose because the claimant had raised a grievance about disability discrimination or had made a protected disclosure.

5.7. We are also required to consider whether these separately or together amount to an act extended over a period of time or are part of a series.

5.8. The protected disclosure and protected act relied upon is the information contained in an email on 11 August 2015 from Neil Messam to Steve Rees.

5.9. The respondents do not accept that the document in question provides a qualifying disclosure from the claimant. The respondent also argues that claims are out of time

5.10. The claimant also contends that the first respondent subjected the claimant to detrimental conduct by supressing material evidence of

events of the 8 September 2016 and by disciplining the claimant and dismissing his appeal.

THE FACTS

6. It is worth prefacing the facts by indicating that Newcastle Emlyn is a very small town in rural west Wales. It is a close-knit community where families and the local organisations, such as the Rugby Club, play a significant role in people's day to day lives. From the evidence we heard, for instance, the second respondent's initial knowledge of the claimant, stemmed from his knowledge of the claimant's father's employment in the fire service and the claimant's involvement in rugby. From that it can be seen that the protagonists in this case lived, to an extent, cheek by jowl.

7. On the 3 January 1995 the second respondent became an employee of the first respondent. By the time the claimant was recruited on 2 October 2011 the second respondent, amongst other roles with the first respondent, had become watch manager at the Newcastle Emlyn fire station, and was the claimant's manager.

8. The claimant had attempted to become a retained firefighter on earlier occasions but had been unsuccessful. The claimant had not been accepted because he had failed to pass several tests on the same occasion as was required. The second respondent had intervened on the claimant's behalf because the claimant had passed each of the necessary tests, albeit on separate occasions. The second respondent told us he was impressed with the claimant's persistence in his determination to become a firefighter.

9. There was a dispute as to whether the claimant had made the second respondent aware of his disability at this time. We prefer the evidence of the claimant on this issuet.

    9.1. The claimant told us that he had difficulty with the tests because of his disability, on the balance of probabilities the claimant is likely to have believed this to be true.

    9.2. It is correct that the claimant had not included dyslexia on the application form, whereas he had done so in the past. The claimant told us that this was because he thought this might have had an impact on earlier applications.

    9.3. We take on board the friendly relations between the claimant and second respondent at that time. It appears likely that the claimant would have been offering explanations to the second respondent for his failure to pass in order to gain his support. We consider, given that relationships between the claimant and the second respondent were very good at that time that it is probable that the claimant informed the second respondent of his difficulties.

10. There is a dispute as to how the hours the claimant was contracted to be available were arrived at. The claimant was contracted to work 118 hours. The claimant's evidence was that these hours were, although agreed with him, put forward at the suggestion of the second respondent. The second respondent indicated the level of hours had been reached by discussion. What was not in dispute was that there was no discussion about the "grey book" (the national document setting out agreed terms and conditions for retained firefighters) terms which set out two rates of retained pay based on thresholds.

    10.1. The discussion, according to the second respondent, began with the claimant indicating that he would make himself available for 168 hours (an entire week); that proposal was rejected as inappropriate. The second respondent told us that the claimant was suggesting that level of availability at a time when it was thought the claimant's employer would release him during daytime working hours; it became apparent that the claimant's employer would not. The second respondent indicated that the figure of 118 hours was arrived at because the claimant could not be placed on 120 hours given his lack of daytime availability.

    10.2. The Newcastle Emlyn Fire Station staffing was to be covered by twelve units, one unit being equivalent to a person contracted to be available for 120 hours (per week) or more.

    10.3. There was then a 75% part of a unit which equated to a person who was available for between 90 and 120 hours (120 hours and over paid at the 100% rate and below 120 hours at 75% rate). Therefore, four people on the 75% rate were equivalent to three on the 100% rate.

    10.4. In addition to contracting 12 units to the station there was an additional consideration in the mind of the second respondent, that of the difficulty in ensuring that daytime hours were covered. The evidence was that it was much more difficult to find individuals that could be available during daytime hours in the working week than for evening and weekend cover. The second respondent had to ensure that the hours worked by the retained firefighters provided sufficient cover 24 hours a day.

    10.5. We were told (and this was not contradicted) that there were a number of people, including the claimant, who were retained on a contract above 90 hours but below 120 hours. This was done in order to maximise coverage but leave 120 hour contracts for those available for daytime weekday cover.

    10.6. The claimant accepted that when he started as a firefighter he wanted to maximise his available hours as it was his ambition to gain experience and become a full-time firefighter.

10.7. In our judgment the selection of hours was related to the above factors. We did not consider that the second respondent gave any thought to the claimant's dyslexia in coming to the decision on the contracted hours, and it was not a factor in the agreed hours of availability.

11. The claimant's dyslexia does not prevent him from reading, however he has to do so slowly. The slow pace of reading does not prevent him from understanding long and complex written materials. The claimant did not read the grey book, but he did sign contractual documents which set out the terms on pay (p.102). The claimant was readily able to read this document when questioned about it at tribunal. The claimant's evidence was that he had not read the contract, although provided with a copy, at any stage. Based on the expert evidence from Doreen Roberts there is nothing, beyond additional time, which would prevent the claimant from a proper comprehension of documents if given time to read them. The claimant gave no evidence that he was not provided with sufficient time to read the contract.

12. There is also a dispute about events on 30 July 2012 when the respondent contends the claimant sought a review of his contracted hours.

12.1. The original decision on hours was set to be reviewed in January of 2012; this was done, but only administratively, and no changes were made.

12.2. The second respondent argues that the claimant made a request to move to 120.5 hours in 2012. The claimant contends that he only discovered the true position as to retained pay in 2015.

12.3. In July of 2012 the claimant raised the issue of differentials in pay and there was a discussion about that between the claimant and the second respondent.

12.4. There is considerable dispute about the content of that discussion which we do not find it necessary to resolve.

12.5. The claimant contends that although he was aware of the differential he did not know he might be able reduce to 90 hours and remain on the same rate of pay; the tribunal do not accept that evidence. The claimant is intelligent and once the issue of pay was raised we have no doubt that he would have considered the matter, we take the view that the requested increase to 120.5 hours is evidence of this.

12.6. In our judgment the claimant did not want to reduce his hours because of his ambition to become a full-time firefighter and was always seeking to increase them.

13. At a training evening, which was in relation to matters of diversity, the claimant contends that jokes were made about dyslexia. It is uncontroversial

that the evening took place, at the latest, in 2014, the respondent, from records places that at 20 January 2014.

13.1. It is admitted that a joke about dyslexia was made, but it is denied that there were a series of jokes. The claimant has been unable to give specifics of any particular joke that was told.

13.2. The joke accepted by the respondent as having been made was told by Daniel Kempton. His account is that his wife is dyslexic, and she sent a joke to him by text message which he then read out. His position was that there was no malice in doing so, he contends that he was at that time unaware that the claimant was dyslexic. However, he also goes on to say that part of the fire station culture was to bond through jokes.

13.3. The respondents contend that the claimant takes part in such "banter" and raise an incident where the claimant referred to the race of another firefighter in a derogatory way.

13.4. In our judgment it is likely that the kind of jokes that the claimant complains of were made, as it is similarly likely that the race issues surrounding comments by the claimant arose in the way we heard described to us by the respondents' witnesses.

13.5. It is particularly unfortunate that the dyslexia jokes were made on an occasion where diversity training was underway. The fact that "jokes" about race and disability are considered as, it would appear, banter, points to a culture where diversity is treated as unimportant.

13.6. In our judgment the claimant would have kept his discomfort hidden on the night to "fit in" with this culture. Investigations by Craig Turner reveal that others (Gethin Davies and Darren Jones) were aware that the claimant had been upset by the events of the evening.

14. In January 2015 the claimant commenced a temporary posting as a full-time firefighter in Haverfordwest (whilst remaining a retained firefighter at Newcastle Emlyn). That appointment was extended, and the claimant was under the impression it would lead to a full-time role. It appears that at some point during this appointment arrangements were made for the claimant to undertake a driving course. The claimant's father was a driving instructor with the first respondent. The second respondent considered that the claimant or his father had in some way engineered this opportunity for the claimant to take the course (we understand that this view was investigated and proved to be unfounded). The second respondent considered this to be unfair, as it placed the claimant in front of other firefighters at Newcastle Emlyn who the second respondent considered to be in advance of the claimant in the queue to be trained. The tribunal consider that this motivated the second respondent to raise concerns about the impact of the claimant's role in the full-time contract as a conflict with his retained status. The claimant's temporary

position was not renewed as he had been led to believe it would be and it came to an end on 31 August 2015. The claimant was informed of this in a letter dated 14 August 2015. In our judgment this is likely to have been connected to the second respondent's intervention. We also conclude that this led to a deterioration in any relationship between the claimant and the second respondent and between the claimant's father and the second respondent, such that they were each at odds from that point on.

15. Someone from the Haverfordwest station approached the Fire Brigades Union (hereafter FBU) in August 2015 to complain that the claimant was being bullied (the claimant had not raised the issue).

    15.1. Mr Messam was asked to investigate the issues and he went to see the claimant on 7 August 2015.

    15.2. The claimant gave him information which he included in a report which Mr Messam sent to the first respondent's HR department on 11 August 2015. That report is described in an email sending it as an internal FBU report. The report complains about the following:

        15.2.1. The events the diversity training session;

        15.2.2. That the second respondent has treated the claimant poorly for three years including intimidating him;

        15.2.3. That the claimant's contract required 90 hours availability but it was demanded that the claimant provide 118 hours;

        15.2.4. That unfounded accusations of drink driving were made against the claimant;

        15.2.5. That the claimant was prevented from taking up a driving course;

        15.2.6. That the claimant's contract would be terminated if he sought different hours;

        15.2.7. That the second respondent had made a false claim for expenses claiming to be working at a Victorian night event.

        15.2.8. The report indicated that the claimant was fearful about raising matters because he wanted a full-time appointment and believed the second respondent was well connected with senior officers of the first respondent.

16. Because of this communication an investigation was set up by the respondent appointing Craig Turner (who was four ranks above the second respondent at the time) as the investigator. The result of that investigation was communicated to the claimant on 1 October 2015; the complaints were dismissed on the basis there was no case to answer. The FBU wrote to the

first respondent and expressed concerns about the investigation. The issues raised were:

16.1. That the claimant had not been approached to give evidence and in consequence hadn't been asked for explanations, allowed to name witnesses or provide any information;

16.2. That the complaint had referred, specifically, to documentary evidence and the FBU had not been contacted to provide that evidence;

16.3. That the complaint of fraudulent behaviour had not been investigated.

16.4. The FBU asked to see the investigation report and to have discussions with the first respondent.

17. Mr Turner told us he did not investigate the fraud matter in the first investigation, beyond looking at some finance department documents. He told us that this was because he considered it to be too serious a matter for him to deal with. His evidence in respect of not approaching the claimant was that he had been provided with the FBU report and considered that to be comprehensive, on that basis he did not believe he needed to speak to the claimant.

18. In consequence of the second letter from the FBU the first respondent instituted a further investigation. This time they instructed Mr Turner to consider the allegation of fraud and to look further into the issues related to the claimant's dyslexia. As a result of this an investigation report was produced on the 18 November 2015. Mr Turner's conclusions remained that there was no case for the second respondent to answer. This was communicated to the claimant on 9 December 2015.

19. On the 10 October 2015 the claimant had become ill and unfit to work and he was later referred to an occupational health appointment in November; he remained unwell when this decision was communicated in December. In January 2016 an occupational health report indicated that the claimant had developed psychological symptoms related to work with the first respondent. This was diagnosed as an adjustment disorder arising from the claimant's perception of work issues. The report indicated that there was no medical solution, but any resolution would require a workplace solution to be reached between the claimant and the first respondent.

20. The first respondent had previously offered mediation and in January 2016 the claimant indicated his willingness to take part. Mediation was to be conducted via ACAS. However, mediation did not proceed as, upon discussing the matter with the mediator, the claimant was told that mediation was inappropriate in the circumstances. This was because the claimant's continuing view that his complaints remained unresolved meant that mediation would not be effective. Whilst there was a dispute about this the

respondent did not rely on any evidence to specifically refute the claimant's account. Further to this the tribunal consider it entirely plausible that a mediator would have communicated concerns about the utility of a mediation process when a potential participant had not reconciled themselves to the existing circumstances.

21. The claimant maintained that the investigation had not been carried out appropriately.

    21.1. Mr Messam requested a copy of the investigation report, this was not provided.

    21.2. Discussions were ongoing between the FBU and the first respondent during the ensuing months. The FBU sent a letter in April 2016 stating the claimant's grievances in significant detail.

    21.3. Further communications were sent by the FBU asking the respondent to provide the second investigation report itself or the methodology used to produce the report.

    21.4. On 23 June 2016 the first respondent wrote rejecting the claimant's complaints; the claimant wrote appealing that rejection on 5 July 2016.

22. On 8 September 2016 an appeal hearing was held. On the same day the following events took place.

    22.1. The claimant's grandmother had been found on the floor; the claimant's mother, a nurse, made a 999 call. In that call she expressed her view that crew from the Newcastle Emlyn fire station (who would respond in an emergency such as a cardiac arrest) should not attend; she made clear her view that her mother had passed away.

    22.2. In such an emergency, qualified paramedics are permitted to declare someone as deceased, first responders, such as firefighters, even with relevant training, are not allowed to make such a judgment.

    22.3. Despite the request made by the claimant's mother and because of arrangements between the fire service and the ambulance service, the Newcastle Emlyn crew were despatched to attend. In a further twist, the usual policy, up to this point, was for a two-man crew to attend in a responder car, however a change in policy meant that the fire appliance was required to attend, with a full crew.

    22.4. The second respondent attended with that crew. The name of the claimant's grandmother was spoken of whilst at the station. We reject the evidence of the second respondent that he did not connect that name with the claimant.

        22.4.1. On the evidence we heard it is apparent that the second respondent gave some thought as to whether he should attend given

the poor relationship between himself, the claimant and the claimant's family.

22.4.2. He held a discussion about this, as can be seen from the records.

22.4.3. No doubt a further consideration in mind would have been the proximity of the appeal hearing to this event. However, the second respondent decided he should go.

22.4.4. The tribunal consider that this decision was appropriate at that stage: the second respondent could have been subject to severe criticism had he failed to attend an emergency involving the claimant's family because of personal matters between him and the claimant.

22.5. There was some dispute as to the positioning of individuals at the time the appliance arrived. The claimant contended that he was in the property engaged in a phone conversation. The records seem to back this up, however, it is also clear that the claimant came out relatively quickly upon the arrival of the appliance. In our judgment, although descriptions of the evening differ, the balance of those descriptions show it is the claimant who is correct that it was his father and brother who originally prevented entry of some of the crew to the property. The claimant then came out and ensured that some of the crew could enter.

22.6. However, it is also clear that the claimant then became embroiled in the arguments between his family members and the second respondent. The claimant and his family were determined that the second respondent should not enter the property, the second respondent seemed equally determined that he should. Even on the second respondent's own account he asked the claimant to fight him elsewhere and in the absence of the claimant's father.

22.7. In our judgment this was a tense situation. There was no right of entry for the respondents, the claimant had ensured that firefighters with appropriate equipment had entry to the property. It should have been clear to the second respondent that he was not welcome to attend the property. In our judgment any professional assessing that situation dispassionately would conclude that the situation was being exacerbated by the attendance of the second respondent. The second respondent should have realised this and withdrawn to the vehicle. He could have supervised events from there; there were sufficient firefighters for him to maintain lines of communication by radio or other means.

22.8. We asked ourselves why the second respondent did not do this. We have concluded that he considered he was being prevented from carrying out his role by the claimant's family. We have already indicated

that there was a poor relationship between the second respondent arising from the complaint about favouritism in the driving school. The person initially challenging the respondent was the claimant's father. Both these individuals, on our assessment, were strong personalities. We have no doubt that this became a battle of wills between them and one which the claimant became embroiled in support of his father. We took the view that it was this battle of wills which caused the second respondent to behave as he did.

23. The claimant's mother raised a complaint with the respondent about these events on 9 September 2016. She explained that she had asked for the Newcastle Emlyn firefighters not to be involved. She made a specific reference to the second respondent where she complained of aggressive conduct. She indicated that she was available to be spoken too about her complaint. The first respondent, on the same day, appointed Simon Jenkins to investigate her complaint. Mr Jenkins did contact her and obtained an account from her. Mr Jenkins then met those who attended the incident, including the second respondent and records were made of these discussions. In his conclusions Mr Jenkins thought that the second respondent had behaved unprofessionally in, essentially, asking the claimant to fight. He also concluded that this was a situation of high tension and considered the behaviour of the claimant and others inappropriate. On 28 September 2016 the first respondent wrote to Mrs Pugh and indicated that, in respect of the second respondent, "certain comments may have been made" but indicated this was a matter for internal procedures and no further comment could be given.

24. Meanwhile, on the 13 September 2016, the second respondent had raised a complaint about the claimant and his father and the events of 8 September. This was date stamped as received on 19 September 2016. Further to this on 15 September 2016 the first respondent wrote to the claimant indicating that his appeal, heard on 8 September, had resulted in a decision that further investigation was required by Mr Turner, this of course would be the third that Mr Turner had carried out into these matters.

25. Mr Turner commenced an investigation interviewing a number of people from the Newcastle Emlyn station throughout October, those interviews concentrated on the grievances previously raised by the FBU on behalf of the claimant. On 11 November 2016 Mr Turner interviewed the claimant for the purposes of the grievance.

26. On 20 October 2016 the second respondent was interviewed about his complaint about the claimant by a Mr Rowlands. There seems to be no co-ordination between the way in which this complaint was dealt with and that which had been made by the claimant's mother, despite them both being about the same event. On the 17 November Mr Jenkins wrote to the second

respondent about this conduct (p.744) and gave informal advice about his involvement in the events. Whereas, on the 23 November 2016, Mr Rowlands commenced interviewing the firefighters who had been present about the events of the 8 September 2016, which led to a disciplinary process against the claimant and the claimant's father, not having access, it would appear, to Mr Jenkins interviews with the same individuals.

27. Mr Turner, having prepared a report as early as 14 November 2016, submitted his report on the 11 December 2016. He set out his view that the claimant's complaints were not supported by the evidence that he had gathered. He expressed the view that the firefighters at the station had not supported the claimant's versions of events. Mr Turner was cross examined extensively about his conclusions. It was suggested to him that he had been "given a steer" towards finding against the claimant; he denied this with some vigour. The tribunal consider that Mr Turner's view, particularly in terms of diversity matters was affected by the culture we have described above. In particular, Mr Turner readily spoke of "banter" and justified it in his questioning as a means in which stress (caused by the nature of the work) was relieved. Whilst cross examination revealed some specific elements of evidence that might have been viewed as supporting aspects of the claimant's complaints, we do not consider that overall, given the tenor of the evidence, Mr Turner reached conclusions outside the scope of a reasonable view of the evidence he gathered.

28. On 12 December 2016 Mr Rowlands produced his report dealing with the incident of 8 September. His conclusion was that the claimant and his father had acted inappropriately in the incident on 8 September 2016. His view was that there was abusive language and physical contact (which he described as minimal) used by the claimant and his father. However, he also indicated that there were mitigating circumstances involving the "ongoing dispute" between the claimant and the second respondent and the fact that the claimant's grandmother was deceased within the property. Mr Rowlands also expressed concerns about the confidentiality of the interviews he had held, expressing his worries about the impact of what he described as a "feud" on the Newcastle Emlyn fire station and wider community. He recommended consideration be given to disciplining the claimant and his father for verbal and physical assault and further training for the crew at Newcastle Emlyn station.

29. On the 26 January 2017 the appeal meeting which had been adjourned for further investigation was reconvened. The claimant's appeal was not upheld. The reasons given were: that although the panel did not consider the claimant's complaint vexatious that did not consider that there was evidence of bullying and harassment by the second respondent. A letter outlining the result dated 30 January 2017 was sent to the claimant.

30. On the 13 February 2017 the claimant and his father were informed that there was to be a disciplinary hearing about the events of 8 September 2016. Mr Rowlands was to complete the investigation for the purposes of the disciplinary process. The claimant was interviewed as part of the investigation on 13 March 2017.

31. On 28 April 2017 the claimant was suspended from duty. He was invited to attend a disciplinary hearing on 31 May 2017. However, this was re-arranged to take place on 11 September 2017 and following submissions from the claimant's union representative in August 2017 the disciplinary hearing finally took place on 19 December 2019. Following the hearing the respondent considered that the claimant was guilty of misconduct; the claimant was given a written warning as the respondent considered that the events occurred in mitigating circumstances. The claimant appealed this decision. An appeal was held and on the 9 January 2018 the claimant's appeal was dismissed.

32. The evidence gathered by Mr Rowland was sufficient for a reasonable employer to conclude that the claimant had engaged in using abusive language and had aggressively come into physical contact with the second respondent.

33. Mr Rees, Deputy Head of HR, gave evidence to us on processes. It was undisputed, first that material gathered for the grievance investigation was not given to the claimant and, second, that the evidence gathered in the process of Mr Jenkins investigation was not disclosed to the claimant or put before the disciplinary or appeal hearings.
    33.1. In respect of the grievance materials Mr Rees told us the following:
        33.1.1. That the standard approach to grievance hearings at the time we are considering was that evidence gathered would not be shared with the complainant.
        33.1.2. That the FBU accepted this as a general understanding at the time as the approach to be taken.
        33.1.3. Mr Rees told us that this approach arose out of concerns in respect data protection duties.
    33.2. Mr Rees then dealt with the issue of disclosure in the disciplinary process and informed us that:
        33.2.1. The material from the Jenkins investigation only came to light in the process of discovery for these proceedings. His explanation for this is that the documents involved would have come to the respondent's human resources department as a closed process and as no actions were required would simply be stored.
        33.2.2. Mr Rees told us that he was unaware of these documents at the time of the disciplinary process taken against the claimant.
        33.2.3. Mr Rees also explained that he was asked to obtain legal advice about a request from the FBU for disclosure of the recordings

of telephone and radio communications which took place on the 8 September 2016. He told us that the advice he received and passed on was that there were data protection issues with disclosing the material.

33.2.4. He told us that the transcripts of interviews of crew by Mr Rowlands were not included in the disciplinary file, he considered tis an “administrative oversight”. In cross examination he told us that he could not explain specifically why the documents {pp. 745(a) to 745(o)} were not included for the disciplinary.

33.2.5. Mr Rees told us that the preparation of a disciplinary bundle would not be dealt with by a HR professional but by an administrative assistant in the department. His evidence was that the assistant would “sometimes" ask about what should go in the bundle but he could not recall if that was done on this occasion.

34. We heard evidence about a number of incidents involving Mrs Pugh and contact with the second respondent. Our overall view was that because of the ongoing difficulties between the claimant and the second respondent there were obvious tensions on any chance encounter between them. We remind ourselves that this was a small community where these individuals were likely to cross one and other’s path occasionally. It is noted that the second respondent indicates that he had no specific recollection of some of the incidents.

34.1. There was a complaint about the second respondent saying “hey” in a creepy voice to the claimant’s wife in the street. Mrs Pugh accepted in cross examination that this could have been based on her negative perception of the second respondent in circumstances where the second respondent felt awkward given the ongoing dispute. The tribunal consider that this event occurred, however we are also of the view that this was nothing other than a difficult encounter where Mrs Pugh’s perception was coloured by her negative view of the second respondent. We are also of the view, given the additional evidence in her witness statement compared to earlier accounts this was an account that grew in the telling. We do not consider this to have been done deliberately but do not consider the account in the witness statement to be entirely reliable.

34.2. There was a complaint about an event on the 18 July 2016 with the second respondent said to be standing at the gateway of the school where the claimant’s wife works preventing her from driving out of the school gates. The second respondent’s children attend that school. On cross examination Mrs Pugh disputed that the second respondent could be there legitimately. Again, the tribunal gained the impression that Mrs Pugh’s negative view of the second respondent coloured her perception. If her account was correct, the second respondent would have been deliberately placing not only himself but his son in danger by blocking the

exit. We do not consider that this is anything other than the second respondent attending the school and crossing the road in the path of Mrs Pugh whilst attending to pick up his children.

34.3. Another complaint was made about an incident in August 2017. The claimant and Mrs Pugh's child was christened. A reception celebration followed, arranged at the local football club premises. On the path between the Church and the football club is a bottle bank. Mrs Pugh accuses the second respondent of "lingering" at the bottle bank long after it was necessary to do so. The chances of the second respondent deliberately placing himself at the bottle bank to coincide with the party leaving the church appear to us to be vanishingly small. We heard that whatever the second respondent did at that stage he was likely to come closer to Mrs Pugh. We consider that he remained where he was in the hope that the party would move on swiftly. This was nothing but a chance encounter.

34.4. Mrs Pugh also complains of an occasion in or around September 2017 when the second respondent slowed down and gestured for her to cross a road. This was not foreshadowed in the pleaded case. We are of the view that the incident has taken on a greater significance for Mrs Pugh as time passed or it would have been included in the initial case documents. In our judgment again, this is nothing but a chance encounter and there is nothing sinister in the conduct of the second respondent.

35. The claimant makes further complaints about the second respondent. We have preferred the second respondent's evidence in this regard, the claimant's evidence was based on hearsay and we did not have a specific reason to doubt the second respondent's account about these matters.

35.1. His evidence that the second respondent approached the claimant's employer and referred to an incident involving the claimant seems to relate to the claimant's sometime role as a "doorman".

35.2. The claimant complains that the second respondent was attempting to paint the claimant in a poor light. There was an incident involving the claimant and another individual in his role as doorman.

35.3. In our judgment this is likely to have been an item of local gossip, we have indicated that this is a small community and an event involving a member of the community would have been the subject of general discussion.

35.4. The second respondent denied having discussed the matter, he accepted that he had been involved in a clean-up of the aftermath of the initial incident.

35.5. We do not consider that there is sufficient evidence that the second respondent discussed this matter. The matter would not have been unknown generally and we cannot accept the hearsay evidence of the

claimant on the issue given that we do not consider the second respondent to have lacked credibility in answering these matters.

35.6. The tribunal takes a similar view of the claimant's complaints about the second respondent asking the claimant's employer what the claimant had been saying about the first respondent and attending rugby matches and asking questions of the claimant's employer and the employer's son about the claimant.

35.7. In terms we consider that any such conversations that took place would have been generalised discussions about the relationship between the claimant and the respondents. It would not have been in the context of the second respondent speaking to the claimant's employer as an employer but as a member of the community and particularly in the context of the shared interest in rugby. It is difficult to imagine in the small community that the relationship between the claimant and the respondent would not have been known about and discussions such as this would inevitably arise. We take the view that nothing specifically to the claimant's detriment is revealed here.

35.8. Where the claimant complains that the second respondent was mouthing or saying things to the claimant whilst driving past we take the view that this probably represents the claimant interpreting matters negatively because of the poor relationship. In cross examination the claimant accepted that he could not exclude that the second respondent was engaged in a hands-free telephone conversation or simply singing along with the radio. We do not accept that there is sufficient evidence that even if the second respondent was mouthing things towards the claimant that this is evidence of detrimental treatment as there is no indication whatsoever of what was being said.

THE LAW

(1) Section 15 Equality Act 2010 provides: *A person (A) discriminates against a disabled person (B) if—*

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

35.9. Section 26 provides:

(1)A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant protected characteristic, and
(b)the conduct has the purpose or effect of—
(i)violating B's dignity, or
(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
----
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a)the perception of B;
(b)the other circumstances of the case;
(c)whether it is reasonable for the conduct to have that effect.

35.10. Section 27 provides:

(1)A person (A) victimises another person (B) if A subjects B to a detriment because—
(a)B does a protected act, or
(b)A believes that B has done, or may do, a protected act.
(2)Each of the following is a protected act—
(a)bringing proceedings under this Act;
(b)giving evidence or information in connection with proceedings under this Act;
(c)doing any other thing for the purposes of or in connection with this Act;
(d)making an allegation (whether or not express) that A or another person has contravened this Act.
----
(4)This section applies only where the person subjected to a detriment is an individual.

35.11. Section 123 deals with Time limits

(1)---------- on a complaint within section 120 may not be brought after the end of—
(a)the period of 3 months starting with the date of the act to which the complaint relates, or
(b)such other period as the employment tribunal thinks just and equitable.
----
(3) For the purposes of this section—
(a)conduct extending over a period is to be treated as done at the end of the period;

(b)failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

36. Section 136 deals with the Burden of proof

(1) This section applies to any proceedings relating to a 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 provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.
---
(6)A reference to the court includes a reference to—
(a)an employment tribunal;

37. The tribunal is required to examine evidence in a broad way in dealing with issues of discrimination. We are not concerned with an overt motive (whilst such a finding would obviously be relevant) so much as examining the mental processes (conscious or subconscious) of those alleged to have unlawfully discriminated. We must consider the approach in ***Anya –v- University of Oxford & Anr. [2001] IRLR 377*** which demonstrates that it is necessary for the employment tribunal to look beyond any particular act or omission in question and to consider background to judge whether the protected characteristic has played a part in the conduct complained of. This is particularly important in establishing unconscious factors in discrimination. ***Shamoon -v- Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*** indicates that the tribunal in examining whether there has been less favourable treatment compared to a real or hypothetical comparator should note that a bare difference in treatment along with a difference in the protected characteristic is insufficient. It is always necessary to find that the protected characteristic is an operative cause of the treatment. In ***Zafar v Glasgow City Council [1998] IRLR 36*** it is made clear that unreasonable treatment should not necessarily lead the employment tribunal to a conclusion that the treatment was due to discrimination. Unfairness does not, even in an employment situation, establish discrimination of itself. Further a tribunal is not entitled to draw an inference from the mere fact that the employer has treated the employee unreasonably see ***Bahl v The Law Society and others [2004] IRLR 799***

38. Section 15 requires no comparator; we are concerned with unfavourable treatment, not less favourable treatment. The test for justification is whether the unfavourable treatment is "a proportionate means of achieving a legitimate aim" this test is squarely one of objective justification. It is for the Tribunal to conduct a balancing exercise based on all the facts and circumstances of the case as to whether the legitimate aim relied upon justified the unfavourable treatment. The employer needs show that unfavourable treatment was 'reasonably necessary in order to achieve the legitimate aim. If it is shown that the respondent could have taken other measures with a less discriminatory impact but which would have achieved the same legitimate aim, the treatment would not be considered to be reasonably necessary. Less favourable (here unfavourable) treatment will be incapable of objective justification where there was an obviously less discriminatory means of achieving the same legitimate aim

39. The tribunal has sought to remind itself of the statutory reversal of the burden of proof in discrimination cases. We consider the reasoning in the cases of ***Igen Ltd v Wong [2005] IRLR 258; Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332*** and ***Madarassy v Nomura International PLC [2007] IRLR 246***. Where it was demonstrated that the employment tribunal should go through a two-stage process, the first stage of which requires the claimant to prove facts which could establish that the respondent has committed an act of discrimination, after which, and only if the claimant has proved such facts, the respondent is required to establish on the balance of probabilities that it did not commit the unlawful act of discrimination. The ***Madarassy*** case also makes it clear that in coming to the conclusion as to whether the claimant had established a prima facie case, the tribunal is to examine all the evidence provided by the respondent and the claimant.

40. We are required to consider time limits, in respect of the discrimination claims. It is clear that some of the omissions complained of occurred more than 3 months before the presentation of the claim. We are required to consider first whether the incidents constitute an act or omission extending over time. We have to judge whether there is a continuing act as set out in ***Hendricks v Metropolitan Police Comr. [2002] EWCA Civ 1686, [2003] 1 All ER 654*.** The claimant needs to establish a nexus between the various events. That nexus does not necessarily mean that the same individuals are involved in each event or that the events follow on from a specific policy. The nexus must, however, be established by demonstrating that there is a state of affairs in existence throughout that period, a connection whereby for instance a particular workplace culture is shown. If there is no continuing act or omission we have to consider whether it is just and equitable to extend time for the presentation of the claim. In deciding whether it is just and equitable we are required to apply the decision in

Robertson v Bexley Community Centre [2003] IRLR. That case makes it clear that there is no presumption that the tribunal should exercise its discretion to extend time. The onus is always on the claimant to convince the tribunal to do so. Auld LJ indicates that the exercise of the discretion is the exception rather than the rule.

41. In addition, when deciding whether it is just and equitable to extend time, we must consider the explanation given by the claimant or any inferences that can properly be drawn from the facts which show an explanation as to why the claim was not made at an earlier stage see ***Abertawe Bro Morgannwg University Local Health Board -v- Morgan [2014] UKEAT 0305/13.***

42. In dealing with issues of harassment, the Tribunal has to have in mind the guidance given by Mr Justice Underhill, the President of the Employment Appeal Tribunal in ***Richmond Pharmacology V Miss A Dhalliwell*** where it is said that prior case law in respect of harassment is unlikely to be helpful in interpretation of the statutory tort of harassment that we are dealing with, and that even less assistance is likely to be gained from the provisions of the Protection from Harassment Act 1997.

    42.1. We must note that there is a formal breakdown of element 2 within the harassment provisions into two alternative bases of liability, that of purpose and effect, which means that the Respondent may be held liable on the basis that the effect of his conduct has been to produce the prescribed consequences even if that was not a purpose, and conversely that he may be liable if he acted for the purposes of producing the proscribed consequences but did not, in fact, do so.

    42.2. Then there is the proviso in Sub Section 2 such that the Respondent should not be held liable merely because his conduct has had the effect of producing the proscribed consequence. It should be reasonable that the consequence has occurred and that the alleged victim of the conduct must feel that their dignity has been violated or that an adverse environment has been created.

    42.3. Therefore, it must be objectively decided whether or not a reasonable person would have felt, as the alleged subject of the discrimination felt, about the alleged subject of the discrimination, and must subjectively feel that their dignity has been violated, etc.

    42.4. Finally, we must consider an enquiry into why the perpetrator acted as they did. This is distinct from the purpose question and relates the reasons why the person has done something not the results they intended to produce.

43. We have to consider the provisions dealing with victimisation. It would appear to the tribunal from the wording of that section that we are no longer

concerned with establishing a comparator. However, the causation issue is important. Is the tribunal to consider that a simple "but for" test is to be applied, or is a more sophisticated approach required asking, perhaps, was the protected act the "reason why" the respondent acted as it did? The formulation of the section links any detriment, using the word "because", to the claimant carrying out a protected act or the respondent's belief that the claimant has carried out or may carry out a protected act. Previous authorities under the old law required employment tribunals to be alert to the actual reason for the detriment see ***Chief Constable of West Yorkshire Police –v- Khan [2001] IRLR 830***. The word "because" is generally defined, in a conjunctive sense, as "for the reason that", that definition fits well with the "real reason" approach. On that basis the test must relate to "the reason why" the employer acted as it did rather than a purely objective "but for" test. That is because in order for a factor to be material some action must be contingent upon that factor. The mere existence of the factor as an event which, in a causative sense, leads to detrimental treatment is not sufficient for that factor to be considered material. It might be said that a plain reading of the section leads to a conclusion that what is being examined is the employer's subjective reaction to a protected act or an anticipated protected act.

44. The Employment Rights Act (ERA)1996 provides:

In section 43A:

> (*i*)*n this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.*

In section 43B:

> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
>
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
>
> *----------*
>
> *(d)that the health or safety of any individual has been, is being or is likely to be endangered,*
>
> *----------*
>
> *(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.*

In section 43C:

> *(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure —*

to his employer,

45. In ***Bolton School v Evans*** [2007] ICR 641 it is made clear that it is the disclosure of information that gives rise to the protection. In ***Fecitt & Ors v NHS Manchester EWCA Civ 1190*** Elias LJ held that liability arises if the protected disclosure is a material (more than trivial) factor in the employer's decision to subject the claimant to a detrimental act. Dealing with an argument related to the applicability of interpretation of discrimination law this area he considered that the reasoning in EU analysis is that unlawful discriminatory considerations should not have any influence on an employer's decisions and that the same principle is applicable where the objective is to protect whistleblowers.

46. The PID provisions also raise issues on the burden of proof. In respect of detriment there is a reversal of the burden of proof once a claimant has proved that they have made a protected disclosure and suffered a subsequent detriment, section 48(2) Employment Rights Act (ERA) 1996 places the burden of proof on the respondent to prove, on the balance of probabilities, that the treatment was "*in no sense whatsoever"* on the ground of the protected disclosure. In our judgment, following the above, the tribunal will have to consider whether the alleged detriment was in no way whatsoever because the claimant had made a disclosure.

47. Detriment is to be considered in the same manner as it would for discrimination cases i.e. that a reasonable worker would or might take the view that he had been disadvantaged in the circumstances in which he thereafter had to work ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285.*** There is support for this approach to be found in ***Pinnington v The City & County of Swansea and Anr. UKEAT/0561/03*** where HHJ McMullen refers to ***Shamoon*** in dealing with the issue of detriment (paragraph 81), albeit obiter, and also in **Dr I M Korashi V Abertawe Bro Morgannwg University Local Health Board *UKEAT/0424/09***

48. There must be a link between the detrimental treatment and the disclosure. Also this must be "deliberate" in the sense of a conscious or unconscious motivation on the part of the respondent because of the disclosure and not for some other reason ***London Borough of Harrow v Knight [2003] IRLR 140.***

ANALYSIS

49. We consider the issue of disability discrimination pursuant to section 15 first.

    49.1. We did not accept the respondents' defence that they were unaware of the claimant's disability at that time. Our findings of fact

indicate that the second respondent was aware and the first respondent would be aware of the claimant's disability based on vicarious knowledge.

49.2. The requirements of the section are that the claimant must establish two causative elements: first that there is a consequence of the disability; second that there was unfavourable treatment which occurred because of that consequence.

49.2.1. What was the consequence of the claimant's disability? It appears that the claimant is contending that he was reluctant to read and/or had difficulty in reading documents and that the respondent would be aware of this.

49.2.2. We have significant doubts about this argument, firstly a reluctance to read is, if anything to do with disability, a reaction of the claimant to the fact that he takes time to read documents. That appears more of a choice than a specific consequence of the disability. If it is the difficulty in reading then that difficulty is simply in the time taken to read, therefore it appears minimal.

49.2.3. However, if the claimant is correct he argues the known reluctance to read and or the knowledge of his difficulty in reading caused the respondent to offer a contract of 118 hours instead of 90 hours availability.

49.2.4. In our judgment, whatever view is taken of the first causative question, on our findings the reason the claimant was offered 118 hours and was maintained at that level was unconnected with his reluctance to read or difficulty in reading in any way whatsoever.

49.2.5. The reasons included the need to distribute work between day and night, the claimant's wish to maximise hours, the claimant's unavailability in daytime hours and the second respondent's wish to maximise available resources.

49.2.6. The claimant was not singled out for the hours to work as others were available above 90 hours but less than 120 hours. On that basis the claimant has not demonstrated the second required element of causation, that his known reluctance to read or difficulty in reading contributed to the decision to offer a contract which required 118 hours of availability to work.

49.3. Even if we were wrong about causation we must consider the question of unfavourable treatment.

49.3.1. The claimant wanted to work as many hours as possible to maximise his experience to apply to become a full-time firefighter.

49.3.2. In the circumstances, in our judgment, giving the claimant additional hours above 90 cannot be considered, objectively,

unfavourable. The claimant may not have been receiving the higher rate of pay, but if 120 hours was not going to be offered (which is the case on our findings), the additional experience was, objectively, an advantage to him given his ambitions. If he was available for only 90 hours he was less likely to be called out than on 118 hours availability. It would not be unfavourable to give to the claimant the maximum number of hours of availability that could be given (given his inability to be available on daytime week days) so that his experience could be enhanced.

49.4. The claimant contends that the maintenance of 118 hours availability as a contractual requirement amounted to a continuing act; we disagree. In our judgment this was a one-off act with continuing consequences. On that basis the claimant's claim is significantly out of time.

49.4.1. The agreement to work 118 hours was reached at a specific point in time. This is a decision that has continuing consequences but the act itself is fixed in time. There is no decision after 2012 where the number of hours of availability is considered. The claimant does not, as part of his complaints, ask to move to 90 hours availability; he simply complains about the requirement.

49.4.2. Even if we consider the review and the discussions in the summer of 2012 (rather than when the claimant entered into the contract) as the point from which time runs that is some six years outside the statutory time limits.

49.4.3. The claimant has not demonstrated any reason, let alone a good reason, for the delay to 2018 in making this claim. His argument that there was suppression of evidence would not apply to this claim in any event, the suppressed evidence is said to relate to the events of 8 September 2016. The claimant knew his hours of work and knew the difference in pay in 2012. The claimant's inhibitions appear to arise out of his ambitions, this does not have sufficient impact to overturn the prejudice caused to the respondent to the respondent by the passage of time.

49.4.4. In our judgment it would not be just and equitable to extend time for the claimant to pursue this claim and the tribunal has no jurisdiction to adjudicate upon it.

50. The claimant's claim pursuant to section 26 EA 2010 is about the training event in January of 2014. We have concluded that jokes about dyslexia were made. In our judgment these would have had the effect of creating the prohibited environment or violating the claimant's dignity and it was reasonable for it to have done so.

50.1. Jokes were made about the type disability that the claimant experienced. These jokes were made in front of colleagues, some of whom the claimant knew were aware of his disability. These comments could and did have the effect of distressing the claimant. That is, at the very least, a description of a hostile environment and clearly would have violated the claimant's dignity.

50.2. We do not consider the defence of "banter", even when the claimant engaged in the racial comments means that it was not reasonable for the conduct to have that effect. There is always a level of "banter" amongst colleagues, its hallmark is that it is reciprocal and limited and is, to an extent, harmless because of that. In contrast we found that there was a culture which tolerated significant verbal insults. This culture accepted a singling out of individuals because of personal attributes. That culture also required individuals to put up with treatment and not to complain because it was only "banter". This meant that there was a perceived barrier to raising matters, which would have a chilling effect on anyone who was distressed by discrimination.

50.3. However, we must also consider the question of time limits. These events took place in early 2014. The claimant was discussing them with his union representative in August 2015. We have heard no specific evidence to explain why the claimant did not pursue this as a distinct complaint at that time. The original response to the complaint was conveyed to the claimant in October of 2015. The claimant again talks of suppression of evidence; however this reason could not apply as the claimant knew of the treatment and his response to it, the evidence of suppression relates to the 8 September 2106 matters.

50.4. There is prejudice to the respondent in defending this matter when it was raised as a complaint four years later, the passage of time is sufficient that the memories of those involved are likely to be diminished. There was nothing to prevent the claimant bringing this at an earlier stage and it is not just and equitable to extend time for presentation of this claim.

51. Did the claimant make a qualifying protected disclosure?

51.1. Firstly, none of the matters raised, other than one, can be said to be raised in the public interest. The complaints all related to the treatment of the claimant and his contractual arrangements, the claimant gave no evidence which would lead us to the conclusion that he raised these matters other than in an entirely personal capacity. The one that falls outside of those personal issues is the allegation of fraudulent behaviour on the part of the second respondent.

51.2. Was what was provided in the email “information”? In our judgment there was sufficient for this to be more than an allegation and to amount to the provision of information. The claimant related information about a false expense claim related to a specific event and stated that there was documentary evidence in support. In our judgment that is more than a mere allegation, thought of as an indictment it might be said that fraud was the allegation and the information about the event the particulars.

51.3. The claimant relies on that information being sent by Neil Messam to the respondent. There is no evidence that the claimant instructed Mr Messam to do that or that he approved of the contents and sending of the report, and therefore that the FBU was the claimant’s agent for these purposes. On that basis the disclosure does not fall within the definition set out in section 43C ERA 1996, the worker did not make the disclosure to his employer.

51.4. The case was not put on the basis of a disclosure pursuant to section 43G or 43H (the other sections that might apply), but in any event, we do not consider that either section is effective on the facts.

51.4.1. In respect of section 43H we do not consider the information provided falls into the category of an “exceptionally serious failure”, allegations of fraudulent expenses claims are run of the mill and there is nothing in the facts here to make us consider that there is anything exceptional in play.

51.4.2. In respect of 43G we do not consider that we have the evidence that would allow us to conclude that the claimant believed at the time of giving the information to Mr Messam that by disclosing matters to the respondent he would be subjected to a detriment, or that evidence would be interfered with.

51.5. On that basis we are unable to conclude that the claimant made a disclosure within the framework provided by the EA 1996.

52. The claimant complained that these matters amounted to victimisation based on the claimant having made a complaint about discrimination. In coming to our conclusions on these matters both in terms of the facts we found and our legal assessment of the facts we viewed them as individual events and considered them in the round.

52.1. The second respondent did not attend the emergency call to the claimant’s grandparent’s property on the 8 September 2016 because of any complaints made by the claimant. He attended because he was the watch manager and it was an emergency call.

52.2. We considered that the second respondent remained at the call after he should have withdrawn despite objections by the family. We considered whether there was an explanation for this conduct. The claimant had demonstrated treatment which would have been upsetting in the circumstances and therefore objectively detrimental, he has also shown that his complaints raised an issue of discrimination. However, looking at the evidence in the round we considered that the conduct arose out of a battle of wills not because of anything connected with the claimant making a complaint. The reason why the second respondent stayed was not in any sense because the claimant had raised a grievance about disability discrimination.

52.3. We did not conclude that the events described by Mrs Pugh of the second respondent speaking to her and saying “hey” in a creepy voice; standing at the gateway of the school preventing her from driving out of the school gates or being at the bottle bank occurred as she said they had. We considered that these were awkward encounters. They did not, objectively, amount to what a reasonable individual in the circumstances would consider a detriment.

52.4. In addition to this we did not consider that any of these events happened because of the claimant raising any complaints about the second respondent. They were simply chance encounters where discomfiture on both sides was apparent.

52.5. We found as fact that the hearsay conversations relied on by the claimant as detriment either did not take place or were not discussions in the way the claimant had portrayed them. Whilst it can be said that gossip is, generally, potentially detrimental the thrust of the complaint is that the respondent was attempting to lower the claimant’s reputation in the eyes of his employer. Based on our conclusions of fact there is insufficient evidence that this was the tenor of any conversations that took place.

52.6. Whilst we are of the view that but for the complaint the conversations may not have taken place. We are not of the view that the claimant has established the reason why the second respondent was having any of the conversations was that the claimant had raised a discrimination complaint, the reason why was that this was the type of discussion that would regularly occur in a small community; it was an expectation that such topics would be raised.

52.7. The complaint about the second respondent mouthing or saying things to the claimant whilst driving past the claimant is not made out factually. We do not consider that the incident can be considered a detriment. We do not consider that the claimant has raised sufficient evidence to establish that the reason why the second

respondent was seen to move his mouth in the car was because the claimant had raised a complaint of discrimination.

53. The claimant contends that the first respondent subjected the claimant to victimisation by supressing material evidence.

53.1. The claimant had made a complaint about discrimination. The failure to provide documents, even if they only provided a limited means of demonstrating contradictions in evidence, is clearly a detriment to the claimant seeking to defend himself.

53.2. The respondent offers the explanation that the documents from the Jenkins investigation were not disclosed to the claimant because that was an investigation that was concluded.

53.3. The evidence we have heard appears to demonstrate a complete disconnect between the Jenkins and Rowlands investigations. Mr Rowlands did not have the material that Mr Jenkins had gathered.

53.4. Mr Jenkins was dealing with an external complaint, Mr Rowlands was dealing with an internal complaint.

53.5. In our judgment the explanation given is correct. The separation of these investigations along with the fact that the disciplinary pack appears to have been prepared entirely administratively, supports the view that a bureaucratic error took place.

53.6. In those circumstances the reason why the documentation was not given to the claimant was a not a deliberate suppression because he had raised a matter of discrimination, but an error entirely unconnected with that complaint.

54. The claimant complains of victimisation by his being disciplined and his appeal being dismissed.

54.1. On the evidence provided by Mr Rowlands, and indeed on some of the claimant's own account, there was sufficient evidence for a reasonable employer to consider that the claimant had behaved inappropriately (indeed this would have remained the case had the Jenkins statements been available).

54.2. The punishment of a warning was in keeping with the conduct that was found to have taken place and the mitigation that applied to it.

54.3. We consider the position of the second respondent who may, to an extent be considered supporting evidence for how a comparator would have been treated. He was given an informal advice about his conduct, it was not merely ignored. His conduct was to engage in a verbal altercation, the claimant, on the respondent's finding of fact

had engaged in the additional element of a minimal physical assault. In our judgment it is likely that had a similar finding been in place in respect of the second respondent it is likely that the approach would have been more formal. We do not consider that the claimant has established that he has been less favourably treated.

54.4. The reason for the disciplinary, the appeal and the punishment was the claimant's conduct as the respondent saw it to be, it was not because the claimant had raised a complaint of disability discrimination.

55. In our judgment the claimant's claim of disability discrimination pursuant to sections 15 and 26 Equality Act 2010 are presented out of time and the tribunal does not have jurisdiction to consider them. The claimant's claim of victimisation pursuant to section 27 Equality Act 2010 is not well founded and is dismissed. The claimant's claim of detriment pursuant to section 47B of the Employment Rights Act 1996 is not well founded and is dismissed.

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Employment Judge Beard
Date: 11 June 2019

Order sent to Parties on

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____11 June 2019_____