EMPLOYMENT TRIBUNALS

Claimant: Mr S Wiswell

Respondents: 1. Greater Manchester Fire and Rescue
2. Tony Hunter

Heard at: Manchester **On:** 4, 5 and 6 January 2021

Before: Employment Judge Leach
Ms J K Williamson (IP)
Mr S T Anslow (IP)

REPRESENTATION:

Claimant: In person
Respondents: Mr C Breen, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaints of direct discrimination (protected characteristic of race) does not succeed and is dismissed.

2. The claimant's complaints of direct discrimination (protected characteristic of religion or belief) does not succeed and is dismissed.

3. The claimant's complaints of victimisation (contrary to section 27 Equality Act 2010) does not succeed and is dismissed.

REASONS

A. Introduction

1. The claimant is a firefighter employed by the first respondent.

2. The second respondent is an Assistant Chief Fire Officer with the first respondent. For a year or so (from mid 2004 until mid 2005) the second respondent was the claimant's Watch Manager whilst based at Blackley fire station in north Manchester.

3. In August 2012 the claimant resigned from his employment with the first respondent. However, he soon began to regret this decision and wanted the first respondent to allow him to withdraw his resignation. Although the second respondent was not then in the claimant's chain of command, the claimant contacted him, seeking assistance.

4. The second respondent was then made responsible for considering the claimant's request to withdraw his resignation from his employment with the first respondent. The second respondent decided that the first respondent should not allow the claimant to withdraw the resignation, and informed the claimant of this decision in a meeting on 31 August 2012.

5. The claimant was very unhappy about this decision and about a number of comments he claims to have been made about him at this meeting. The claimant involved the Chief Fire Officer, and threatened (although did not bring) Employment Tribunal proceedings.

6. The outcome of the claimant's contact and meetings with the Chief Fire Officer was that the claimant was not reinstated to his original employment but was provided with an opportunity of new employment. By this stage the claimant's employment had ended for some months. The claimant accepted the offer of new employment and began employment again as a firefighter from 31 December 2012 (we refer to this as the “second employment”, and the earlier employment as the “first employment”).

7. In the second employment the claimant did not have continuous service from the first employment. In addition, there was a new Firefighter’s Pension Scheme applicable to the second employment (“the 2006 scheme”) which was less valuable to the claimant than the scheme (the 1992 scheme) which had applied to the first employment.

8. Whilst the claimant accepted the terms of the second employment he has not, since then, accepted that he was treated fairly and in the course of the second employment there have been incidents and internal processes referring back to the first employment, and the decision not to allow the claimant to withdraw his resignation.

9. In August 2019 the claimant was provided, for the first time, with a copy of an internal email between the second respondent and the first respondent’s then Chief Fire Officer, dated 30 August 2012. In this email the second respondent explains why he was then recommending that the claimant should not be allowed to withdraw his resignation. The claimant claims that specific comments in this email show that the decision not to allow him to withdraw his resignation amounted to direct discrimination contrary to section 13 of the Equality Act 2010 (“EqA”). The protected characteristics relied on by the claimant are (1) race, and (2) religion or belief. The claimant converted to Islam in 2011. The claimant's wife is also Muslim and is of

Pakistani national origin. The claimant's complaints include ones of discrimination by association.

B. The Hearing

10. The hearing was mainly conducted as an "in person" hearing. During the course of the hearing (at the end of day one) a Government announcement was made stating that England and Wales were about to enter a further period of lockdown. The lockdown was made law from 6 January 2021 (the third day). The Tribunal, the claimant and the respondent's representative (Mr Breen) attended in person throughout the three day hearing, including on the third day. However, no witnesses attended in person on the third day, instead attending by Cloud Video Platform. The witnesses attending by CVP were:

(1) Mr McGuirk (previously Chief Fire Officer, now retired);

(2) Current Deputy Chief Fire Officer, Dawn Docx;

(3) Sarah Horsman (Head of Audit and Assurance for Greater Manchester Combined Authority).

11. The claimant's wife gave evidence on day two, also attending by CVP.

12. The second respondent attended in person and gave evidence on day 2.

13. We were provided with a paginated bundle of documents for use during the hearing. Our references below to page numbers are references to this bundle.

14. Two important jurisdictional issues arose during the hearing, as we note these below.

<u>The identity of actual comparators</u>

15. Whilst the claimant had provided details of the circumstances of actual comparators in his witness statement, no names of those comparators had been provided by him.

16. We were informed that the parties had corresponded on this issue. The claimant explained that he had not wanted to provide names because the comparators themselves had not wanted to be named. The respondent understood that the claimant had agreed to proceed on the basis of a hypothetical comparator comparison and was surprised therefore to see the description of the circumstances affecting actual comparators.

17. The claimant told us that he did want to proceed by relying on actual comparators, and therefore time was provided for him to discuss matters with the comparators and to disclose their names. Once the comparators were named, the respondents asked for (and were provided with) time to take instructions and late in the evening on day one, provided a witness statement giving evidence in response to the actual comparators (in response to the circumstances of the 2 named comparators.

The claimant's application to amend the claim to include a victimisation complaint

18. On day two, at the end of his evidence, the claimant asked whether his application to amend his claim had been allowed. Whilst we were aware that the claimant had written in August 2020 to ask if he could amend his claim to bring a victimisation complaint, we had understood that had been dealt with by way of correspondence from the Tribunal dated 13 October 2020, and that there was no further correspondence on the issue. The claimant however informed us that he had replied by email dated 20 October 2020 specifically making the application and providing further details.

19. During a break we located the email of 20 October 2020 and agreed to hear the application to amend. For the respondent, Mr Breen left it to the Tribunal to decide whether to allow the application but noted that there was some uncertainty about the protected act that the claimant was relying on in relation to a victimisation complaint.

20. We allowed the application. The respondents did not resist the application. We also noted that:

(1) The claimant's claim of victimisation arose from documents which the claimant first saw on disclosure in these proceedings; and

(2) The detriments claimed were the same as the detriments claimed in his complaints of direct discrimination.

21. We also took into account that the respondent was ready and willing to deal with the victimisation complaint at the hearing, relevant witnesses were attending and no postponement would be necessary.

22. We have added the victimisation complaint to the List of Issues that had already been agreed between the parties and which we note below.

C. The Issues

23. A List of Issues was agreed between the parties in advance of the preliminary hearing (case management) in this case on 18 February 2020. They are recorded in the Case Management Summary and set out below, with the addition of the victimisation complaint:

Direct discrimination contrary to section 13 of the EA

(1) *Did the respondents treat the claimant less favourably because of race and/or religious belief when they refused to allow him to rescind his resignation in August 2012. The claimant contends that he has been discriminated against because of his association with his wife who is Pakistani and Muslim. The acts of discrimination occurred on:*

(a) 30 August 2012 when Mr Tony Hunter (Head of Operational Assurance and Performance for the first respondent and the second respondent in these proceedings) confirmed his

recommendation for the first respondent to decline the claimant's request for a retraction, citing his "personal circumstances" and "relationship" and "external influence" as part of such reason. As further explained below, the claimant only became aware of what the claimant considers to be the respondents' discriminatory motives on 17 August 2019; and

(b) 31 August 2012 when Mr Hunter, the second respondent, forced the claimant to attend a meeting alone during which he belittled and humiliated him. Considering the above, the claimant believes that the second respondent treated him in this way because of his association with his wife.

(2) *The claimant converted to Islam and became a Muslim on 01/05/11. Did the respondents treat the claimant less favourably because of his religious belief when they refused to allow him to rescind his resignation in August 2012. The acts of discrimination occurred on:*

(a) 30 August 2012 when Mr Tony Hunter (Head of Operational Assurance and Performance for the first respondent and the second respondent in these proceedings) confirmed his recommendation for the first respondent to decline the claimant's request for a retraction, citing his "personal circumstances" and "relationship" and "external influence" as part of such reason. As stated below, the claimant only became aware of the respondents' discriminatory motives on 17 August 2019; and

(b) 31 August 2012 when Mr Hunter, the second respondent, forced the claimant to attend a meeting alone during which he belittled and humiliated him.

(3) *The claimant contends that there are no time limit issues to be addressed in this claim because:*

(a) The claimant saw the above-mentioned email for the first time on 17 August 2019. The EHRC Employment Statutory Code of Practice, which Employment Tribunals must take into account, states that the relevant time limit will start to run from: "the date on which the alleged unlawful act occurred, ***or the date on which the worker becomes aware that an unlawful act occurred****" (paragraph 15.23). In the alternative and additionally, it would be just and equitable for the Employment Tribunal to extend time, considering the fact that the Claimant only became aware of the offending email on 17 August 2019.*

(b) The claimant started the ACAS Early Conciliation Process on 30 October 2019 (before 16 November 2019) and lodged his claim in the Employment Tribunal within one month of the ACAS Early Conciliation Process concluding.

Victimisation – section 27 Equality Act 2010

(4) *Did the claimant do a protected act? The claimant relies upon his challenge to racist conduct by a firefighter colleague which took place at Blackley Fire Station in 2009 or 2010 when the claimant intervened when that colleague was making monkey gestures behind the back of a black firefighter;*

(5) *Did the respondent subject the claimant to the following detriments:*

(a) 30 August 2012 when Mr Tony Hunter (Head of Operational Assurance and Performance for the first respondent and the second respondent in these proceedings) confirmed his recommendation for the first respondent to decline the claimant's request for a retraction of his resignation;

(b) 31 August 2012 when Mr Hunter, the second respondent, forced the claimant to attend a meeting alone during which he belittled and humiliated him.

(6) *If so, was this because the claimant did a protected act?*

Remedy

(7) *The claimant seeks compensation for hurt feelings and in respect of the pension benefits he would have secured had he remained in the respondent's earlier pension scheme. Given that the pension loss question will be a complex one the initial hearing will deal with liability only and should the claimant succeed Case Management Orders dealing with the pension remedy calculation can be made.*

D. Findings of Fact

24. In this section we set out our findings of fact relevant to the issues that we need to decide in this case. We note that in the course of the hearing it has become clear to us that there has been ongoing disagreement between the claimant and the respondents from 2012 onwards. We have explained to the claimant during the course of this hearing that these Tribunal proceedings are not a means for the claimant to air all of the grievances and disagreements that he has with the respondents. The claimant has made claims of direct discrimination and (now) victimisation. The issues were clearly set out and agreed and necessarily our focus is on those issues and the facts relevant to them.

The claimant's resignation in August 2012 and the reasons for resignation

25. Earlier in 2012 the claimant had successfully applied for a place on a Masters course at the University of Nottingham, studying history and politics. The claimant hoped to be able to undertake the course on a full-time basis whilst on secondment from his employment with the first respondent. Unfortunately for the claimant, the

first respondent's policy at that time was not to allow firefighters to take career breaks or sabbaticals save in exceptional circumstances.

26. On 30 July 2012 the claimant emailed a number of the first respondent's managers asking for a career break. It is clear from the terms of this email (page 86) that he had already by that stage made enquiries and been told that the first respondent's policy was not to allow career breaks.

27. One of the managers emailed by the claimant (Andrew Heywood, Borough Manager, Manchester) ("AH") responded by informing the claimant that the formal policy was not to grant career breaks. He did however provide the claimant with an opportunity to make a formal application for special leave. It was clear, however, that the application had very little prospect of success and, unsurprisingly, it was not successful.

28. The claimant was disappointed to receive a formal refusal of his application and on 8 August 2012 he sent an email expressing disappointment and including the following comment:

> *"I am told it's the Chief that makes these decisions. Being cynical, one can only wonder if he just doesn't like the thoughts of the troops becoming better educated than he is* 😉*."*

29. Although the claimant's formal application had been refused, he persisted and on 10 August he emailed the Chief Fire Officer ("CFO") Mr McGuirk directly, asking that he reconsider the application.

30. The CFO responded later that day. His response is considered and included suggestions and guidance for the claimant even though it confirmed the decision not to allow the claimant a career break. The response included the following:

> *"As it stands at the moment we froze recruitment in 2009 and have no firm plans to restart as we are currently over 100 surplus to requirements. That means we are paying for wages for which we receive no income and so it is self evidently crucial that people do 'drop out' of the system over a reasonable period of national wastage.*
>
> *Our policy is one of avoiding compulsory redundancy but I make no guarantees that this will remain the policy – as if they don't drop out we will need to act in some way.*
>
> *Every day we still have around 10,000 hits on the recruitment bit of the website – thousands harbouring a faint hope of the excellent career you would be 'gutted' to leave….*
>
> *I can only be straight really – if history and politics are your hobby do your Masters in your spare time (I in fact did my Masters in this way). If you believe you have an alternative career – take the plunge and go for it.*
>
> *I'm afraid the best of both worlds is not currently a realistic or affordable option.*

I appreciate this may be disappointing. But in order to help you plan your life it's better to be honest. And of course still have a right to a grievance though having responded to you direct in the spirit of honesty and openness another colleague would need to hear that."

31. The claimant was disappointed with this response and sent an email to the CFO which included the following comments:

"I do however find the 'like it or leave it because there are thousands willing to replace you' argument disappointing and inappropriate.

Sadly there seems to be little reward or recognition for good conduct, experience etc., the times in which we live I guess.

I still however remain convinced that allowing career breaks would be beneficial to the service. Being purely cynical, one can only wonder if the brigade management don't like the thought of the troops being as well educated as they are 😉."

32. On 11 August 2012 the claimant emailed the CFO, the Head of HR and AH giving notice that he had decided to leave the service and informing them that he would formally put notice of termination of contract down on paper, but asking that they take notice from 11 August, i.e. that day.

33. The claimant confirmed his decision to resign by letter to his Station Manager (Tony Bryan) ("TB") on 15 August 2020 (pages 103 and 104).

34. Also on 15 August 2012 TB met with the claimant in the presence of the claimant's Watch Manager, Mr Gudmunsen ("SG"). As watch manager, SG was the claimant's direct line manager. A record of this discussion is at pages 115-117. It is termed an "exit interview". The claimant has taken issue with this noting that the respondents policy on exit interviews enables the departing employee to decide whether or not they require an exit interview – and he did not state that he required one. However, he accepts that a discussion did take place between himself, TB and SG on 15 August 2012.

35. In his evidence the claimant also claimed that the notes of the discussion were a fabrication and were not created until after the decision of 30 August 2012. Our findings in relation to this meeting and the record are as follows: -

(1) The document is a record of a discussion that took place between the claimant, TB and SG.

(2) The document was created shortly after the discussion (it is dated 20 August 2012). It is an accurate record of that discussion.

(3) R2 received the document and believed that the contents were accurate when considering the claimants request to withdraw his resignation notice. The contents of the document are part of his consideration as we note below.

36. As far as the discussion on 15 August 2012 is concerned, we find as follows:

(1) That the claimant informed TB and SG that he was fed up with his job as a firefighter. He told them *"I've been fed up with the job for some time. Specifically with the prevention and protection aspects of the role: working in the community, knocking on peoples' doors and fitting smoke alarms. I'm just fed up with it and it's not for me anymore"*;

(2) That the parties discussed ongoing consultation about pension reforms and the claimant made known that he was dissatisfied with the proposed reforms;

(3) That TB discussed with the claimant the possibility of the claimant pursuing his studies on a part-time basis and also asked the claimant whether he had reached the decision to resign with the support of his wife and family. The claimant noted that he his family were supportive and he was adamant that he wanted to process his resignation;

(4) That TB raised with the claimant that aspects of his correspondence may have been unhelpful (he was referring to the comments noted above about the chiefs not wanting the "troops" to be more educated) and that he should reflect on some of the content of his email correspondence;

(5) The claimant was also asked to ensure that future correspondence was directed through the recognised chain of command, and was asked to formalise the resignation with a formal letter.

37. Following this meeting the claimant provided TB and SG with his formal letter of resignation (see 32 above). At this stage TB asked the claimant again about whether he was sure that this was what he wanted to do and whether he wanted additional time to reconsider his position. The claimant declined the offer of additional time. He was sure.

38. We find that the claimant resigned for these reasons:

(1) The claimant had been accepted on a Masters programme at Nottingham University;

(2) The claimant was fed up with the role as a firefighter, highlighting the prevention and protection aspects of the role;

(3) The claimant wanted some time away from his employment as a firefighter. He hoped to do this by having the safety net of a career break or sabbatical, and when he was denied this he was frustrated and reacted angrily and in some haste.

<u>The claimant's request that he be allowed to withdraw his resignation</u>

39. On 17 August 2012 (2 days after handing in his resignation) the claimant made contact with the second respondent. The second respondent was not in the claimant's management line/chain of command. The claimant did not contact his

Watch Manager (SG), TB or AH. Instead he chose to contact the second respondent because he believed that he had had a good relationship with him and he thought the second respondent was in a better position to assist. The initial contact was by text on the following terms:

> *"Hi Boss. It's Steve, Mr Wiswell, from Blackley! Any chance you could give me a quick call! Got a serious problem. Alternatively, if you are at HQ, I could have a drive over. Thanks. Sorry for troubling you. Steve."*

40. The second respondent agreed to meet with the claimant and the meeting between them took place later that day. During this meeting the claimant told the second respondent that he had resigned, that he had made a stupid decision which he regretted and that he wanted to withdraw his resignation. He explained personal circumstances that had recently affected the claimant, which we note below. The claimant and the second respondent had not been in contact for some time before this, and this was the first time that the second respondent was aware of the claimant's circumstances, including his resignation.

41. The second respondent agreed that he would have a look at the claimant's position and asked him to send relevant details.

42. We find that the second respondent agreed to become involved in this issue and did so because the claimant asked him to become involved.

43. The second respondent contacted HR to inform them that the claimant had approached him, and was told by HR there was no obligation on the part of the first respondent to consider the claimant's request to withdraw his resignation. Even so, the second respondent decided that it was appropriate to consider the request.

44. Separate to the claimant's approach to the second respondent, the claimant sent a letter to the Head of HR and to TB in which he stated that he thoroughly regretted his resignation and asking to be allowed to stay in his post. This letter is dated 22 August 2012 and is at page 189. In this letter the claimant provides the following information:

> *"If I may, I would like to offer some mitigating circumstances as to why my behaviour has been so ill-considered and out of character recently. I have entered into a mixed race marriage which brings with it many cultural and religious differences. There has been some tension from my wife's side of the family which has caused some problems. In addition, our first child (my wife already has two children from a previous marriage) was prematurely stillborn in March, having been due to be born in July. I think that these factors have affected me more than I have probably admitted and made me question many aspects of my life. This does not however excuse my stupidity in recent weeks."*

45. The second respondent considered the claimant's request to withdraw his resignation. As he was involved by then, the first respondent allocated responsibility for considering the claimant's request, to the second respondent. In addition to the steps noted above of meeting directly with the claimant and also seeking HR advice,

the second respondent took a number of steps over the following few days, as follows:

(1) 28 August 2012 – a three-way telephone call took place between the second respondent., TB and AH (TB and AH being two of the claimant's line managers). The claimant is critical of the second respondent here because he did not speak with a number of other current and former line managers. We note that the claimant's immediate line manager (SG) was part of the exit interview and this was considered by the second respondent.

(2) The second respondent looked at the claimant's past appraisal records (called PPRs), and the claimant's attendance records.

(3) The second respondent looked at the organisational position of the first respondent, including its requirement to reduce the number of firefighters.

46. The second respondent decided that the first respondent should not agree to the withdrawal of the claimant's resignation. His reasons were provided in an email dated 30 August 2012 (pages 124 and 125). Certain terms used in this email are central to the claimant's complaints, and we set out the wording of the email below in full:

"Sir,

Following our discussion surrounding [the claimant's] resignation and having thoroughly reviewed his case, my recommendation is to accept his resignation and for [the claimant's] final working day in [first respondent] to be 31/08/12.

I base this recommendation on:

Exit Interview

- *During his exit interview carried out by SM Tony Bryan, [the claimant] was adamant that resigning was what he wanted.*
- *[The claimant's] aim was to pursue further education with the potential pf progressing into teaching.*
- *[The claimant] highlighted his concern over potential changes to the firefighter's pension scheme and how those changes may affect him.*
- *[The claimant] spoke about his perception of the over-emphasis on prevention and protection activities and his disillusionment in the service from his perspective.*

Attendance

- *29 periods of sickness in 19 years, none on duty, two certified.*

- *His most frequent day for booking sick is a Saturday, of which seven have commenced.*
- *His sickness equates to 6.5 days each year of his service:*
  - *Four sprained ankles*
  - *Seven flu*
  - *Six gastric/vomiting related*
  - *Two other leg injuries*
  - *Two back pain*

Performance

- *No history of disciplinary issues or outstanding performance in his PRF.*
- *As a firefighter he has scored 3s in his PPRs.*
- *He is EFAD and a Watch BAI.*
- *Having completed a temporary crew manager's role as S13 Moss Side, his Watch Manager Paul Hesford scored him 4s.*
- *There is no history of any new initiatives that he has instigated or played a significant part in, although in recent communications he does refer to a number that he would like the opportunity to pursue.*

Behaviour

- *SM Bryan is adamant that if it wasn't for [the claimant's] personal circumstances he wouldn't have reacted the way he did.*
- *[The claimant's] circumstances are likely to remain the same for some time as he remains in the relationship.*
- *The comments that he made rationally both in emails and face to face should not be ignored.*
- *It has been noted that other GMFRS staff have been through their own personal tragedies but have not reacted in such a way.*
- *[The claimant's] conviction that resigning was the right course of action and then his subsequent change in mind could again be changed given the external influences.*
- *[The claimant's] comments and attitude leave me to firmly believe that it is only a matter of time before this situation reoccurs should we decline his resignation.*

Organisational Perspective

- *As a service-facing significant financial and people based pressures, the need to reduce the number of staff whilst striving for those that remain to be excellent performers will be key;*

- *That need to reduce the number of staff will result in those with poor attendance be reflected in their scoring when considering early stage redundancies.*

In summary, taking into consideration the claimant's absence, average performance and most worryingly his comments made during his exit interview, and also considering the future challenging circumstances the service faces, I see no reason to decline his resignation."

47. We find that this email accurately records the reasons why the second respondent recommended that the claimant should not be allowed to withdraw his resignation. As already noted, the claimant's comments at the exit interview included his dissatisfaction with the expected changes to the pension scheme, his perception of an over-emphasis on prevention and protection activities and his disillusionment with the service. These were the comments that the second respondent described as *"worrying."*

48. The reference to the *"future challenging circumstances"* was a reference to the financial position the first respondent was in at the time and that it was employing too many fire fighters.

Events of 31 August 2012

49. The second respondent arranged to meet the claimant in person to inform him of his decision. The second respondent's evidence (which we accept) was that he did not consider it appropriate to simply write to the claimant with his decision and thought that a face to face meeting would afford the claimant more dignity.

50. The meeting of 31 August 2012 was not in the nature of a hearing which formed part of the second respondent's decision-making exercise as he had already made his decision. The second respondent reviewed and tested the reasons for the decision in a "pre-meeting" which he held with an HR representative, Nicola Banks ("NB"), as well as AH and TB. Although AH then left before the claimant arrived, NB and TB were still present and, together with the second respondent, met with the claimant.

51. No-one had told the claimant to attend with a representative of the recognised union, the Fire Brigade Union) ("FBU"). The claimant had asked if he needed to attend with an FBU official and had been told by TB that he would not need to.

52. The claimant has alleged that he was told to attend alone and specifically not with a union official. We do not find this to be the case. There is a difference between being informed (in response to a question from the claimant) that it was not a requirement for him to turn up with an FBU official, and specifically being told that he must come alone. We also note here that the claimant himself had not involved

the FBU. The claimant had pursued the process himself, involving a number of the first respondent's senior managers, often outside his line of management/chain of command. The claimant decided for himself, how to proceed with his applications for a career break, his resignation and then his request to withdraw his resignation.

53. When the claimant attended the meeting on 31 August 2012 he brought with him a letter from his GP (page 121). The letter states as follows:

> *"Unfortunately he has been under a lot of stress earlier in the year as his wife was pregnant and had a stillborn baby in March. This tragedy has had a significant effect on Mr Wiswell's psychological state. He tells me that he handed in his notice with the intention of having a year out of his career in order to do a Master degree. However, he now feels that his judgment was affected by his emotional state and the psychological stress that he has been under. He has therefore changed his mind about resigning and wishes to withdraw his resignation. I would be grateful if you would take the background circumstances into account when considering his request."*

54. The claimant provided the second respondent and other attendees with a copy of this letter. As noted, the second respondent had already reached this decision and this meeting was arranged in order for the second respondent to communicate that decision to the claimant. The second respondent had not therefore been able to take into account the content of that letter when reaching his decision We find that the second respondent did read and consider the letter from the doctor, and he decided that it did not provide him with any new information. His evidence is that if new information had been provided to him at that meeting which caused him to doubt his decision he would have reviewed the decision. We accept the second respondent's evidence on this, although we do find that as the second respondent had made his decision in advance of the meeting, new information would have had to be immediately persuasive.

55. We have been provided with two sets of notes of this meeting. One version is the version written up by NB (pages 139-141) and the other is the second respondent's notes (pages 137 and 138). Although these notes are not the same, they broadly follow the same themes in the same order, and our finding is that the notes are broadly accurate.

56. The claimant has disputed these notes. In addition, his evidence is that the second respondent was "snarling" at the claimant in this meeting and that he was treated with contempt. We do not find that the second respondent was snarling. We do not find that the claimant was treated with contempt.

57. At this meeting, the second respondent delivered difficult and unwelcome news to the claimant which was upsetting to him. However, it was the news that was upsetting to the claimant, not the way that it was delivered. The claimant gave evidence that he would have preferred not to have been required to attend this meeting and would have preferred the respondents to have provided him with a written response. The second respondent was not to know that. Further, this is not relevant to the claimant's complaints.

<u>The offer of the second employment</u>

58. Although the claimant's employment ended on 31 August 2012, he contacted the first respondent asking for further documentation relating to his resignation including notes of the meeting of 31 August 2012. The claimant was provided with copies of various procedures of the respondent, but he was not provided with a copy of the meeting notes. The CFO (at the claimant's request) agreed to meet with the claimant and did so later in October 2012.

59. The claimant had by then collected a number of testimonies or references from former colleagues. These are in the main in glowing terms and clearly the claimant was well thought of by his firefighter colleagues. The claimant's former Watch manager, SG, provided one of the reference. We note here that SG stated, *"although I can understand some of the reasons for not withdrawing his resignation given at his meeting with AM Hunter, I would ask you review this decision giving respect for Steve's 20 years' service and reconsider this position"*.

60. The claimant also provided the CFO with evidence that he had challenged racist behaviour in a particularly unpleasant incident two or so years previously when a firefighter had been making monkey gestures behind the back of a black colleague.

61. It is relevant that we note that the claimant provided this information at this stage because of its relevance to the claimant's victimisation claim. We find that this information was provided to the CFO. We also accept the claimant's evidence that he did challenge the racist behaviour at the fire station as he has described to us, by physically pinning the perpetrator against a wall and telling him in no uncertain terms that his behaviour was inappropriate. The claimant did not report the incident to a manager. We find that the second respondent was not aware of this incident at any time prior to the end of the first employment. The second respondent became aware of the incident when asked by the CFO to review again the reasons why the second respondent decided not to allow the claimant to withdraw his resignation.

62. The CFO asked the second respondent for a detailed report, reviewing again his reasons. The second respondent provided the CFO with a report dated 2 November 2012. In this report the second respondent states as follows:

> *"Mr Wiswell's belief that he has 'put a stop to' prejudice views is admirable but I would suggest a little farfetched. Mr Wiswell's belief that he has put a stop to prejudice views causing no trouble for the organisation is in fact contrary to what is best for the service as hiding a problem is not solving a problem and is certainly not exemplary conduct."*

63. We have been provided with a copy of the second respondent's report. It is detailed and, with appendices, is at pages 43 to 171.

64. The CFO met with the claimant after he had received the report from the second respondent. He did not share the report with the claimant. The first time the claimant saw the report was during disclosure in these proceedings (which is what led to his application to amend in order to include a claim of victimisation).

65. Whilst the CFO accepted the validity of the second respondent's reasons for not agreeing to allow the claimant to withdraw his resignation, he was sympathetic to the claimant, particularly because he was informed by the claimant that he and his

wife had lost their first child and also because he met with the claimant and witnessed that he was very upset (the CFOs evidence, which we accept, is that the claimant wan in an emotional and distressed state).

66. The CFO decided to provide the claimant with an opportunity to work again as a firefighter, but under fresh employment terms. The claimant accepted this offer of fresh employment, which began in January 2013, some 4 months after the termination of the first employment.

Wording in the second respondent's email

67. Certain words used in the second respondent's email of 30 August 2012 are central to this claim, specifically the terms "personal circumstances" "relationship" and "external influences." We make the following findings of fact:-

67.1 The second respondent used the term *"personal circumstances"* as a summary of the circumstances that the claimant had told the second respondent about and as described in the extract we have quoted from the claimant's letter dated 22 August 2012 (see para 44 above).

67.2 The second respondent used the term "relationship" to refer to the claimant's marriage.

67.3 The second respondent used the term "external influences" to refer to in part to the "personal circumstances" but also the claimants desire to pursue a Masters course and potentially look for an alternative career.

68 The claimant claims he is offended by the second respondent's use of the comment "relationship" The claimant claims that describing his marriage as a "relationship" in some way belittles or demeans its nature; that it is a disrespectful term to use when describing a marriage. We do not find that is the case. Further, we find that was not the second respondent's intention when using the term.

69 The claimant claims that the second respondent's reference to "personal circumstances" "relationship" and "external influences" within the email shows that a key part of the decision not to allow him to withdraw his resignation was his marriage to his wife, knowing her to be of Pakistani national origin and of Muslim faith. We set out above our findings about why the second respondent decided that it was not appropriate to allow the claimant to withdraw his resignation. The race and/or religion of the claimant's wife (or the claimant's own religion) was not one of the reasons.

70 We find that the second respondent made reference to the claimant's personal circumstances because the claimant himself had informed the second respondent of these. The claimant put them forward as mitigating factors. The second respondent considered the information on that basis and decided that the circumstances as described by the claimant should make no difference to his (the second respondent's) decision. Had the claimant not made any reference to the personal circumstances in mitigation, the second respondent would not have referred to them but his decision would have been the same.

Did the second respondent fabricate his reasons for not agreeing to a withdrawal of the claimant's notice of resignation?

71 A key part of the claimants case is that the second respondent's email of 30 August 2012 and report of 2 November 2012 (both of which set out the reasons for not agreeing to a withdrawal of the claimant's notice) are to a substantial extent fabricated; that the second respondent is lying in these documents as a significant reason for not allowing the resignation to be withdrawn, is the claimant's Muslim faith and/or his association with his wife who is of Pakistani national origin and Muslim.

72 We have considered the evidence of the second respondent, the evidence of the CFO and contemperaneous records such as the "exit interview" report (which was not written by the second respondent). We find that the second respondent truthfully and accurately recorded his reasons in the 2 documents.

The claimant's comparators. .

73 The claimant relies on 2 comparators, Simon Streets and Amy Redfern. Both are fire fighters in the employment of the second respondent. We find as follows:-

73.1 Simon Streets. In 2006, Mr Streets requested a transfer to the Cheshire Fire Service in order to be nearer his home. This was approved. He remained in the fire service nationally and so retained pension rights and certain benefits associated with length of service, but transferred from one service (or Brigade) to another. Some 2 months in to his service with Cheshire, Mr Streets contacted the second respondent and asked if it was possible to return. He did not hand in his notice initially with Greater Manchester or subsequently with Cheshire, until he had secured a role with the different brigade.

73.2 Amy Redfern. In 2019, Miss Redfern had only been with the fire service for 20 months when she submitted her resignation. She was still within the applicable probationary period and was still being trained. Shortly after her resignation, the womens' representative of the FBU contacted Dawn Docx, who is the deputy chief fire officer of the second respondent. Ms Docx and the FBU representative discussed Miss Redfern's circumstances. There were issues with Miss Redfern's training plan and supervision at the fire station where she was based. It became clear that Miss Redfern did not want to resign from the fire service but wanted to continue to pursue her career. Ms Docx and the FBU rep reviewed the development plan, had a number of concerns and were willing to offer Miss Redfern an opportunity to continue her training and her career, but based at a different fire station under different management. In 2019, the first respondent was in a different position to 2012, from a recruitment perspective. In 2019, the first respondent was short of fire fighters.

E. Submissions

74 Mr Breen and the claimant made oral submissions. What follows is a brief summary. Both parties may be assured that we considered fully the submissions made.

75 Notably, on behalf of the respondents, Mr Breen made no submissions on the time limit point.

76 In the submissions made, Mr Breen referred us to the Equality Act 2010 (EqA) and various case authorities, particularly on the issue of proving discrimination and we refer to a number of these below.

77 In reference to section 136 EqA ("Burden of Proof") Mr Breen submitted that, on the facts presented, there were no facts from which we could conclude, on the facts presented, that the respondents had contravened section 13 (Direct discrimination)

78 Mr Breen noted the significant differences in the circumstances of the named comparators when compared with the claimant's circumstances, and on this basis, they were not valid comparators for the purposes of the section 13 claim.

79 In his submissions the claimant submitted that it is clear from the circumstances applying to his comparators that the first respondent was willing to reinstate fire fighters after they had resigned. The key difference between the claimant and the comparators was his wife's race and religion and/or the claimant's religion.

80 Further, neither of those comparators had the reasons for their resignation thrown back in their face as, the claimant submitted, had happened to him in the meeting of 31 August.

81 The claimant'[s submission is that his faith and the faith and national origins of his wife were a significant factor in the decision not to allow him to withdraw his resignation.

F. The Law

Direct Discrimination – section 13 Equality Act 2010

82 Section 13 states:

> *"A person (A) discriminates against another if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

83 Section 13 covers both discrimination because of a protected characteristic of the party being discriminated against ("A") and also discrimination because of a

protected characteristic of a person with whom A associates (discrimination by association).

84 An important question for us is whether the protected characteristics relied on (or either of them) were an effective cause of the treatment which we find. As was made clear in the case of **O'Neill v. St Thomas More Roman Catholic School [1996] IRLR 372** the relevant protected characteristic need not be the only cause of the treatment in question. We also note the following:-

84.1 the House of Lords in **Nagarajan v London Regional Transport 1999 ICR 877, HL**, held *"discrimination may be on racial grounds even if it is not the sole ground for the decision……..If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."* (judgment of Lord Nicholls)

84.2 Paragraph 3.11 of the EHRC Employment Code which states that *'the characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause'*

85 Section 13 provides that direct discrimination occurs where an individual is treated "less favourably" than another. It is generally necessary therefore to identify a comparator who does not share the claimant's protected characteristic, although claimants can rely on a hypothetical comparator (the term "or would treat others" within the wording of section 13 makes this clear).

86 Section 23(1) EqA requires that there is "no material difference" between the claimant's position and his/her comparators position. Case law makes clear that the comparators circumstances doe not have to be the same in all respects; rather they have to be the same (or nearly the same) in those circumstances which are relevant to the claimant's claim. (see for example the decisions of the House of Lords in **Shamoon v. Chief Constable of the Royal Ulster Constabulary 2003 ICR 337** and **MacDonald v. MOD; Peace v. Mayfield School 2003 ICR 937**).

Victimisation – section 27 Equality Act 2010.

87 Section 27 states

(1) A person (A) victimises another person (B) if A subjects B to a detriment because-
(a) B does a protected act all
(b) (b)B believes that A 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 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 the act

Burden of Proof

88 We are required to apply the burden of proof provisions under section 136 Equality Act 2010 when considering complaints raised under the Equality Act 2010.

89 Section 136 states:

" (*1) This section applies to any proceedings relating to a contravention of this Act.*

(e) If there are any facts from which a court could decide in the absence of any other explanation, that a person (A) has contravened the provision concerned, the court must hold that the contravention occurred.

(f) But subsection 2 does not apply if A shows that A did not contravene the provision."

90 We have also considered the guidance contained in the Court of Appeal's decision in **Wong v. Igen Limited [2005] EWCA 142**. This case concerned the test as set out in discrimination legislation that pre-dated the EqA but the guidance provided in there remains relevant. The annex to the judgment sets out guidance (the revised Barton guidance).

91 That guidance notes that it would be unusual to find direct evidence of discrimination as few employers would be prepared to admit discrimination, even to themselves. It is often necessary therefore for a Tribunal to consider what inferences should be properly drawn from the facts as found by the Tribunal.

92 We are also clear that the wording of the statute itself – s136 EqA - is the key reference in relation to burden of proof when reaching decisions about whether there has been a contravention of the EqA.

93 Finally, on the issue of burden of proof, we are mindful of guidance from case law indicating that something more than less favourable treatment may be required in order to establish a prima facie case of discrimination; see for example **Madarassey v. Nomura International [2007 ICR 867]** where the following was noted in the judgment:

> "*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

Time Limits

94 Section 123 EqA provides that complaints may not be brought after the end of 3 months "*starting with the date of the act to which the complaint relates"*

(s123(1)(a) EqA. This is modified by section 140B – providing for early conciliation.

95 Section 123(1)(b) provides that claims may be considered out of time, provided that the claim is presented within *"such other period as the employment tribunal thinks just and equitable."*

96 We note the following passages from the Court of Appeal judgment in the case of **Robertson v Bexley Community Centre 2003 IRLR 434**:-

> *"if the claim is out of time there is no jurisdiction to consider it unless the tribunal considers it is just and equitable in the circumstances to do so."* (para 23)
>
> *"…the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of discretion is the exception rather than the rule."* (para 25 of the judgment)

97 The EqA itself does not set out what Tribunals should take in to account when considering whether a claim, which is presented out of time, has been presented within a period which it thinks is just and equitable. We note the following:-

97.1 British Coal v. Keeble EAT 496/96 in which the EAT advised, when considering whether to allow an extension of time on just and equitable grounds, adopting as a checklist the factors referred to in s33 of the Limitation Act 1980. These are listed below:-

- the length of and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;
- the extent to which the party sued had co-operated with any requests for information.
- the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action.
- the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

97.2 Rathakrishnan v Pizza Express (Restaurants) Ltd 2016 ICR 283, EAT. This case noted that the issue of the balance of prejudice and the potential merits of the (in that case) reasonable adjustments claim were relevant considerations to whether to grant an extension of time.

G. Discussion and Conclusions

Time Limits

98 It is appropriate to first note our decision on the time limit issue.

99 The claim was presented many years out of time. Applying, section 123(1)(b) EqA, we have decided that it is just and equitable to extend time to the date that the claim was in fact presented (23 December 2019). We base this on the following

- 99.1 That the claimant did not see the second respondent's email of 30 August 2012, until August 2019.
- 99.2 That the claimant did not see this email because the respondent had not provided it to the claimant
- 99.3 That the claimant acted relatively quickly once he had seen the email.
- 99.4 That the respondent has not provided any evidence or made any submissions about how or why it would not be just and equitable to allow the claim to proceed out of time.
- 99.5 That we have heard the relevant evidence and we are satisfied that is reliable evidence and the parties recollection of events is sufficient in order that we can reach a fair and just decision.

Comparators.

100 We have considered the circumstances of the 2 comparators having regard to the terms of section 23 EqA and the case law guidance referred to above. Our decision is that neither is an appropriate comparator.

101 Mr Street did not at any stage leave the Fire Service nationally. Whilst he did move from one brigade to another, he did not move at all without having secured a position in the neighbouring fire service thus ensuring that all of his rights (including his pension) were protected.

102 Miss Redfern was at a very different stage in her career. Her cause was championed by the FBU who approached Ms Docx. The FBU and Ms Docx looked in to the circumstances which led to Miss Redfern's resignation and identified organisational issues that needed improving that had played a key part in the resignation. Miss Redfern had not said that she was fed up with her employment with the fire service ad had given contrary indications.

103 We also note that the economic and organisational circumstances affecting the first respondent were different to how they were in 2012.

104 We have however considered the claims of direct discrimination based on a hypothetical comparator.

105 In the case of the allegation of discrimination by association, the hypothetical comparator would be a firefighter who was married to a spouse who was the same race as the claimant or a fire fighter who was not married at all and where the same or similar relevant circumstances applied.

106 In the case of the allegation because of the protected characteristic of the claimant's religion, the hypothetical comparator would be a firefighter who did not follow any religion and where the same or similar relevant circumstances applied.

107 The same or similar relevant circumstances would be a firefighter who had resigned for similar reasons, where there were indications from the fire fighter that s/he was to some extent disillusioned with their employment, had a similar employment record as the claimant and whose resignation was at a time when there were too many fire fighters in the second respondent's employment.

Direct discrimination contrary to section 13 of the EA

Did the respondents treat the claimant less favourably because of race and/or religious belief when they refused to allow him to rescind his resignation in August 2012. The claimant contends that he has been discriminated against because of his association with his wife who is Pakistani and Muslim. The acts of discrimination occurred on:

(a) 30 August 2012 when Mr Tony Hunter (Head of Operational Assurance and Performance for the first respondent and the second respondent in these proceedings) confirmed his recommendation for the first respondent to decline the claimant's request for a retraction, citing his "personal circumstances" and "relationship" and "external influence" as part of such reason. As further explained below, the claimant only became aware of what the claimant considers to be the respondents' discriminatory motives on 17 August 2019; and

(b) 31 August 2012 when Mr Hunter, the Second Respondent, forced the Claimant to attend a meeting alone during which he belittled and humiliated him. Considering the above, the Claimant believes that the Second Respondent treated him in this way because of his association with his wife.

108 Applying section 136 EqA, we do not find that there are facts from which we could decide in the absence of any other explanation, that the respondents have discriminated against the claimants as alleged, because of his association with his wife. We have carefully considered the use of the terms about which the claimant

complains. Even knowing the race and religion of the claimant's wife, we could not decide, in the absence of any other explanation, that the respondents have discriminated against the claimant as alleged.

109 Based on our findings of fact, there are no inferences we could properly draw to show that, in the absence of an explanation, the respondents discriminated against the claimant because of his association with his wife and her protected characteristics. Specifically regarding the wording of the email of 30 August 2012, an inference of discrimination could not be properly drawn.

110 However, and as we heard the evidence in this case we have considered the explanation provided by the respondents – namely the reasons why they did not allow the claimant to withdraw his resignation together with their treatment of the claimant at the meeting on 3 August 2012. We deal with the 2 allegations below:-

111 The reasons that the second respondent refused to allow the claimant to withdraw his resignation were set out in the email of 30 August 2012 and expanded in the report of 2 November 2012. The second respondent did not fabricate these reasons. The race and/or religion of the claimant's wife was not a significant factor in his decision not to allow the claimant to withdraw his resignation. It was not a factor at all. The second respondent referred to the claimant's personal circumstances because the claimant had brought them to the second respondent's attention, asking that they be taken in to account. Whilst the second respondent did consider what the claimant had told him about his personal circumstances, he decided that they should not change his decision. However, they were not the reason (or any part of the reason) for the second respondent's (or the first respondent's) decision.

112 The hypothetical comparator would have been treated in the same way as the claimant.

113 As for the treatment afforded to the claimant at the meeting on 31 August 2012, no one belittled or humiliated the claimant. The respondents delivered a difficult message to the claimant that the claimant did not welcome and which upset him but they did not deliver this message in the manner described by the claimant.

The claimant converted to Islam and became a Muslim on 01/05/11. Did the respondents treat the claimant less favourably because of his religious belief when they refused to allow him to rescind his resignation in August 2012. The acts of discrimination occurred on:

(c) 30 August 2012 when Mr Tony Hunter (Head of Operational Assurance and Performance for the first respondent and the

second respondent in these proceedings) confirmed his recommendation for the first respondent to decline the claimant's request for a retraction, citing his "personal circumstances" and "relationship" and "external influence" as part of such reason. As stated below, the claimant only became aware of the respondents' discriminatory motives on 17 August 2019; and

(d) 31 August 2012 when Mr Hunter, the second respondent, forced the claimant to attend a meeting alone during which he belittled and humiliated him.

114 As with the allegation of discrimination by association, our decision is that the claimant has not proven a set of facts from which we could decide that the respondents have discriminated against the claimant as alleged. However, having considered all of the evidence in the claim we have considered and made findings on the reasons why the respondents refused to allow the claimant to withdraw his resignation.

115 We are satisfied with the respondents' explanations as provided and noted above. The hypothetical comparator would have been treated in the same way as the claimant.

Victimisation – section 27 Equality Act 2010

Did the claimant do a protected act? The claimant relies upon his challenge to racist conduct by a firefighter colleague which took place at Blackley Fire Station in 2009 or 2020 when he intervened when that colleague was making monkey gestures behind the back of a black firefighter colleague;

Did the respondent subject the claimant to the following detriments:

30 August 2012 when Mr Tony Hunter (Head of Operational Assurance and Performance for the first respondent and the second respondent in these proceedings) confirmed his recommendation for the first respondent to decline the claimant's request for a retraction of his resignation;

31 August 2012 when Mr Hunter, the second respondent, forced the claimant to attend a meeting alone during which he belittled and humiliated him.

(8) *If so, was this because the claimant did a protected act?*

116 We have made a finding of fact that the second respondent was not aware of the protected act on or before 31 August 2012. His actions on 30 and 31 August

2012, could not have been (and were not) because the claimant challenged his colleague about his offensive racist behaviour in or around 2010.

..

Employment Judge Leach

Date 15 January 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

20 January 2021

FOR THE TRIBUNAL OFFICE