EMPLOYMENT TRIBUNALS

Claimants: Mr M Wright

Respondent: Nottinghamshire Fire and Rescue Service

Heard: Remotely by CVP (Nottingham)

On: 9-13 August 2021 and in chambers on 1 September 2021.

Before: Employment Judge Clark
Mrs F Newstead
Mr G Looker

Representation

Claimant: Mr Ahmed of Counsel

Respondent: Mr Crow of Counsel

JUDGMENT

The unanimous judgment of the tribunal is that: -

1. The claim of detriment **fails** and is dismissed.
2. The claim of victimisation under s.27 Equality Act 2010 **fails** and is dismissed**.**
3. The claim of unfair dismissal **fails** and is dismissed.
4. The claim of Breach of Contract (Notice) is **dismissed** upon withdrawal.

REASONS

1. Introduction

1.1 The claimant was a fire fighter. Twice he has applied to his employer for flexible working. Twice it has been granted in principle but, in practice, the exact terms of what

Mr Wright sought could not be implemented. After raising a grievance, he resigned. He claims his resignation amounts to an automatically unfair dismissal, he claims that he suffered victimisation and detriments because of making a request for flexible working. The original claims of direct disability discrimination and failure to make reasonable adjustments have previously been struck out and the claim of "associative" direct discrimination also previously dismissed on withdrawal.

2. Issues.

2.1 The live issues are set out in an agreed list of issued prepared by the parties found at page 494 of the agreed bundle. We adopt that and use it as a basis to structure our conclusions save for two amendments we agreed with counsel at the start. The first is that the claimant has confirmed in correspondence that he does not claim breach of contract in respect of notice. We dismiss that claim upon its withdrawal. Secondly, the list of detriments appears to be replicated for each of the three causes of action relied on. The victimisation claim is slightly different as it does not, and cannot, include the detriment of the decision taken on 6 August as this precedes the alleged protected act. Similarly, the allegation appearing at 4.vi. must also fail as this too precedes the alleged protected act.

3. Evidence

3.1 For the claimant we heard from Mr Wright himself. For the respondent we heard from Michael Sharman and Karen Jennings concerning the statutory responsibilities and operational requirements engaged in the handling of this case. We heard from Bryn Coleman and Ian Pritchard on the claimant's grievance and appeal.

3.2 We received a bundle running to 501 pages. All witnesses gave affirmed evidence and were questioned. Both Counsel produced written closing submissions and were given time to amplify and respond orally.

3.3 We reserved our decision due to the available time. We gave advance warning and apology for the effect the current caseload was having on timescales. Regrettably, we had to inform the parties that this was compounded further by the effect of a period of covid related absence.

4. The Facts

4.1 It is not our role to resolve each and every last dispute of fact between the parties. Our function is to make such findings of fact as are necessary to answer the issues in the claim and to put them in their proper context. On that basis, and on the balance of probabilities, we make the following findings of fact.

4.2 The claimant commenced his employment as a fire fighter in 2009. The respondent is the statutory authority for the provision of fire and rescue services within the Nottinghamshire County Local Government area. It operates within a statutory framework of services to be delivered against set standards. We are in no doubt that the pressure of managing the provision of those services within budget has only increased in recent years.

4.3 As might be expected of a large employer such as this, it is resourced with specialised HR advisers and applies a range of published employment policies. We find these are developed with some degree of involvement of the staff side organisations, including the Fire Brigades Union ("FBU"). One of those policies is a job share policy which sets out the approach the employer seeks to take in response to applications for job share. In this case we find Mr Wright was not seeking *only* a job share, but it is common ground that his applications for 50% part time working included job share as one obvious route by which the employer could potentially manage, and he could achieve, his desired reduction in working hours. Indeed, Mr Wright himself acknowledged that this route was more readily achievable for firefighters than others.

4.4 We have seen a flexible working policy, the significant aspects of which include: -

> ***2.1 The Fire Authority understands and respects the needs of employees who may need to consider flexible working. It supports Family Friendly employment policies and promotes work-life balance, and will therefore approach each request in a positive manner and work with the employee to reach a mutually acceptable solution as far as is practicable.***
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> ***2.2 It should be noted that any application made under this policy provision must be founded on the principle that the adjustment to working arrangements is not made with the intention of undertaking secondary employment on either an employed or self-employed basis. Any agreement made by the Service is undertaken on this basis and any breach of this understanding will be considered as a serious conduct issue.***

4.5 The relevant factors the employer might need to have regard to in considering an application are set out as: -

- ***The burden of additional cost***
- ***Any detrimental effect on the ability to meet service requirement***
- ***The ability to re-organise work for existing staff***
- ***The ability to recruit additional staff***
- ***Detrimental impact on quality***
- ***Detrimental impact on performance***
- ***Insufficiency of work during the periods the employee proposes to work Planned structural changes***

4.6 In broad terms, the flexible working policy adopts the statutory procedure for consideration of flexible working requests to vary the contract including the timescale in which decisions will be reached. It states that any request may take up to 3 months to determine.

4.7 At the material time, we find meaningful minority (about 25 - 33%) of front-line firefighters had secondary employment. It is termed “secondary” because there is a contractual (or at least collectively agreed principal within the terms and conditions of employment) that a fire fighter must treat his or her employment with the fire service as a priority. It follows, therefore, that where there is any tension between the obligations to the fire service and the secondary employment, it is expected and understood by all that the secondary employment is the one that will give way. We accept that the employer has a legitimate interest in the activities of such employees outside their contractual obligations to it. In furtherance of that aim, it has published a secondary employment policy, the significant aspects of which include-

> ***2.3 In principle, the Service recognises the right of employees to undertake secondary employment in their own time so long as it does not impact on their primary employment. Permission to undertake secondary employment is at the discretion of the Chief Fire Officer, subject to those considerations set out in this document, and the Service shall not be liable for any loss of earnings, losses or debts incurred by not granting or withdrawing permission for secondary employment.***
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> ***..***
>
> ***2.6 The Service may apply specific restrictions to the permission granted and may restrict or withdraw permission to undertake secondary employment at any time. Examples of where this may be applied include during periods of suspension (under the disciplinary procedure), during periods of sickness absence or modified duties where it is considered detrimental to effective recovery, as a result of action taken to address poor attendance or performance issues, or where hours of work have been reduced to facilitate a request under the Flexible Working Policy. In this case any restrictions will be confirmed in writing to the employee.***
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> ***..***
>
> ***2.8 The Service requires that efficiency and performance of duties shall not be impaired by the secondary employment and must be satisfied at all times that its interests are not being detrimentally affected in this respect, and that employees comply with any statutory regulations, including those set out in paragraph 2.7and under the Working Time Regulations.***
>
> ***..***
>
> ***2.17 Permission for secondary employment will lapse after 2 years from when permission was granted. Employees will be required to confirm that there has been no change to their original application. It is the responsibility of the employee to ensure that they re-submit an application to undertake secondary employment if any information provided, including a change of the nature or conditions of that employment, changes at any point.***
>
> ***..***
>
> ***3.10 Primacy of Employment***
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> ***The needs of the Service shall take priority over any secondary employment arrangements. Commitments arising from outside employment must not impair attendance for, of the efficient performance of, official duties and there must be no interference with any requirement set out in the contract of employment. This will include the ability of the employee to attend training courses or to work at any Service location or on any recognised duty system either on a temporary or permanent basis. Employees will not be released early from duty to take up secondary employment.***
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> ***..***

Rest Periods

3.19 Employees have an obligation to report for work sufficiently rested and in a condition which will allow them to undertake their duties without compromising the health and safety of themselves, their colleagues or others or detrimentally affecting their performance at work. Fatigue plays a major part in physical and mental capacity and alertness and secondary employment must not compromise an employee's ability to present themselves as fit for work.

4.8 And of particular significance in the circumstances of this case: -

Sickness

3.22 No work associated with a secondary employer or on a self-employed basis, whether paid or unpaid, may be undertaken whilst on sick leave without express permission from the Service. This is to ensure that the work does not exacerbate the condition or extend the recovery time.

4.9 These are measures by which the respondent seeks to manage a series of particular concerns potentially arising from secondary employment. In the context of a firefighter absent due to sickness, first and foremost they focus on the concern about the adverse effect on recovery and return to work which may in itself compromise the principal that the fire fighter role takes primacy. We also find there is a very real issue of public sector finance and governance that would be likely to arise in cases where an employee was on sick leave from the fire service yet continuing to work in their secondary employment. We find those considerations are of such significance that it does not surprise us that the evidence was that no one had ever known of permission being given to continue in secondary employment whilst on a period of sick leave from the fire service. Against all that we have heard, we have no reason to doubt the accuracy of that and every reason to accept it.

4.10 We have seen the sickness absence policy itself. The significant aspect of which that we have been directed to are : -

2.4 Employees are expected to:-

Not abuse the sickness absence procedures or sick pay scheme by taking unjustified/unreasonable time off work due to sickness, undertaking paid employment whilst in receipt of sick pay, or in anyway impeding recovery from sickness/injury.

Obtain authority from the Service to undertake work, including voluntary work, whilst on a period of sickness absence.

4.11 Despite what would in due course become his grievance and, ultimately, his claim before us, we accept Mr Wright's evidence of his own knowledge, understanding and beliefs about the operation of these policies in practice. In summary, he put them in these terms: -

a) He accepted had no right to insist on a part time role, only a right to ask for changes to be considered.

b) He accepted he had no right to expect part time working outside the job share scheme, but expected it to be considered.

c) He had no right to undertake secondary employment whilst under contract to the fire service without express permission to do so.

d) He accepted he had no right to ***continue*** with any secondary employment during periods of sickness absence without express permission of the employer. Indeed, during the relevant period of sickness absence in this case, he says he had no intention to do any work under that secondary employment in any event.

e) His understanding of the terms of the permission to undertake secondary employment was in line with the policy that we have seen and summarised above. In particular, that permission for secondary employment could be withdrawn at any time.

4.12 We find part-time working amongst operational fire fighters is extremely rare. One reason for this is due to the intensive training of fire fighters, both initially on appointment and continuing subsequently when in post. This is such that we find access to the initial training and the maintenance of the necessary competencies becomes a legitimate concern of the employer where the firefighter works less than full time hours. Linked to this are the varying competency frameworks necessary for any additional specialist activities at certain stations. Whilst all firefighters are required to maintain the basic set of competencies, some stations require additional, specialist competencies. An example of these arises in respect of the operation of an aerial ladder platform ("ALP") and the specialist search and rescue teams ("SRT"). We find the concept of maintaining competencies needs to be viewed at two levels. At the individual firefighter level, it is obviously crucial that they each maintain their own particular competency for the roles they perform. We find that is the level at which Mr. Wright considered the question of competencies in the case before us. However, for those charged with running the service they have the added task of ensuring competencies are maintained across a station or a watch. In that regard the focus is then on the mix of individual firefighters capable of operating and maintaining the various applicable competency frameworks in the context of workforce planning.

4.13 We find another reason for the rarity of part time working flows from the structure of delivering a service through individual crews and watches at individual stations. Those crews need to operate in a complex rota system to deliver 5 individuals of the necessary competencies to operate any particular engine or appliance. To accommodate annual leave, sickness and other reasons that might take an individual

firefighter away from their crew on any particular day, there has to be a reasonable and practicable means of replacing individuals in a way that maintains the integrity of that crew on that appliance on that watch and at that station.

4.14 We find part of the complicated process of workforce planning for front line fire-fighters starts with a concept described as “the ridership”. This shorthand label encapsulates a range of factors. It is important to make this broader definition clear as we find it has been used in some of the evidence and arguments before us in a very narrow way relating only to numbers in the entire service. Whilst at times it may simply be used to mean the number of front-line firefighters available, either in total or at discrete stations or on discrete watches, it can also refer to the relative number of full-time equivalent appointments actually occupying posts or the number of posts the service needs to operate its services, something akin to, but not quite, in the nature of an organisational “establishment” of posts. As well as a quantitative concept, we find it is also used to refer to the qualitative nature of the posts behind the numbers, incorporating those areas needing specialist training and those fire fighters who possess the competencies in those specialist areas. It may therefore also be used to reflect the mix of those specialist skills and the need to maintain that competency mix, sometimes between the relatively new and the more experienced firefighters. That mix necessarily means one person’s contribution to a station may not be readily swapped with that of another, at least not on a long-term basis and not without careful consideration of the individuals concerned and how they contribute to maintaining the necessary competency mix.

4.15 We have no doubt rostering and managing working hours in the fire service presents a particularly complicated workforce planning challenge. Not only are the initial and ongoing training considerations restrictive of working patterns outside the usual, the means by which reductions can be backfilled also creates a particular concern. Overtime is a short-term solution. We find it creates its own additional complications for the management of the individuals doing the overtime. It affects their right to rest days and working time over and above the financial implications to the respondent. Those financial implications were, however, also a real consideration at the material time. We are sure they are always material but during the time that this case unfolds, there was already close scrutiny being paid to the overtime expense due to other financial and budgetary restraints imposed on the respondent by the generally difficult financial situation. We therefore find relying on the overtime of others was not a reasonable basis for accommodating any individual’s reduction in working hours.

4.16 We find the longer-term solutions to accommodating non-standard working patterns relied on an ability to recruit into the part time vacancy that would be created by a full-time fire fighter reducing their working hours. That again engages with obstacles found in the structure and delivery of the initial training which exists largely on the back

of a regional, or national, periodic intake of new recruits as well as the ongoing competency training undertaken throughout the day-to-day activities of a fire fighter undertaking their watch rota. Whilst in theory it is possible to place an external advert for a part-time fire fighter, we find that there is no ready market of trained and competent fire fighters currently unemployed or otherwise available but who are not applying to work as a fire fighter simply because the current model of recruitment offers only full-time roles. We prefer the respondent's witnesses' assessment of this contention although the parties were not altogether polarised on this. Mr Wright's own trade union representative accepted that recruiting in this way would be unusual.

4.17 For all those reasons, we find the practical reality is that, in most cases, the only achievable solution to a request for part time working amongst fire fighters is found in a 50/50 job share. We accept that is not the only *possible* solution and that there are examples of others who have ended up working in a stand-alone, 50% role but we find they are the exception. In addition, where they have happened we find the employer has subsequently encountered additional problems in the areas identified above and in respect of which we accept it has a legitimate interest in not replicating. We do not accept that a prior example of this creates a precedent that entitles all subsequent applicants to the same outcome, despite the operational difficulties that entails or that exist at the time.

4.18 We do, however, find that the rarity of part time working is not due to any general objection to accommodate it per se but, instead, is due to the real difficulty in safely and successfully accommodating it for front line fire fighters as we have set out above. In fact, we find this employer has on two separate occasions genuinely and positively responded to Mr Wright's requests to reduce his hours and has taken reasonable steps to try to accommodate that request in practice.

4.19 We then turn to Mr Wright's own circumstances. The background and context to his flexible working requests comes from a number of sources. First, the claimant and his fiancée had, since around 2015, operated a boarding Cattery as a partnership business. It had proved to be a successful and profitable business. Secondly, the claimant's fiancée had her own health issues which had been a source of concern for the claimant and which he disclosed as a basis for wanting to spend more time at home with her to support her. Thirdly, in June 2017 the claimant incorporated Hobbit House Limited, as a vehicle to launch a second trading company constructing garden structures stylised on the partially subterranean homes seen in "the Hobbit" films. In his 2017 PDR review, his line manager was aware of the claimant's business interests and they recorded a discussion about the "crossroads" that he might face in the future in respect of his future career. We find this was, on balance, a reflection of the claimant's desire to run his various business interests and a recognition that he might need to make a choice at some point in the future.

4.20 In early 2017, the claimant had made his first flexible working request. A meeting was promptly held on 30 January 2017 to discuss it and the claimant was advised of the process, the result of which was that, on 1 Feb 2017, he amended his request seeking part time or job share but working night shifts only. His aim was not only to reduce his working time but to be free from any commitment to his fire service duties during the day, save for occasional training. The reason was put in these terms: -

> ***I'm generally a private person when it comes to my personal life, tending to keep things to myself and just getting on with things. I feel uncomfortable discussing these matters but I love my job as a Firefighter and would rather seek to find a solution than have to give up the Job completely. I would however like to keep my personnel circumstances and reasons for requesting Flexible working confidential.***
>
> ***Prior to last week, I had never come across or heard of Part-Time Working within the Fire Service but on day shifts last set, a paramedic who was on station in between calls said that he was doing part-time working which got me asking some questions.***
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> ***….***
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> ***The main reason I am requesting Flexible working is because my fiancee suffers with severe anxiety and I have been struggling to support her while working full time. Dealing with her condition on a daily basis can prove very challenging but generally, her anxieties are greatly decreased while I'm at home during the day and am able to keep to a daily routine.***

4.21 Mr Wright quoted para 2.2 of the flexible working policy and disclosed the fact that he already operated a boarding cattery at his home together with his fiancée. He accepted that continuing that business was a factor in his decision in the sense that he was financially able to reduce his working hours with, and income from, the respondent. We find his application was restricted to exactly what he was asking for and nothing else. In other words, if he could not have 50% working night shift only, he was not interested in making any changes at all.

4.22 We find the respondent gave genuine consideration to the claimant's application. In fact, the evidence we have seen shows that despite the practical obstacles involved, it has treated all such applications seriously including the two made by Mr Wright. We find that is not an entirely altruistic position. Applications typically come from experienced fire fighters and retaining their skills is clearly in the interests of the respondent. Further, some of those who do reduce to part time will seek to return to full time at a later date which, again, is a reason for the respondent to try to accommodate their requests where it is feasible to do so.

4.23 In respect of this 2017 application, however, we find the idea of a nights-only contract was simply impossible. In evidence, Mr Wright accepted this option was never realistically viable. However, notwithstanding that situation, the claimant's general request for part time working was still granted in principle on the ground that it was

necessary for Mr Wright "to provide care for your partner". It was however, made subject to an explicit caveat that: -

> ***The agreement is not meant to allow you to undertake another employment on either an employed or self employed basis. The Service will expect you to seek agreement before undertaking any such employment, and may request you to return on a full time basis if it is clear that you have capacity to do so. Any breach of this understanding may be considered as a serious conduct issue. With regard to the business you run (cattery), I note that you currently carry out 10 hours per week under the provisions of secondary employment and I would stipulate that this weekly allowance is not exceeded under any new working arrangement.***

4.24 Around the same time, a separate flexible working request had been made by another fire fighter. As a result of that coincidence the claimant was offered a job share with her. Mr Wright refused the offer on 5 February. He said nights were not just a preference but were the *only* basis on which he could contemplate a reduction in working hours in order to provide the support to his fiancée. He complained that his individual circumstances had not been taken into account.

4.25 In evidence before us, the point was made that the other fire fighter we have referred to was able to move to part time working even though the claimant withdrew his flexible working request and she therefore did not have a job share partner. We find she was one of only two examples of part-time working that have existed outside the concept of 50/50 job share partners in front line fire-fighting roles. She was also a new mother returning from maternity leave. Mr Wright viewed her circumstances as warranting the application to reduce to part time more than his application did. That was not the view of the respondent's witnesses and it was not suggested that applications from new mothers had a greater prospect of achieving part time working than applications made on other grounds. In fact, we find the reason for this person's application going ahead, as well as being the reason for the only other stand-alone part time firefighter position being granted, was that they were both approved by a previous Area Manager. The consequences of those decisions had led to some practical difficulties to the extent that the respondent, and in particular the new area manager Mr Sharman, now felt it had to take greater care about the wider workforce planning implications of reductions in working hours. Despite that, we find applications continue to be considered genuinely against the operational situation at the time.

4.26 On 6 Feb 2017, Karen Jennings of HR and the station commander met with the claimant to better understand the situation behind his application. In that meeting, Mr Wright unexpectedly got upset and left. This was understandably seen as odd behaviour to arise in the context of what we find was a positive meeting. As a result, we find there was a genuine concern about Mr Wright's mental wellbeing and he was referred to Occupational Health. The occupational health adviser responded quickly on 13 February, stating that Mr Wright felt intimidated in the meeting which seems to be because the offer made was not in the exact terms he had sought. On 7 Feb 2017, the

reason why the service could not grant a nights-only contract was explained in a detailed email from Group Manager Clark. We can be sure the reasons given were fair and genuine as, on 16 Feb 2017, the claimant withdrew his flexible working request accepting the reasoning, stating: -

> ***Thank you again for your response and time taken on this matter.***
> ***I understand the Services point of view and the valid reasoning you have given.***

4.27 Throughout the material time since its incorporation in June 2017, Mr Wright has been the sole shareholder and director of Hobbit House Limited. We find he did not disclose this business interest to his employer or seek permission for the secondary employment that it necessarily entailed. On the face of it, that was in breach of the policy. He spent the first 6 months or so of the company's life constructing a prototype product. He acknowledged in evidence that he had failed to inform his employer and sought to suggest the reason was that it was not necessary for him to do so as he was not yet drawing a wage. At times during his evidence on this and other matters, we found Mr Wright's interpretation of his obligations under the various policies to be imbalanced between how he saw his "obligations" and his "rights". We noted a tendency for him to interpret policies and situations as it suited him, yet at the same time strictly against the employer. Despite not drawing a wage, we note that the first year's balance sheet showed the business had acquired c.£50,000 worth of assets and incurred debts of £54,625. By the time of the second flexible working request, those figures had grown to c.£184,000 and c.£205,000 respectively and the business was by then an employer in its own right. Throughout this case, Mr Wright has insisted on calling his activities a "hobby business". We take the view that that label is irrelevant save to the extent that it demonstrated to us that Mr Wright has sought to downplay the nature of this interest and activity.

4.28 In March 2018, Hobbit House Limited attracted local press attention. This was quickly followed by national press interest. Once again, we found Mr Wright sought to downplay the extent of his activities. Contrary to his initial oral evidence to us, we find he had in fact by then set up a website for the business to develop sales and take orders. We accept some of the press reporting may have skewed his words but, whilst he may have not yet had a paying customer, it is beyond doubt that this was a marketing exercise for sales. Each unit was estimated to retail at c.£50,000.

4.29 We find this press activity clearly raised a problem for him. He was by then already stretching his own interpretation of the policy on secondary employment and had therefore not applied for the necessary permission but we find the press publicity meant he was forced to apply. He attempted to declare it around this time through the employer's intranet but could not do so for technical reasons related to the system. We suspect the system is designed to accept only one notification of secondary

employment and he was already registered as having outside employment for the cattery he could not add another. In April 2018, he was permitted to make his declaration on paper rather than on the intranet. That said nothing about the cattery although his covering email did refer to the cattery to the extent that the maximum permitted 10 hours per week for secondary employment would thereafter be split with 8 hours for Hobbit House Limited and 2 hours for the cattery. We have some doubts about the openness with which this business was disclosed to the employer but nevertheless, as a result of this further notification and an informal meeting on 1 May 2019, the secondary employment with Hobbit House Limited was approved on 16 May 2018.

4.30 Also during 2018, the respondent undertook a review of secondary employment generally. Whilst Mr Wright's situation was not the catalyst for this, his evidence was that he was not alone in failing to seek to renew permission for his secondary employment every two years as was explicitly necessary under the policy. We find there was clearly a legitimate concern that the employer needed to address and it did so by way of a general staff briefing. We find that took place in the second half of 2018 and all those with secondary employment were required to reapply for permission. The claimant did not do so, mainly it seems because his stand-alone application in respect of Hobbit House Limited seemed to have broadly coincided within a few months or so of this process. However, we find the result of this was that the employer then only had the new application for Hobbit House Limited on its records and no renewed application for the cattery business which, we find, was then treated as having lapsed.

4.31 The following year, on 7 June 2019, Mr Wright submitted his second flexible working request (193-4). He said: -

> ***I would like to apply to work a flexible working pattern that is different to my current working pattern under my right provided under section 80F of the Employment Rights Act 1996. I confirm I meet each of the eligibility criteria as follows:***
>
> ***• I have worked continuously as an employee of the company for the last 26 weeks.***
>
> ***• I have not made a request to work flexibly under this right during the past 12 months.***
>
> ***• I previously applied for flexible working over two years ago and it was granted. After further consideration I withdrew my application.***
>
> ***I would like to apply for flexible working. (Part time or Job Share)***
>
> ***I would like to work every other set if possible.***

4.32 He repeated the issues with his wife's mental health and the desire to reduce working to improve their quality of life. Again, his application explicitly included the prospect of job share as well as simply working part time.

4.33 We find the respondent once again dealt with the application genuinely and was prompt in its response. For the reasons we have already set out, it sought to

accommodate the request through a job share. Emails were sent to crew managers and other steps taken to identify potentially interested job share partners across the entire ridership. Within 4 days, on 11 June, the first potential job-share was identified with fire fighter “D” at the Newark station. Over the next few weeks, two further potential job-share partners were identified. First on 12 June with fire fighter “R” and then on 4 July with fire fighter “S”. In due course, each of these potential partnerships would each reach the stage of an “in principle” offer being made, subject to the job share being agreed by both halves. For one reason or another, they each fell through. In all cases, the reason for them failing was because of the job share partner either withdrawing their request, leaving the service or returning to full-time working. We find, as Mr Wright readily accepted, that this was not in anyway the respondent’s fault.

4.34 The total ridership number at the time of the application was 358. Recruitment happens annually and the actual ridership can fluctuate around that figure. Sometimes it is over, sometimes it is under. Long term sickness absence and other forms of long-term absence together with resignations clearly affect the ridership. We find it is clearly easier to accommodate changes that might have the effect of reducing the ridership at times when the number in post is otherwise running at or above target compared to when it is below. That applies both when workforce planning is considered across the service as a whole, and also from station to station. Conversely, at times when it is running below target, we find it may simply not be possible to accommodate such changes.

4.35 We find the suitability of a job share at an individual level meant each applicant’s circumstances had to be considered in the round. The complexity of the workforce planning and the associated wider concept of ridership meant that it was not only the effect of Mr Wright reducing to part-time at the particular station that had to be assessed but the same had to be assessed of the job share partner and the effect on their respective station or watch. Mr Wright says he was more flexible than the other party as he was prepared to change watch or even station. We do not see that distinction arose in fact in any material sense. We have already noted the significant and legitimate concern for the employer that its ridership maintained their respective competencies in their particular station. Fire fighter D had been granted stand-alone part time working at Newark by the previous area manager in circumstances which he potentially should not have (at least when viewed through the circumstances as they then existed before Mr Sharman). We do not accept that the granting of this position is a “breach or policy” as Mrs Jennings initially described it, but we do accept her revised characterisation that it was a decision that in hindsight should not have been made.

4.36 We find it gave rise to problems in respect of the individual concerned being unable to maintain his competencies which we accept had become a real problem for the station. This was particularly acute as Newark hosts the SRT which demanded a

wider competency framework to be maintained. As a result of identifying this, the prospect of a job share *at Newark* was rejected. However, we find the respondent took a practical approach to finding a solution that would potentially benefit all concerned. The solution was to propose to fire fighter D that he transferred to London Road Station where the claimant was based. That would not only give the claimant his desired part time working but would mean he remained at his previous station. This solution came with the added benefit that it would overcome the existing problems of fire fighter D and Newark being able to maintain the necessary competencies and would also leave Newark with a whole-time equivalent vacancy of 1.0 instead of 0.5 which we find the service would be able to fill far more readily than is the case with a fraction of a vacancy.

4.37 The plan was set. The “in principal” offer was made. However, the execution fell through as fire fighter D’s family circumstances changed unexpectedly and he had to revert to full time working.

4.38 On the question of offers being made in principle, we find that the offer was made on the common understanding that it was subject to the other half of the job share also taking it up. If they did not, the offer fell away. We find that was so even though, once a job share was up and running it was common ground that there would be no obligation on the remaining half to revert to full time working if the other half of the job share resigned. At times during the cross-examination of the respondent’s witnesses it seemed that the constructive dismissal claim was shifting from a breach of the implied term of trust and confidence and towards a breach of an express term in respect of reduced hours of work. For present purposes, we find as a fact Mr Wright understood the offers to be conditional and we accept, as a fact, that the condition did not materialise. He has not based his subsequent grievances on such a breach of contract; has not sought to enforce any revised contractual term and did not ultimately resign because of this. There is no claim before us on such a breach and we do not, therefore, go into this aspect further.

4.39 Returning to the decision making at the time, in assessing the suitability of each option, we accept that the ability of the respondent to backfill into any fractional vacancy created was crucial to its overall workforce planning. We accept Mr Sharman’s explanation of the difficulties in recruitment and training of trying to fill a 0.5 vacancy compared to a full, 1.0 WTE, vacancy. Much of the case before us challenged the wisdom of some of the management thinking and whether they were making the best decision. There may be some force in some of the challenges in the longer term. For example, if desire for 50% working grows amongst the workforce, it may become more practicable at some point to simply accommodate the first half of a job share and suffer the added complications for the time it then takes until the next application is made. That, however, is not to say the concerns of the employer in managing its workforce

planning to deliver a range of statutory objectives is not still a legitimate concern and its principal consideration. Similarly, maintaining competencies seem to us to be not only a legitimate, but a critical, concern of the employer. We do accept that the maintenance of ***individual*** competencies ought to be no more difficult for a stand-alone 50% part timer than it is for a 50% job sharer. In any event, the maintenance of competencies is also a matter of maintaining a collective framework of competencies across the crew of a particular watch/station and if it cannot be satisfactorily maintained, is a factor that the employer can legitimately say points against 50% working. We accept that these are not theoretical. The employer did have past and present experience of deficiencies in competency standards where stand-alone part time working had been granted and the addition of specialist competencies at certain stations such as ALP and SRT only adds to this concern.

4.40 We find the employer has to make a qualitative judgment as well as quantitative. The challenges Mr Wright makes to the decision making are not invalid, but we find they go to some of the considerations within that wider process. It is not for us to say the employer should have reached a different decision. How it went about reaching its decision, however, could have implications for our assessment of other issues in the case. We are satisfied that the employer reasonably weighed the various factors and came to its decision on how it could accommodate the claimant's request. The fact that it theoretically could have allowed a stand-alone 50% part time post does not mean it had to. Doing that would come with other implications to the management of its services that it is entitled to have regard to. Similarly, the timing of when it can put a potential job share in place has to be assessed against similar factors which often evolve, for better or worse, over time. The fact that the ridership may be running below target is a legitimate reason for delaying any changes until after the next recruitment intake.

4.41 As each potential solution for Mr Wright was identified it was offered in principle to the claimant. As each plan broke down, the potential date for the changes necessarily got delayed. However, all these developments were taking place within the 3-month period that the policy anticipated. Whilst the parties were in that period and there remained the potential for a mutually acceptable solution, the search for it continued. We find the respondent did not reject the claimant's request until later when the circumstances overall changed.

4.42 Another fire fighter, "R" was then identified as a possibility when he sought part time working. Unfortunately, he then withdrew his application before it could be implemented.

4.43 Another fire fighter, "S", then applied for part time working. His request was driven by the circumstances of his own ill health which was such that he was, at the

time, absent on sick leave. A return to part time working was potentially the means by which he could remain in work. Once again, the respondent identified him as a potential job share partner and in principle offers were made. Initially, it appeared the changes could be in place as early as July 2019, then it was delayed until August. On 22 July, in a telephone call between the claimant and Karen Jennings, Mr Wright was told the job-share with fire fighter S had to be delayed to 1 September 2019 due to his ongoing sickness. In the end, his ill health proved to be of such an extent that he could not in fact return to work at all and his employment ended with the obvious added consequence that yet another potential job share partnership for Mr Wright had failed to get off the ground.

4.44 On 22 July 2019, Mr Wright sent an email to Michael Sharman. The content was both chasing for an earlier start to his reduced hours and expressing frustration at the process. His views targeted the two individuals principally responsible for managing it, Karen Jennings and Andy Linley. He set out his view of the chronology and summarised it in terms of him: -

> ***"becoming concerned and aggrieved by the delay and mismanagement".***

4.45 We recognise that he was frustrated in not being able to immediately drop his hours to 50%, but this seems to be an odd position to arrive at in circumstances where Mr Wright otherwise accepts he had no right to change his hours and where not only do we find the employer had genuinely and quickly taken steps to make it happen but where Mr Wright also accepted the failures were not its fault. In evidence before us he accepted his tone was inappropriately strong and that it was reasonable for his email alleging "mismanagement" to be treated as a complaint.

4.46 His complaints prompted responses from both Mr Sharman and Ms Jennings. Mr Sharman wrote, firstly on the same day reassuring him that his application was being dealt with and explained the legitimate considerations he had to weigh when considering each potential option. He included the point that it was not just Mr Wright's personal circumstances that had to be considered but also any potential job share partner. He made clear that the respondent could not agree to his request from 1 August 2019 but that they would endeavour to ensure any decision and its implications were communicated as soon as possible. On 25 July he wrote again to confirm that he was still considering the job share solution and, we find significantly so, that he was also considering options for a reduced hours flexible working request. In other words, simply finding some form of stand-alone part time role. We find all options were therefore open, not just the job share option. However, job share was still clearly the preferred solution for any fire-fighting role for the reasons we have already set out and, in fact, it seemed at times that the claimant acknowledged the practical implications.

4.47 The second response came from, Karen Jennings on 23 July. She wrote in her professional capacity arising from the fact that the claimant's email was critical of her "mismanagement". The purpose of her response was to inform Mr Wright that she was stepping back from his application. As this stands as one of the discrete allegations of detriment and an event said to contribute to a breach of contract, we set it out in full. She said: -

> ***Despite my best efforts to accommodate your flexible working request, in view of the fact you have made a complaint about how you believe I have mismanaged this matter, which I would strongly dispute as I have no influence over individuals who have withdrawn from the process or Service Delivery implications, of which I understand SM Lindley has kept you fully informed, I would advise I will no longer be dealing with your request, this will be handed over to one of my colleagues.***

4.48 We struggled to see anything objectionable in this response. Mr Wright accepted his earlier email could be interpreted as a complaint against her and that it was reasonable for her to respond in the terms of this email. He accepted that there is nothing in her reply that was phrased inappropriately or "terse". His position before us was that she shouldn't have taken it personally as he apologised immediately in response to her sending it. We accept that he did in fact promptly apologise and also that Ms Jennings accepted his apology and the matter was then closed. Thereafter she continued to work on his case as before.

4.49 His frank and fair reflection on this complaint before us, introduces another aspect of this case. It is that the claimant was not well at the time and his state of health would suffer a further down-turn shortly before his resignation. This incident was one of a number of examples where, in his evidence to us, Mr Wright was able to reflect in the calmness of hindsight and he accepted his reactions were "not reasonable or rationale" and also that the employer "was acting rationally in its handling of his situation when he was not". It was Mr Wright who described the content of his own correspondence as "ranting and raving".

4.50 Around this time, two other fire fighters (B and MS) applied to reduce to 50% working on a job share basis. Significantly, we understand they were making a joint application at the same station which meant they each produced a job share solution as part and parcel of their joint application. Despite the relative ease with which this could have been accommodated they were still declined, at least at that point in time, due to the feasibility of accommodating it within the current ridership numbers. We find they were told they could have their application reconsidered in the new year if they wished. We understand their application was subsequently approved and implemented in 2020. We find the sole reason for this application being declined was the ridership numbers which, by the autumn of 2019, had deteriorated to a situation where it was now substantially down on target numbers. The numbers had in fact been slightly up by 2.5

fire fighters at the time of Mr Wright's original application. By September, they had dropped to being 18 fire fighters short. The next intake of new fire fighters would not be recruited until the new year at which point we find the prospect of being able to accommodate applications for part time working could resume. It follows that we find that down-turn would have the same effect on Mr Wright's application so far as any job share was concerned. At the time, however, everyone was hoping and expecting that it would come to pass with fire fighter S as the job share partner.

4.51 On 1 Aug 2019, the claimant submitted a statement of fitness for work. This statement diagnosed "stress at work" and signed him off work for an extended period of two months. The GP also recorded that: -

> ***"on discussion with patient explained has other jobs – cattery, building garden structures - patient finds these activities relaxing / beneficial and feels is not contributed to diagnosis above. Therefore agreed would discuss with employer about continuing this work whilst absent from fire service.***

4.52 The fit note is structured so that this box contains two headings. The first is "…you may benefit from" after which there are 4 boxes setting out typical therapeutic options, all of which are struck out as being inapplicable. There is then a heading of "comments including functional effects of your conditions". The claimant has relied on this note, repeated in subsequent fit notes, as amounting to a recommendation on medical advice from his GP that he should continue with his two businesses outside the fire service for therapeutic reasons. We do not agree. This note reflects the claimant's own comments to the GP. We do not accept it is correct to elevate the comment to the status of medical evidence or opinion. Whilst it is no doubt possible for the comments section to include further matters that may be of benefit to the patient, this is not the case here. The only thing that can be said to come from the doctor is the agreement that the claimant discuss his desire to continue with the secondary employment with his employer.

4.53 We were not surprised to be told, and we find, that there has never before been an occasion when a fire fighter with permission to undertake secondary employment has then been given permission to continue with that secondary employment whilst on sick leave. Similarly, we are not surprised that that Mr Sharman's response to the proposal that he take two months paid sick leave yet was well enough to continue working in two other businesses was "totally unacceptable". It was suggested in questioning that in the absence of evidence that Mr Wright was actually "working", there were no actions to find "unacceptable". We find it was the proposal to continue with these two businesses whilst on sick leave which Mr Sharman was referring to as being totally unacceptable. Mr Wright may not have physically performed any duties for either business during his sick leave but it is wrong to say the employer did not have evidence

before it of secondary employment. It had a history of approvals in place to perform 10 hours per week work in secondary employment and it had a clear expression of the Mr Wright's intention to continue with that arrangement from the comments expressed to his GP and repeated in the fit note.

4.54 We find Mr Wright was referred to occupational health on the same day as his fit note was submitted. We find the secondary employment was key to this referral. The referral set out the recent background and policy implications and the specific mention of continuing it. Advice was sought on his fitness for alternative work, the causes of his stressors and implications of secondary employment. Whilst the referral did not ask the specific question of whether the secondary work would be therapeutic or detrimental, it is clear from the occupational health response that it was asked to comment on the terms of the fit note where the reference to secondary employment was to be found.

4.55 We find the claimant spoke with his line manager, Crew Manager Parker. He asked him to make the request for him to carry on working whilst off sick. On 6 August, another manager, Mr Archer, telephoned the claimant to acknowledge receipt of the fit note and to remind him of the secondary employment restrictions during periods of paid sick leave. The respondent was challenged on the distinction between reminding him of the restrictions on secondary employment and engaging with the ongoing flexible working request. It is clear to us however, that the potential implications of a breach of the secondary employment terms could have effect during the sickness absence and there is nothing in taking that approach which contradicts the approach to otherwise limit contact by the employer when an employee is absent for work related stress reasons. In any event, the claimant's evidence is that he was fine with this, that he understood the policy and knew he could not undertake secondary employment. In fact, his evidence was that he did not intend to do any. Although not a discrete allegation before us, the claimant says that in the course of that phone call he was threatened with the sack. In fact, we find on balance that the actual conversation arose in the context of explaining the policy and that he was reminded that conducting secondary employment whilst absent on sick leave would be treated as a serious disciplinary matter. That seems to us to be no more than what the policy says and what Mr Wright already knew. In any event, there was nothing at that stage to discuss about the ongoing flexible working request. As things stood, it was hoped that fire fighter S would return to work and, subject to the claimant's own health, that the planned job share would start on 1 September.

4.56 At this time Mr Wright's health seemed to be deteriorating and, in his words, he became paranoid. Part of the paranoia was that both his businesses were on his home premises and he feared being found performing duties for either business. That risk could only arise if he actually performed work for the businesses.

4.57 In a letter dated 6 August 2019, Michael Sharman confirmed the decision regarding secondary employment. Mr Wright was explicitly told he was not authorised to carry out secondary employment whilst in receipt of sick pay. We find this was, as the claimant put it, a judgment call for the respondent to make. We can find no evidential basis to find that the application for flexible working was in anyway a motivating factor for this decision. We are satisfied Mr Sharman was concerned simply that the employer and employee focus on his health and a successful return to work in due course.

4.58 In the letter Mr Wright was told that a referral had been made to occupational health to look at supporting him during this period. The fact he felt able to continue working in his two businesses had also prompted the respondent to ask occupational health to consider if he would be fit to undertake any modified duties, something we accept it reasonably considered his GP may not have been aware was a possibility to support the claimant. We find one significant consequence of taking this course would have been that, if he could return to modified duties, this would be a basis for him continuing to undertake his out of work secondary business activities. There was no dispute before us that the symptoms Mr Wright described encountering would have had a similar effect in respect of both his employment as a fire fighter and his responsibilities to his secondary employment.

4.59 The Occupation Health report is dated 14 August but due to the particular consent procedures adopted in this setting, we accept as a fact that it was not released to the employer until early September 2019. The Occupational Health Physician report stated, in brief summary: -

a) That the deterioration in Mr Wight's health was attributed to the delay in the business granting his request for part-time hours.

b) That Mr Wright was quite aggrieved about not being able to undertake what the physician records being described as his "remunerative hobby business".

c) That in response to the decision on secondary work Mr Wright had attempted to book himself fit to return to work but was told he needed to await the occupational health report.

d) That Mr Wright reported symptoms of sleep disturbance, reduced energy, concentration, memory, confidence social interactions and coping and that he found decision making impaired.

e) Mr Wright's preferred outcome was simply to be allowed to undertake his businesses activities during his absence.

f) That it was odd that there was such a lengthy fit note without any therapeutic intervention; that the only work-related issue was his request for flexible working; and set out various interventions to support a return to work including alternative work which the OH advice was that he was fit to do.

4.60 The reference to attempting to book himself fit seems to be a contact Mr Wright made after the call from Crew manager Parker in which he sought to say that he was actually fit to work and would be returning. For obvious reasons, we find the respondent was not comfortable simply ignoring a fit note that days earlier had been submitted stating he was unfit for work for at least 2 months.

4.61 The Occupation Health Doctor addressed the question of conducting secondary employment specifically in the context of his fitness to do any work at all. Whilst the specific question on therapeutic benefit of secondary employment was not asked, we find the issues engaged were considered when expressing the view that the claimant remained fit for modified, part time duties and that the effect of adopting this option would be to remove the restriction of the secondary employment to allow that to continue. We find that was not something Mr Wright was prepared to contemplate.

4.62 It follows that the grievance had overtaken, albeit it remained entwined, with the claimant's ill-health. Resolution was not found in a medical plan, it was a matter of changing positions. Either the respondent gave the claimant *exactly* what he asked for, or the claimant accepted it was not possible at that time. Unless either of those extremes was adopted, the claimant seemed destined to remain absent from work.

4.63 At this time we find the employer was continuing to give consideration to practical solutions for the claimant's flexible working request. Moreover, we find it was not limiting its consideration of Mr Wright's flexible working request to job share only. During August, a stand-alone part-time post in fire prevention was identified as a potentially suitable post for the claimant. We return to the circumstances of this below.

4.64 Against that background, on 15 August 2019 the claimant intimated a grievance by email. In summary, he asked for the permission to undertake secondary employment to be revisited. He then set out various factors about that secondary employment followed by an assertion that his doctor had assessed and concluded that these activities would be beneficial. As we have already indicated, we do not agree that that is what the doctor had stated. Mr Wright made clear that: -

> ***"I have at this stage lost all confidence in the service, and do not trust the decision's made thus far by those involved. I feel victimised and unfairly treated.***

4.65 He went on to say: -

> ***"when I feel well enough I will be submitting a grievance to address the services failings and claim back any stopped wages if necessary. I hope to prevent other employees being treated unfairly under such difficult circumstances"***

4.66 That grievance followed two weeks later in an email dated 3 September 2019. This is said to be a protected act for the purpose of section 27(2) of the Equality Act 2010. It is a very lengthy document covering 15 pages and embeds earlier correspondence. It is too lengthy to set out in full but it is necessary to briefly summarise the content and record specific parts. Before doing so, we must say this. The basis on which it is said to be a protected act has not been set out in the claim form nor has it been explained in Mr Wright's witness statement beyond it simply being labelled as such. Upon our own independent reading of this document, each of the members of the tribunal was unable to identify what part was said to form a protected act. Mr Wright was cross examined on this point and asked to identify any passages which established it as a protected act. He too was unable to do so and seemed to have no understanding of what a protected act was. Whilst an employee is not expected to know the law, the essence of what the law protects in a claim of victimisation is a matter of fact that an employee might be expected to have some basic sense of. Whilst we are tasked with objectively interpreting what was being conveyed by the words, it is unusual to have a case where the author cannot explain any subjective intention behind the words. In fact, the basis on which this is said to be a protected act did not emerge until the respondent's witnesses were themselves cross examined. We record here the passages that were put to them.

4.67 On page 8 of the grievance, in which Mr. Wright embeds a previous email dated 8 August 2019, there is a paragraph stating: -

> ***This was quickly followed up by a letter date 06/08/19 to the same effect threatening me with a serious conduct issue if I was found to be carrying out secondary employment.***
>
> ***Over the next couple of days the stress my wife and I were put under became unbearable, we felt harassed in our own home...***

and

> ***the service in my opinion has shown no support, compassion or understanding and I am feeling victimised.***

4.68 On page 11 of the grievance, Mr. Wright stated: -

> ***My businesses are very important to me and I believe they are key to my recovery, for several reasons. Firstly, the services punitive approach has exacerbated my condition and made my wife and I feel harassed and victimised in our own home.***

4.69 On page 12 he stated: -

> ***I have at this stage lost all confidence in the service, and do not trust the decisions made this far by those involved. I feel victimised and unfairly treated.***
>
> ***The service appears to be ignoring medical advice I can only conclude this is because I submitted a flexible working application and then now because I have been signed off sick with stress at the workplace, this seems to me that I am being made an example of and victimised as a result.***

4.70 These extracts are relied on because within each there is a sentence including the words “harassed” or “victimised” or both.

4.71 Those extracts, and the entirety of the grievance, follow an introductory paragraph which states: -

> ***“I am raising a grievance with regards to the handling on my flexible working request and also the services most recent decision to not authorise for me to carry out any secondary employment whilst I am off sick and in receipt of sick pay.***

4.72 We find everything that followed in that grievance is in furtherance of those two central concerns, namely the handling of the flexible working request and the decision not to authorise secondary employment. In respect of both, the claimant regarded the outcome to be unfair and unreasonable.

4.73 Before the grievance had been submitted, fire fighter S handed in his resignation with the result that we find the last chance for a 50% job share had come to an end, at least for the foreseeable future. The stand-alone part time fire prevention role remained and we find that that would soon be offered to the claimant. As a result of the grievance being lodged, we find those previously involved took a step back from the decision making concerning his application and absence. That post would therefore be offered to the claimant within the grievance process itself.

4.74 Area Manager Coleman was assigned to deal with the claimant’s grievance. Despite the occupational health report stating Mr Wright was fit to attend a future meeting, the claimant did not feel he was. Mr Coleman attended the meeting. The claimant was represented in his absence by a FBU representative who pressed Mr Coleman to modify the grievance procedure to permit the hearing to take place in Mr Wright’s absence and with his trade union representative making his case. We find Mr Coleman was uncomfortable with going ahead in his absence but permitted it in the circumstances. The FBU representative therefore put the claimant’s case and Mr Coleman decided the grievance based on what he had before him and his knowledge and understanding of the applicable policies. Mr Wright accepted in evidence before us that aspects of his case would inevitably not have been put across as well or as fully as if he had himself attended and that Mr Coleman’s opportunity to test and relay his thoughts to the claimant was diminished. We also find that matters that were summarised in the outcome letter would, inevitably, have been the topic of further discussion and explanation had he attended.

4.75 Some time was spent during live evidence exploring in detail the approach Mr Coleman took to the conclusions he reached. We are satisfied that he was fully aware of the changing state of the ridership. We are satisfied that he had regard to the policies and the factors identified within them relevant to such applications. In all cases, and against a generally positive response to the claimant's request, we find that if there was a way to achieve an individual employees' request within the constraints of the operational reality, it would have been granted. In this particular case, we also find Mr Coleman was seized of other key facts that he had to address within his decision making. They included the fact that three attempts at job share had failed, that the state of the ridership was not in as good a place as it was when the application was made and that we find it was perfectly reasonable for him to conclude on the evidence before him that the continued uncertainty on the flexible working application was directly having a detrimental effect on Mr Wright's mental well-being. That is what Mr Wright was telling the employer. Faced with a choice of letting the certainty drag on and cause more harm to the claimant, he decided to bring it to an end. We find that when that decision was communicated in his outcome, he also knew he could soften its impact with the offer of the stand-alone part time role in fire prevention.

4.76 That outcome of the hearing was sent in a letter dated 16 September 2019. The claimant's grievance was rejected. It is significant that the grievance was understood to be in respect of two central issues. They were the handling of the flexible working request and the refusal to authorise secondary employment whilst on paid sick leave. Mr Coleman set out his reasoning in rejecting both. Three further matters arose from his consideration of the case. The first is that it came to Mr Coleman's attention that the service did not have a current authorisation in respect of the cattery business which had lapsed in 2018. Against a concern of the claimant's that there might be suspicion he was working whilst off sick, Mr Coleman said: -

> ***During the grievance meeting, [the FBU rep] asked if the service had conducted an investigation into your activities and businesses including Limes Grove Cattery and Hobbit House Limited. I can confirm that currently you are not under investigation for conducting secondary employment. However, it should be noted that we currently only have a secondary employment request submitted 17/04/18 for your Hobbit house limited. You previously submitted a secondary employment request for your cattery in 2015, however employees with existing agreements were expected to reapply through the 2018 process of secondary employment request.***

4.77 The second further matter was that in upholding Mr Sharman's decision to withdraw permission for him to perform his secondary employment, Mr Coleman made clear that the question of secondary employment would be reviewed in the future, 6 months following Mr Wright's return from sickness absence. In reaching that decision, we are satisfied Mr Coleman had in mind broadly the same aims and objectives as we find were in Mr Sharman's mind, namely that the focus should be on achieving a safe

return to work and having some the potential impact of that work on his ability to comply with his contractual duties. We find Mr Coleman was well aware of the policy and the discretion he had under it. We find there was no difference between him and Mr Wright on their understanding that permission was required, was temporary and could be withdrawn at any time.

4.78 The third further matter to emerge from this process was that Mr Coleman took the decision to bring the flexible working request process to an end. We find this was directly linked to the claimant's own clear statements that the process was causing his ill-health. However, as we have said already, that decision was accompanied by the offer of the 0.4 FTE fire prevention role that had been identified a few weeks earlier. He said: -

> ***I apologise on behalf of the service if this process has caused you anxiety, but would reiterate that both service delivery managers and human resource is we're trying to accommodate your request. However, as you have detailed the process as one of your stressors I feel that after failing to find a job share partner for you after three attempts I must advise that we are no longer able to accommodate your flexible working request, continuing to work in Service Delivery on a reduced hours basis, either part time or job share.***
>
> ***Having looked into other options that may be suitable for you, we have a position within the Risk Reduction team, based at Highfields which is 0.4 FTE, 16.8 hours per week, working two full days. If you would like to be considered for this role please let me know by 30th September 2019. Due to the ridership numbers detailed above, if you were interested in this position, the Service would look at moving you into this role at a time when the operational ridership is at a sufficient level***

4.79 At the time this post had first been identified, the parties were all hoping that the prospect of the job-share with fire fighter S would materialise. In any event, we find nothing material arises from the short delay in offering it to the claimant as his position was, in any event, to reject it. He felt it was unsuitable on two grounds. His first criticism was that it was not a fire fighter role. We do not agree. We accept the respondent's evidence that the focus of this role is itself part and parcel of the duties of a fire fighter. The occupier of the role remains subject to the requirement to maintain certain operational competencies and can be called upon to undertake operational duties. However, we do accept the common position of both parties that it is not an emergency response role and that it does not "ride fire engines daily" as it was put in evidence. The extent of that difference, however, is measured in the fact that the firefighter on an engine responds to 999 and other calls for about 5% of their time. The rest is made up of fire prevention duties such as this, training and station duties. There may be more intangible differences arising from status and perception.

4.80 The second challenge was that the hours were 18.5 (0.4 WTE) and not the 21 (0.5 WTE) that Mr Wright had explicitly requested. That much is clear. Overall, however, the issue for us is that given the position that had been reached with job share

and the claimant's desire for a stand-alone part-time role, we find it was a wholly appropriate and reasonable step for this post to be considered as a suitable offer to make to Mr Wright even if, equally, it was open to him to refuse it. Conversely, an employer such as this would run the risk of legitimate complaint and challenge if such a vacancy was identified but not brought to the attention of the full-time fire fighter seeking reduced working hours.

4.81 The communication referred to an invitation to the claimant to express an interest in being considered for the role. In fact, we find that had he responded positively to the proposal, the role would have been his and there was no selection process or other hurdle for him to overcome. Moreover, had he been prepared to explore the modified return to work suggested by occupational health, we find it highly likely that this role would have been the basis for such a role. We find either route into that part time role was likely to be a favourable starting point for future adjustments and we suspect in hindsight, Mr Wrights rejection was arrived at a little abruptly.

4.82 The fact that this possible solution has been criticised as it has serves to bring the case into sharper focus. Despite his concessions on the policy limitations, the operational constraints and repeatedly accepting that his employer was making rational decisions within the scope of its discretion, the claimant's case essentially distils to one in which he feels he should have been allowed to simply reduce his contracted hours to 50% and for this to be implemented immediately upon request. Anything short of that would lead to the dispute by now encountered.

4.83 We find by this time the employer had exhausted the reasonable search for opportunities to facilitate a reduced working pattern. We find it was likely to remain the case for the foreseeable future, that is at least until the following year. There is no evidence before us of other job share opportunities being available. There is no evidence of other stand-alone part-time opportunities for fire fighters. The only option to achieve Mr Wright's desired outcome would be for the respondent to create a stand-alone part-time fire fighter post which the respondent was not prepared to do for reasons which we accept were genuine and material considerations. We find these are all factors operating on Mr Coleman's mind when dealing with the grievance.

4.84 On 23 Sept the claimant attended a meeting to discuss his return to work and additional support in the meantime. He met with Mr Archer. The email recording their discussion seems reasonably positive. Mr Archer confirmed further support from the service, a phased return to work, initially on part time hours, a choice of where to work and the alternative of modified duties. The choice was given to the claimant and sought to offer all of the supportive options recommended by occupational health. We note the significance that it would have provided the immediate part time working, albeit temporarily.

4.85 The claimant's state of mind can be seen in the tone of his reply on 27 September 2019 where he stated: -

> ***I don't appreciate your aggressive tone or threats of "if that's how it's going to be"***
>
> ***[In] discussion with my doctor about my ongoing condition which continues to worsen as the direct consequences of the services actions. I feel that I am not fit for work and my doctor agrees. Do not tell me that your doctor's report from six weeks ago said I am fit and should therefore return to work.***

4.86 Mr Wright lodged an appeal against Mr Coleman's grievance outcome. He set out 3 brief appeal points. They were summarised as: -

a) "the decision not to accommodate my flexible working request"

b) "I believe the services response is poor and does not answer the questions I raised"

c) "I would also like an explanation on the services response to withdraw permission to undertake secondary employment".

4.87 In respect of the second ground, we find this was focused on the fact that he had complained about confidentiality breaches and gossiping amongst his colleagues. We find this had not been explicitly addressed by Mr Coleman but we do accept that the watch managers were, as a result of the claimant's complaint, spoken to about it and asked to act to stop it.

4.88 On 6 September 2019, Mr Wright submitted a further fit note for a further month. On 3 October 2019 a further referral was made to occupational health.

4.89 Mr Pritchard, the respondent's Assistant Chief Officer, was appointed to deal with the appeal. On 7 October Mr Wright attended the grievance appeal hearing. He requested that the meeting was recorded. Although not provided for in its usual procedures, the respondent agreed to Mr Wright's request.

4.90 Those involved in the response to the grievance were towards the top of the organisational hierarchy. We find Mr Pritchard did have some discussions about the situation and did not come at it completely ignorant of some of the background. We have not found anything inappropriate in him conducting the appeal or in the discussion he had and we find that he was sufficiently independent and senior to do so. There were aspects of cross examination that went to how he might have conducted the appeal differently, or better, and suggesting his mind was closed. We found him to be genuine in his approach to the issues in the case and do not accept he was biased or closed.

4.91 Within their discussion at this hearing. Mr Pritchard is accused of making flippant and dismissive remarks which are said to be both detriments and the part of the last

straw informing the claimant's decision to resign. They arise from the following exchanges: -

a) An exchange of views about the nature of running a construction business and the stress "associated with dealing with pay, contractors, sub-contractors and stuff like that".

b) In respect of a request to simply reduce to 50% Mr Pritchard said, "we can't just say you can have half a job".

c) In one exchange between the two Mr Pritchard partly addressed a question of the claimant concerning why he would be back to work quicker if not undertaking secondary employment to which Mr Pritchard responded "Erm, because you'd probably need the rest, I suggest. I don't know".

d) That Mr Pritchard disagreed with the claimant whether his GP had recommended he undertake the secondary employment or merely reported what Mr Wright had said in respect of wanting to continue his secondary employment whilst off sick.

e) On the question of gossip in the station he said "you've been in the fire service long enough to know that everything gets discussed around the mess table anyway, erm you're going to have to be a bit more specific than generalisations of that" in response to which Mr Wright then set out his concerns.

f) That Mr Pritchard had commented about stand-alone part time working in terms that the service "could do it in the future but don't do it now"

g) That Mr Pritchard stated how the service "..did try. And you can't deny that we did try with three on three occasions. Now you can sit there and say that the service didn't bend over backwards for you and it did"

4.92 These are all single comments within a broader exchange which come before us principally because the employer permitted the hearing to be recorded and the transcript permits these natural oral exchanges now to be examined before us with a forensic microscope. We have tried to read them in the context of the natural ebb and flow of a two-way discussion, exploring the relevant issues and to put them in context, with these sorts of comments occurring off the cuff. We take the view that is the way to assess whether these are flippant and dismissive and whether they amount to detriments in themselves showing a dismissive approach to the appeal. Seen in context, we note Mr Pritchard had a previous working experience of the construction sector industry which he was sharing and which he expressed in terms of "it's just my view..." Similarly, we find reference to half a job, when viewed in context, is neither flippant nor

demeaning. The issue was whether the service could either just create a 50% job or do without the other 50% of a full-time job. The expression used conveys that. In fact, we are entirely satisfied all of the comments are in the nature of conversational exchanges and the totality is such that we do not accept he was flippant or demeaning or closed. It may be Mr Wright genuinely interprets it as such, but we do not accept that is a reasonable reading of the approach in totality or that it reflects Mr Pritchard's mindset.

4.93 In a letter dated 11 Oct 2019, Mr Pritchard communicated the grievance appeal outcome. Before dealing with the substance, Mr Pritchard dealt with an issue about timescales for appeal hearings under the policy and reassured Mr Wright again that he was not under investigation. In respect of the concerns about confidentiality Mr Pritchard explained he had referred the matter to Mr Sharman. Turning to the substance, Mr Pritchard concluded that the service did seek to accommodate Mr Wright's flexible working request on the same basis as it would for anyone else whatever the underlying reason was for requesting it. That it had identified possible solutions on three separate occasions but that these had fallen down for reasons outside the respondent's control. That led him to conclude that it had responded positively to his requests. He explained why the service was unable to accommodate his request for part time working due to the impact this arrangement would have on service provision, specifically in terms of the impact on ridership levels and the crewing of appliances. He explained his decision that Mr Wright had not been treated differently to others who in the past had moved to stand alone part time working.

4.94 He reviewed the correspondence and satisfied himself that the claimant had been informed of ongoing efforts but after he went on sick leave it was decided to minimise contact with him so as not to risk exacerbating his condition. He concluded that the search for flexible working had been fairly and reasonably conducted but, when Mr Coleman indicated he was ending the application process, he do so with the alternative option of the stand-alone role which the claimant had chosen not to explore further.

4.95 On secondary employment he concluded that the GP's note of the claimant's position on secondary employment was not medical advice and that "decisions regarding secondary employment are a matter for the employer to determine". He concluded that the policy was explicit in that it states at paragraph 3.22 that 'no work associated with a secondary employer or on a self-employed basis, whether paid or unpaid, may be undertaken whilst on sick leave without the express permission of the Service.' He found the decision not to authorise it during sick leave was with regard to avoiding anything which may impair his ability to return to work on full operational duties. We find in the context of this policy that was a decision the employer could reasonably reach. It did not require the employer to obtain medical evidence of whether doing so was detrimental or therapeutic. Mr Pritchard recorded Mr Wright's indication

that he was continuing to comply with that request. He rejected the contention that the service had ignored medical advice and referred to the occupational health advice that he was fit to undertake modified duties.

4.96 That Mr Pritchard adopted a closed mind is further undermined by the fact he did uphold the appeal in the claimant's favour concerning the withdrawal of permission to undertake secondary employment. He stated: -

> ***"I confirm that I fully support the decision to withdraw the secondary employment whilst you remain on sickness absence. It is my decision, however, that at the point that you are in a position to return to full operational duties this decision should be subject to review."***

4.97 In other words, the question of reinstating secondary employment would no longer be subject to any additional period of work before it could be reviewed and would instead be considered at the same time as the assessment of his fitness to return to work in the round.

4.98 In a report dated 9 Oct, the Occupational Health Doctor reported again on Mr Wright's health. As before, we find this took around 2 weeks or so to be cleared for release to the employer and the content was not known to Mr Pritchard at the time of his appeal.

4.99 It is apparent that Mr Wright's health had deteriorated since the first report. The Physician noted that Mr Wright was quite aggrieved at the Fire Service and this appears to be fuelling some of the symptoms and that he hoped the service was "able to manage the employment aspects with appropriate empathy, tact and diplomacy where you reasonably can to help address this situation."

4.100 We find Mr Wright received the grievance appeal outcome letter a day or two after it was sent on the 11 October 2019. He resigned on 28 October 2019, a little over two weeks later. His letter stated: -

> ***I am writing to inform you that I am resigning from my position as a Firefighter with Nottinghamshire Fire and Rescue Service.***
>
> ***Please except this as formal notice of my resignation and termination of my employment contract with you in accordance with my contract.***
>
> ***Due to: Being subjected to unreasonable and unfair treatment. I feel I have no other alternative but to resign from my position.***
>
> ***Due to the behaviour outlined above, I believe the employment relationship has irrevocably broken down and I resign as a result of the fundamental breach of the employment contract on your part, in particular the duty of trust and confidence.***

4.101 We find the decision to resign was in respect of the central substance of the outcome of the grievance appeal. That is, the two central issues in respect of part-time working and secondary employment.

4.102 It is common ground that the employment came to an end on 24 November 2019. The claimant remained off sick throughout the period and declined an exit-interview on a final visit to the workplace.

5. Flexible Working Request Detriment

5.1 The cause of action is found in section 48(1) of the Employment Rights Act 1996 ("the 1996 Act"). Section 47E of the 1996 Act provides,

> ***47E Flexible working***
>
> ***(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the employee—***
>
> ***(a)made (or proposed to make) an application under section 80F,***
>
> ***(b). . . . . .***
>
> ***(c)…, or***
>
> ***(d)alleged the existence of any circumstance which would constitute a ground for bringing such proceedings.***
>
> ***(2)This section does not apply where the detriment in question amounts to dismissal within the meaning of Part X.***

5.2 For the purpose of section 47E(1)(d), the grounds for bringing proceedings under section 80F are set out in section 80H. In summary they are this. First, that the employer has not dealt with the application in accordance with section 80G(1), that is dealing with it reasonably, notifying the outcome within the decision period and limiting refusal to the specified grounds. Secondly that the employer based its decision on incorrect facts. Thirdly, that the employer has wrongly given a notice under section 80G(1D) (that is a decision to treat non-attendance at a meeting as withdrawal).

5.3 The meaning of detriment carries a consistent meaning in this field of law and amounts to no more than circumstances in which a reasonable employee might feel they have been subjected to some sort of disadvantage.

5.4 The test of "on the ground of" carries a similar meaning to "because of" found in the Equality Act 2010. We are concerned with the material reason why the act or omission happens. Motive and intention are not relevant whereas the operative reasoning is. We focus on the mental processes, conscious or subconscious of the employer.

5.5 Section 48(2) of the 1996 Act provides: -

> ***On a complaint under subsection (1),….it is for the employer to show the ground on which any act, or deliberate failure to act, was done.***

5.6 If the claimant establishes the prescribed circumstances, a deliberate act or failure to act amounting to a detriment and some basis to argue the causal connection, it is for the employer to show on the balance of probabilities that the deliberate act or failure to act was not on the proscribed ground. (**Yewdall v Secretary of State for Work and Pensions UKEAT/0071/05**). This is not a reverse burden of proof in the sense found in the Equality Act 2010 and there is no mandate to find for the claimant upon the employer failing at 48(2) (**Serco Ltd v Dahou [2016] EWCA Civ 832**) but failings by the employer to demonstrate the ground may be a basis to draw inferences. The operative reason for the deliberate act or omission remains a matter for the tribunal to reach a finding on and it may be found to be a reason that neither party contends for. (**Kuzel v Roche Products Ltd [2008] IRLR 530**).

5.7 The proscribed reason may be one of a range of reasons but it is sufficient if, being one of two or more reasons, it has a material effect on the decision that leads to the detriment. It does not have to be the sole or principal reason.

Analysis

5.8 There is no dispute that Mr Wright made a flexible work request and explicitly did so by reference to section 80F of the Employment Rights Act 1996. He necessarily satisfies the first route to the detriment claim provided for by Section 47E(1)(a).

5.9 The claim is premised not only on the *making* of a flexible working request but also on the basis that he has alleged circumstances constituting a ground for bringing a claim under s.80H. There was some argument on whether this limb of the claim was properly before us. It did not feature in the agreed list of issues. Mr Ahmed took us to the Claimant's ET1 in which the second limb was asserted, albeit not particularised. The reason why it was dropped from the list of issues was not explained. We were concerned about the basis on which the respondent may have been wrongfooted by relying on the agreed list of issues but concluded this was an example of the list of issues adequately signposting the claim as pleaded in shorthand, as opposed to materially altering it or abandoning matters. Having said that, the detail of what allegation the detriment is said to have been based on has not been articulated further in any meaningful sense and we are left with little more than a generalised assertion that, within his grievance of 3 September 2019, the claimant's complaints amounted to grounds under s.80H of the 1996 Act. In submissions it was put simply that Mr Wright complained that the flexible working request had not been managed properly

5.10 Not managing it properly may or may not disclose a ground under s.80H. The grievance itself was as much about the decision on secondary employment whilst on

sick leave as the flexible working request. Nothing in that former issue can engage with s.80H. We can rule out the existence of grounds that might exist under 80H(1)(b) and (c) as the underlying state of affairs relating to rejection or deemed withdrawal did not exist. The only ground can be that the employer has not dealt with the application in a "reasonable manner". Beyond that, however, we are not clear what the allegations are that support that. Left to our own reading of the first half of the grievance, we can see that there were allegations that Mr Wright: -

a) [felt] that the service should have dealt with my application in a more sensitive manner taking [his own mental health] into consideration.

b) [had] to jump through hoops to facilitate a job share whilst other firefighters have been given part time working without the need to find a job share partner.

c) Alleged the employer had failed to manage the application in a timely and appropriate manner.

5.11 If they are what the claimant relies on, we can see that those allegations are capable of amounting to an allegation that the employer has failed to deal with the application in a reasonable manner.

5.12 The third allegation we have identified in the grievance may go to reasonableness of the manner of the respondent or may go to the timing within the decision period. Insofar as it was intended to relate to the latter, the decision period had not ended. As an allegation it was premature, at least under the statutory scheme. It has not been argued that, as a matter of law, it is not possible to make an allegation under 47E(1)(d) at a time when the law precludes an application under 80H because the decision period has not ended and the application has been neither refused nor deemed withdrawn. That may be because of the way this aspect of the claim unfolded in the course of the hearing. For our part, we are inclined to interpret the circumstances described in s.47E broadly so as to achieve the essence of the protection it is intended to convey.

5.13 The key question in this allegation is the reason why any of the alleged detriments that are made out actually arose.

5.14 In any detriment claim the focus is on the mental processes that bring about the detriment and that they are influenced by the prescribed event, whether that event is the application for flexible working, making a relevant allegation or doing a protected act. This therefore applies as much to the claim under s.27 of the 2010 act the instant claim of detriment.

5.15 The fact that two of the alleged detriments said to arise in this claim occurred before the grievance (the alleged protected act) and one remained a live allegation until day one of this hearing sends out a warning to us that this claim may not have been considered with the forensic scrutiny it deserved, either by the claimant or his advisers. It may indicate that it may not have been driven by the claimant's own sense of what actually happened at the time.

5.16 Before getting into the detail, one does not have to step back far from this case to see the recent events in context. That recent history contains glaring and extensive evidence of a favourable response to applications for flexible working on two occasions, in 2017 and again in 2019. Despite Mr Wright's views of what he says it should have done, we have been satisfied that the respondent has responded favourably to his application to reduce his working hours. At the time of the alleged protected act, it had already sourced 3 possible job share partners necessary to accommodate his request for 50% part time working, all of which were scuppered by the individual circumstances changing of the other half of the job share. Mr Wright accepts this state of affairs was not the fault of the employer. Within his claim is a complaint that the request for part time working did not have to be executed by job share and that a stand-alone part time job was an option and that the respondent's operational reluctance to do that was unreasonable. Whether that was unreasonable or not, or whether there was scope to look at options other than job share does not really enter into our sphere of concern until and unless the unreasonableness begins to cast doubt on whether those reasons were genuine and, consequently, whether another reason might be at play. In such case, the proscribed reason may then be engaged.

5.17 In this case that possibility has not arisen. It may be that stand alone part time working can be done even though it is undoubtedly more convenient for the employer to accommodate front line firefighters wanting part time working through job shares. But if we are satisfied that the reason for the refusal was genuinely the operational implications, which we are, then the fact that other options might have existed is nothing to the point. The question for us really is whether the pleaded detriments occurred in any way because of the alleged protected act. We are satisfied they did not.

5.18 There is an irony in this case that at various stages it has seemed Mr Wright was himself somewhat inflexible in his flexible working request and that his request has been viewed as trumping the needs and considerations of the service. Much of the evidence has focused on the alternative options that might have been available to the employer and to test the reasonableness of its decisions. In this claim we are not assessing reasonableness of the decision making. Beyond the effect reasonableness has on our assessment of the evidence, our only concern is that the basis for the decisions were genuine which we are satisfied they are. The decisions sit against a backdrop of a detailed policy framework which we are satisfied was genuinely applied. That can be

seen in a history of engaging with requests positively including both of Mr Wright's applications which have been supported to the stage of being granted in principle and that it is common ground that the implementation of that agreement in principle failed through no fault of the employer. To the extent that Mr Wright has any evidential burden to point to factors which might raise the prospect that his application or his later complaint led to detriment, we are not satisfied he has shown anything of substance.

5.19 We also record our observation that there have been numerous occasions where aspects of what was happening in Mr Wright's business interests would appear to have potentially been in conflict with his primary obligations to the respondent. There may even be reasonable cause for doubt about Mr Wright's real motivations behind his applications. We record how we found no evidence of such in the employer's decision making and we regard that as further ground for confidence that it has always only considered the balance between Mr Wrights desire to reduce working and its own operational ability to facilitate it.

5.20 Against that background we have concluded that the making of a flexible working request, or any complaint as to its execution, was not a material reason for the matters said to be detriments. As to the discrete detriments alleged we reach the following conclusions.

i. The decision on 6th August 2019 to prevent secondary employment;

5.21 We are satisfied that withdrawing a discretion that has previously been granted, even within a tight policy framework is capable of amounting to a detriment. It may be finely balanced where it happens in circumstances where everyone expects it to be withdrawn, but we are prepared to accept it still falls within the definition.

5.22 There was no dispute about the effect of the relevant policies. The policy position is clear in a number of respects about the availability of secondary employment. It does so by balancing the primacy of the fire fighter role with the notion of secondary employment. There is no dispute on the evidence that permission to undertake the role is temporary subject to periodic reapplication and review, can be withdrawn at any time and will cease during periods of sickness absence unless express permission is granted for it to continue. The default position we draw from the policy framework is that the application of the policy brought the permission to an end. The claimant sought permission which was refused. There is no evidence of it ever being previously granted in similar circumstances or even that anyone knew of such an example. The question for us is whether the reason for decision was because the claimant had made an application for flexible working or that he had made the relevant complaints in his grievance.

5.23 We do not accept that either was in any way a material reason. The application and, indeed, the complaints in the grievance were being dealt with in exactly the way that one would expect under the relevant policy framework. The fact that the application had been granted in principle undermines the suggestion that it was the reason for this decision. Something else was material to the situation. We have concluded that that something else is the fact the claimant went off on long term sickness with a condition which genuinely raised the concern in the minds of the decision makers that it was not conducive to him fulfilling his primary contractual duties in the near future. In any event, we note the restriction on secondary employment in paragraph 3.22 of the policy is not expressed to be *contingent* on an assessment of exacerbating factors or factors that might extend recovery for the particular firefighter absent on sick leave. It is an explanation as to why the general policy exists as it does.

5.24 The view the employer came to about whether the circumstances were appropriate to grant permission was a view it was entitled to come to. It was informed by an occupational health assessment of the situation, including a view that the claimant would have been fit for modified duties which would have opened up the scope for secondary employment to continue. They were also informed by their understanding of the relevant policy framework and the balance of permitting secondary employment. There may be challenges that can be made to aspects of these decisions but we are satisfied that they were reasonable decision that this employer was entitled to come to and were based on grounds that were not materially on grounds of the application or the relevant complaints.

ii. The rejection of the grievance on 16th September 2019;

5.25 The rejection of a grievance is generally sufficient to amount to a detriment.

5.26 The grievance contains two broad topics. One related to the application itself, and within that part we find the matters which may amount to allegations of circumstances which would constitute grounds for an allegation under s.80H of the 1996 Act. The other is in respect of the secondary employment.

5.27 The material reason for rejecting the grievance in respect of the first was because the employer was of a view that it had treated the application genuinely and constructively, had promptly identified potential job share solutions and but had found itself in a position where it could not find a solution on that basis. The effect on health was now directly linked to the continuing situation. It was entitled to reach the conclusion it did on the appropriateness of the attempts to find part time work; the appropriateness of the secondary employment issues; the fact that the grievance addressed an existing decision to withdraw secondary employment which itself could not have been because of the protected act means the secondary decision to uphold it

seems instinctively less likely to be because of it. Again, theoretically it may be possible to say if the grievance had not contained a protected act it could have been upheld but the facts do not support that. This was done for the same reasons as the original decision was made.

iii. The rejection of the grievance appeal on 11th October 2019;

5.28 A rejection at appeal clearly can be a detriment as much as the rejection of the original decision.

5.29 We are satisfied for the reasons already given that it was done for same reasons as the grievance. Neither the flexible working request itself nor any wider allegation about its handling can be said to be the reason for its rejection.

iv. The decision, on 16th September 2019 and the affirmation of that decision on 11th October 2019, to remove the right to undertake secondary employment until a review after 6 months;

5.30 We are satisfied that removing the right to undertake secondary employment for a further period of 6 months is capable of amounting to a detriment. We are satisfied that this decision was reached based on Mr Colemans assessment of the evidence before him. We have no basis for concluding that the making of the flexible working application or the complaints about it were the reasons for it.

5.31 Turning to the second limb of the allegation, the facts do not support the way this allegation has been put. The decision of Mr Coleman in respect of secondary employment was not in fact affirmed at the appeal stage. It was actually overturned in the claimant's favour, albeit that the decision remained subject to review at the time of any return to work as part of the totality of the assessment of Mr Wright's return.

5.32 There is nothing to lead us to a conclusion that Mr Pritchard's decision was materially influenced either by the fact of making the request for flexible working or the complaints within the grievance were in any way a material consideration. Mr Pritchard was himself concerned to manage Mr Wright's successful return to work and we are satisfied it was that which was the sole motivating factor in this and all his decisions on appeal. The fact the he recognised the potential for disadvantage in restricting the permission for a further 6 months is to Mr Pritchard's credit, but it does not alter the underlying motivating factors that operated on the decision to turn them into the impermissible fact of application or complaint about it.

v. The suggestion of wrongdoing (by way of a failure to re-apply for permission regarding the cattery business);

5.33 In any event, to the extent that it is a detriment we found as a fact that there had been a gap in the claimant's application process such there had not, in fact been the necessary re-application in respect of the cattery business. We are satisfied that the reason for Mr Coleman raising this was because that was his genuine belief in the state of affairs. It was a belief that was well founded for the reasons we found. It is significant that the context of the issue being dealt with was this subject, it was factually accurate and, despite how it is put in this claim, it did not go so far to intimate that any disciplinary consequences would follow and, as a matter of fact, they did not.

5.34 We take the view its nature and substance falls on the boundary of what can properly constitute a detriment. For our part we would conclude that it falls the wrong side from Mr Wright's perspective and amounts to an unjustified sense of grievance, perhaps borne out the perception Mr Wright had at the time of a right to engage in secondary employment gained through a clouded view of the situation and policies.

5.35 In any event we have identified no causative relationship to the flexible working request or his later complaints. The sole reason Mr Coleman referred to it in the letter was because of his reasonable view that it was relevant to the subject matter and an accurate state of affairs.

vii. By decisions on 16th September 2019 and 11th October 2019, the rescinding of the initial agreement to accommodate flexible working;

5.36 The decision to reject the flexible working request was made and confirmed in the appeal. That is sufficient to amount to a detriment. It was, however, limited to the scope for job share working.

5.37 It is conceptually difficult to conclude that the application was the reason for rescinding something which had, in principle been granted and, but for events which are accepted as being outside the control of the employer, would have been implemented. We have concluded therefore that the reasoning must lie elsewhere. There are two factors which stand out as the material reasons for this decision all of which are unrelated to either the application or the allegations in the claimant's grievance.

5.38 The first was the fact that after three attempts to identify a job share, the third of which had also fallen down through no fault of the employer. The second factor is that the claimant was by then firmly linking the continued delay and uncertainty in the process to his deteriorating ill-health. That was the reason for the decision to bring that application to an end. It was not reached without wider consideration of where the organisation was in supporting the application. It could not conceive a fourth job share being identified. Indeed, it had also had to put off the other joint application it had received due to the current state of the ridership. But the decision was not, as alleged, to rescind the in principal agreement as it did not do it without returning to the possibility

of the stand-alone role in fire prevention. That would have provided an immediate part-time working solution for the claimant, albeit in a slightly different role and for slightly less than 50%. That may be an offer that was open to him to decline, but it does not mean that it was not a reasonable offer to make to the claimant and, in making that offer, the respondent demonstrated that it had not closed off the possibility of part time working for the claimant as alleged.

5.39 That decision was one that had justification and was based on reasons which do not relate to the making of the application or the relevant complaints in his grievance.

viii. The alleged 'terse' response of Ms Jennings in the email dated 23rd July 2019;

5.40 We are not satisfied that Karen Jennings email was "terse". It was accepted in evidence as being a reasonable response to a complaint that, whilst Mr Wright denied he was alleging mismanagement, despite his clear use of the word, accepted was reasonable for her to interpret as such. Her response provided what, in other circumstances, might be thought to be the expected and certainly a reasonable response to solve the perceived complaint. The miscommunication, if that is what it truly was, was swiftly addressed between the parties and the previous state of affairs resumed. Whilst the allegation has been maintained to conclusion in submissions, it was effectively abandoned by Mr Wright in his evidence of fact. To the extent that it remains before us, we do not accept this exchange was sufficient to amount to a detriment. We would reach that conclusion on our own assessment of the situation but Mr Wright's concessions in evidence and during measured reflection only serve to reinforce that. The reason for her reply was to remove herself from the handling of the grievance where the complainant had complaint about her mismanagement. That was not on grounds of his application and cannot be on the basis of the alternative ground of the alleged failings as this is said to be done in the grievance of 3 September 2019 which had not happened by then.

ix. Alleged 'flippant and dismissive remarks' in the meeting of 7th October 2019 and the letter of 11th October 2019.

5.41 We are not able to accept that the claimant has been subject to a detriment. There is an extent to which these allegations exist only because of the employer's otherwise favourable stance of permitting the grievance appeal to be audio recorded. Of course, that in itself is not a defence but what we have read appears to reflect a natural exchange of views on various topics. Whilst Mr Wright may not like the tone of the extracts in isolation, there is insufficient in them in our judgment to amount to a detriment.

5.42 To the extent that there is any further detriment alleged in the second limb of the allegation "and the letter of 11th October 2019" there is nothing we can see that differs from the outcome of the appeal already dealt with above.

5.43 We have concluded that there may be something in the respondent's contention that the presence of this allegation may reflect more on Mr Wright's own state of mind at the time than can be found in the objective assessment of what was being said. We have had regard to the fact that this has come out of a transcript of a recorded meeting. The words, phrases and sentiments take place within the to-and-fro of an open discussion to explore and test the issues in the case. Part of that discussion is Mr Pritchard sharing observations and responses.

5.44 In any event, there is nothing on which we could reasonably conclude that Mr Pritchard used any of the alleged words of phrases on the ground that

6. Victimisation

6.1 Section 27 of the Equality Act 2010 provides so far as relevant: -

> ***(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.***

6.2 There is no suggestion in fact that 27(2)(a) or (b) apply. Detriments may be suffered under the act because of a belief that the empliyee had or may do a protected act.

6.3 "Because of" means no more or less than it does elsewhere in the 2010 Act. The relevant proscribed reason (in this case the protected act) must have some material effect on the decisions, acts or omissions that make up the detriment. As ever, it is open to us to conclude the actual reason where that is clear on the facts. Otherwise, we apply section 136 of the 2010 Act. If the claimant proves facts from which we could conclude the proscribed factors were material, we must so conclude unless the respondent can show it is in no way whatsoever because of that reason. (**Royal Mail Group Limited v Efobi [2021] UKSC 33**)

Analysis

6.4 The first question is whether there was a protected act. Sections 27(2)(c) and (d) are wide. To satisfy (c) requires only a finding that whatever was done was either for the purpose of the Act or in connection with it. Similarly (d) engages in any reasonable form of allegation that could be made under the act. Recognising that a claimant need not know the detail of the legislative provisions, we keep in mind that it is the essence of the Act, its provisions and the purpose they serve which are central to determining that question. There would have to be some basis in our findings of fact which brought the facts within that.

6.5 This is a question of whether the facts as found can fall within the provision. It is clear from the terms of the act that an allegation does not have to expressly state the statutory provisions in any respect. It is enough that the effect of the statutory provisions is intimated in the facts of what is alleged. We therefore have to reach a conclusion of what the grievance means. The fact that it does not explicitly refer to the 2010 Act but does use words found in the act may have more than one explanation. One might be that this is a case where a lay person was expressing concepts that lawyers would understand to be rights under the 2010 Act. As long as we can discern some concept of acts, omissions or failures that might fall under the act, such as less favourable treatment, detriment etc., we are satisfied that that conclusion would be enough to bring the grievance within section 27. Alternatively, it might be that whilst a lay person is using language found in the Act such as discrimination, harassment or victimisation they are not using those words to convey the essence of what the 2010 Act means and the protection it provides. In that case, we are not satisfied the mere use of the words is sufficient to engage the protection of section 27.

6.6 In **Durani v London Borough of Ealing [2013] UKEAT 0454/2012**, the EAT confirmed a decision that the claimant had not used the word “discriminated” in any sense other than that he had been treated unfairly and as there was no complaint which could be understood as one arising under the act, in this case of race discrimination, his claim for victimisation had rightly been dismissed.

6.7 In **Chalmers v Airpoint Limited and others UKEATS/0031/19** the EAT dealt with the interpretation of allegations made within an alleged protected act. Although very much a case on its facts, critical to the reluctance of the EAT to interfere with the finding was the fact that (a) the alleged protected act did not reference a protected characteristic that might be engaged and (b) the state of relative knowledge and awareness of the complainant when it came to how she framed her claim in the way she did.

6.8 We have concluded that the grievance does not contain a protected act. We recognise the words harassment and victimisation have been used but we reject Mr Ahmed’s submission that the context conveys concepts within the 2010 Act. We have

been unable to interpret the grievance as reasonably conveying any essence of the protection afforded by the 2010 Act for it to then amount to "an allegation [of a contravention of the Act]" or alternatively so that it could be said Mr Wright was "doing any other thing for the purpose or in connection with the Act". We reach that conclusion for these reasons: -

a) We do not accept anything intimated could reasonably be interpreted as any form of prohibited conduct under the act.

b) There is no discernible reference to a protected characteristic. There is reference to the claimant's mental health but it is clear that this in raised in the context of a consequential result of the actions of his employer and not in any way the basis or relevant to the cause of an alleged breach of Act.

c) There is no reference to the Equality Act either explicitly or by implication.

d) There is reference to harassment and victimisation. Employment lawyers understand them to have technical meaning under the Act but we have concluded it was not how Mr Wright used them. These words were positively used to convey their ordinary meaning in the context of his sense of grievance amounting to "unreasonableness" and "unfairness" and the relevance of the sense of harassment or victimisation focused on the fact both of his businesses were based at home where he was whilst off sick.

e) The basis of interpreting the individual words used must be set in the overall context of the grievance. That was clearly set out in the opening paragraph. This premised everything that followed on fairness and reasonableness within in the explicit context of his flexible working request and the permission to work in secondary employment.

f) Although Mr Wright's subjective intention may not be determinative one way or the other to our conclusion, the fact that he himself could add nothing to explain why or how this grievance was a protected act falling within s.27(2) has relevance for our conclusions on the context. It is clear to us from the subsequent internal hearings and his resignation that the concepts within the 2010 Act were not in his mind as the reason for that sense of injustice.

6.9 It follows, therefore, that if there was no protected act, the claimant cannot have been victimised because of it. However, that is subject to one caveat. That is that the protection afforded by section 27 applies also to cases where the employer *believed* the employee has, or may do, a protected act even where there is no evidence of a protected act.

6.10 We can deal with that alternative possibility briefly for two reasons. First, that is not how the case has been put by the claimant and it would be wrong of us to determine a case on a fundamentally different basis to that which it has been professionally argued. Secondly, a consequence of the way the case has been put and defended is that the witness evidence does not go to the question of whether any of the actors responsible for the alleged detriments believed that the claimant had, or might do, a protected act. Even if we concluded it was open to us to determine the case on this basis, there is no proper basis for making the necessary finding of fact that any of the actors believed that to have been the case.

6.11 As a result, the victimisation claim must fail. We have therefore not repeated the analysis we have set out in respect of the s.47E detriment claim but the same conclusions apply so far as we have considered whether the allegation amounts to a detriment and the positive operative reasoning for the events occurring.

6.12 The only final observation to make in respect of this cause of action is that the first alleged detriment relating to the decision on 6 August does not feature as it predates the alleged protected act. For the same reason, allegation (vi), concerning Ms Jennings' "terse" email, was abandoned by Mr Ahmed at the start of the hearing.

7. Unfair dismissal

7.1 It is axiomatic that to claim unfair dismissal, the claimant must have been dismissed. Section 95(1)(c) provides the statutory definition of dismissal thus: -

> ***(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—***
>
> ***(a)…***
>
> ***(b)…***
>
> ***(c)the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.***

7.2 We have directed ourselves to the essential authorities on "constructive" dismissal generally and, as this case has been put as a last straw case, to the correct approach in such cases. The key authorities are **Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761** on the application of common law principles of repudiatory breach and acceptance in the context of contracts of employment. To **Mahmud v BCCI [1997] UKHL 23** on the implied term of trust and confidence that an "Employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage trust and confidence' (and **Morrow v. Safeway Stores Ltd [2002] IRLR 9, EAT** on the practical application of that test). To **London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493** on the necessary contribution of a

"last straw" event not needing to be a breach in itself but adding something of substance to the character of the overall state of affairs, being more than utterly trivial. To **Kaur v Leeds Teaching hospital [2018] EWCA Civ 978** on the approach to take in last straw cases. To **Croft v Consignia PLC [2002] 1160/00/3009** on the measure of conduct capable of amounting to a fundamental breach of the implied term and the requirement for both parties to absorb "lesser blows".

7.3 The approach in Kaur essentially requires us to consider the events said by the claimant to breach the implied term in reverse and start by analysing the most recent act or omission. Underhill LJ suggested 5 questions for tribunals to consider in cases where the last straw doctrine was relied on. They are: -

a) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

b) Has he or she affirmed the contract since that act?

c) If not, was that act (or omission) by itself a repudiatory breach of contract?

d) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation.)

e) Did the employee resign in response (or partly in response) to that breach?

7.4 It has long been recognised that the fact that an aspect of the employment relationship is governed by something which is discretional, or even wholly discretional, does not mean that the manner in which that discretion is exercised cannot itself amount to a breach of the implied term of trust and confidence. Our understanding of the law, however, is that we must be careful not to reach a conclusion which is founded on our own view of how we might have exercised that discretion, nor must we apply a standard to the exercise of that discretion which restricts the employer's legitimate basis for when and how that discretion is to be exercised. We accept Mr Crow's submissions on the interaction between the exercise of discretion and the implied term of trust and confidence. For a legitimate discretionary decision to amount to a fundamental breach of the implied term of trust and confidence, it is necessary that the exercise of that discretion was irrational or 'Wednesbury' unreasonable (**Faieta v. ICAP Management Services Ltd [2018] IRLR 227**, **IBM v. Dalgliesh & others [2018] IRLR 4**). We did not understand Mr Ahmed to challenge this approach.

7.5 Our acceptance of this proposition, however, was not without first considering whether this reopens an impermissible test to the question of breach by, effectively, applying a range of reasonable responses test to it as is prohibited by **Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121**. We have concluded that is not so. The question at the first stage of whether there was a breach of contract remains one of applying the unvarnished **Mahmud** test. For that implied term to be breached requires the employer's conduct to be without reasonable and proper cause. At one level it may be said that most, if not all, acts are a form of discretion and in that general sense, we would not apply a range of reasonable responses test to determine whether it had been breached or not. However, where, as here, the subject of the act or omission arises in the context of something that both parties have previously acknowledged alongside their other contractual obligations to each other to be a matter of discretion for the employer, any proper exercise of that discretion will establish the reasonable and proper cause to negate a breach of the implied term of trust and confidence. Consequently, the similarity of the test of whether a discretion amounts to a breach of the implied term is, conceptually, within the strict requirements of **Buckland** and the common law. In short, it is not the tribunal that impermissibly applies a range of reasonable responses test to the employer's act, but the term itself incorporates something similar which has to be considered to determine whether it has been breached or not.

7.6 If there is a dismissal in law, the question then turns to section 98 of the 1996 Act and, in the first instance, whether the respondent has shown a potentially fair reason for dismissal. Of course, if the acts or omissions relied on to breach the implied term of trust and confidence are themselves acts of detriment in response to the Flexible Working application or a relevant complaint about it, the ensuring dismissal will itself be an automatically unfair dismissal under s.104C. As we have dismissed that contention, the prospect of an automatically unfair dismissal falls away.

7.7 If satisfied that there was a potentially fair reason, a neutral question then follows as to whether the employer acted reasonably in relying on that reason as sufficient to dismiss. Clearly, that test needs to be viewed through the prism of the matters leading to the resignation and the reasonableness has to be assessed against the actions of the employer which are said to lie behind the events relied on by the employee to found his resignation.

7.8 Finally, we sought to understand how the respondent's alternative case of a fair dismissal would work in the context of this case. At the outset of the hearing, Mr Crow had confirmed that the alternative defence that any dismissal we found to have occurred was fair relied on the same factors which the respondent says established the "reasonable a proper cause" for the actions that the claimant relied on to establish his dismissal in law. During closing submissions, we explored further the implications of the

different tests involved in establishing a breach of contract with those involved in determining whether they were a reasonable response and Mr Crow accepted that the case was all or nothing on both. The situation therefore became this. If the circumstances established reasonable and proper cause, the question of fairness would not arise as there would not have been a dismissal in law. If they did not, meaning there was a dismissal in law, those factors that had by then failed to establish reasonable and proper cause could not realistically be found to be decisions or other actions falling within the range of reasonable responses of the hypothetical reasonable employer to support some other substantial reason for dismissal. Whilst we stressed throughout, and Counsel agreed, that the two tests are legally distinct, no one could envisage a situation where the practical applications of the two tests could arrive at different outcomes. Either way, therefore, the alternative case of fairness will not arise for us to determine.

Analysis

7.9 Against that direction on the law, the first "Kaur" question for us is to identify the alleged last straw event. This is said to be the outcome of the grievance appeal before Mr Pritchard and appears in the second limb of paragraph 7.vii of the list of issue although we take the view this is the same as appears in allegation at 7.iii. We see no distinction in substance between the decision to reject the grievance (or at least the two central elements of it) and the outcome letter communicating that decision.

7.10 The second question is whether there has been affirmation of the contract since the breach. The claimant delayed by a little over two weeks before submitting his resignation. That is not a particularly lengthy delay and its significance as a basis to infer acceptance is diminished further by the fact the claimant was absent on sick leave, and so not actively performing his side of the contract in a way that might actively engage the essence of the alleged breach. Moreover, it is clear he was not well at the time and, to quote his own description, was not acting rationally. We do not regard there was affirmation following this act.

7.11 That takes us to the third question which is to consider whether the conduct amounts to a breach in its own right. The essence of the outcome is that Mr Pritchard dismissed the appeal concerning Mr Wright's Flexible Working application and maintained the decision that permission would not be given to undertake secondary employment, albeit reducing its reach so that the question would be considered as part of the claimant's return to work.

7.12 Mr Wright had a right to have his Flexible Working application considered within the scope of the internal policies and against the statutory scheme in part VIIA of the 1996 Act. We are not only satisfied that his application was so considered, but we are

also entirely satisfied that the employer demonstrated an open and genuine approach to it and in reaching its decision considered all the relevant factors. We accept a number of fundamental premises were applied in this and all of the decision making on this subject: -

a) There is no principled objection to part time working per se.

b) There is no absolute right for full time fire fighters to work part time.

c) The operational considerations the employer faced are significant and any adjustment has to work within that.

d) Though itself not straightforward, the relative ease by which part-time working can be accommodated within a 50/50 job share compared to a stand-alone is significant and relevant for the employer to weigh.

e) The preference of job-share over stand-alone part time working finds justification in how the cost, disruption and practicality of cover of the remaining 50% vacancy is met. It is an inefficient and costly solution to rely on overtime budgets. This drains what is always a limited resource but one which at the material time was further constrained by budget limitations. Additionally, it raises secondary considerations of the working time of those other, full time, fire fighters being called on to provide the cover.

f) It also finds justification in the feasibility of replacing the remaining 50% through recruitment. Realistically, there is no ready labour force of unemployed but trained and competent fire fighters waiting for an opportunity for part time work in the locality or at all. It is no answer to simply advertise for such. The decision makers understanding of the recruitment market was sufficient to justify their position that that would not be a realistic solution.

g) On two separate occasions the respondent has acted promptly and positively in response to the claimant's applications.

h) It is common ground that the three possible job share solutions fell away through no fault of the respondent

i) That Mr Wright himself acknowledged the practical feasibility of managing a Flexible working request through a job-share as opposed to a stand-alone part time basis

7.13 We then consider whether there were any irrelevant factors that have influenced the decision. We have rejected that both the Flexible working application and the

relevant complaints in the grievance had any bearing on the decision. There are no other irrelevant factors that appear to have been taken into account.

7.14 We would add that the facts of this case have raised something of an elephant in the room which appeared to us to arise in the facts. That is whether there were concerns about claimant's business activities themselves, whether he was continuing whilst off sick, whether the alleged grounds for part time working relating to supporting his wife were the genuine reason, whether he was exceeding his stated time for which he had permission for secondary employment and simply whether this was all part of a plan to use the fire service to financially support a transition to self-sufficiency in his business interests. Those questions might will arise from the facts but we have to say we have no evidence that they were factors in the minds of any of the actors alleged to have made decisions or that have contributed to the claimant's decision to resign. We know that the request for the Hobbit House Limited was agreed after further discussions with the claimant. We know that the claimant's application was accepted in principle based on the need for him to support his wife's ill health. There is no basis for us concluding any of those potential issues arose in this case. If they had, of course they may have been relevant considerations and not irrelevant, so long as they were transparently dealt with. On our findings, they did not feature at all.

7.15 We are satisfied that the decisions Mr Pritchard came to in his appeal was reasonably open to him. It was reasonably open to the respondent to conclude that it had to bring an end to the delay and uncertainty when faced with the clear and unambiguous contention that that was a cause of the claimant's ill health. That was not a decision taken in a vacuum. It occurs after nearly 3 months and 3 failed options to find a job share.

7.16 Similarly, in respect of the second limb concerning secondary employment we are satisfied that the employer did have regard to relevant considerations. Most were enshrined in the existing policy statements. They include the primacy of the fire-fighting role, the fact the claimant was absent on sick leave. That there was an established position in respect of sickness absences. The apparent likely duration of the absence. The occupational health view, in particular suitability and fitness for modified duties. The public perception of governance and finances.

7.17 We are satisfied that there were no irrelevant factors considered in reaching the decision. It was open to Mr Pritchard, as it was to Mr Coleman, to conclude that there was insufficient basis to depart from the policy position and grant the explicit permission for secondary employment in this case.

7.18 We conclude, therefore, that the appeal outcome does not amount to a breach of the implied term. In respect of both key issues, Mr Pritchard made a decision that he

was entitled to come to, considered relevant factors and was not influenced by irrelevant factors.

7.19 That then leads us to consider the fourth question. That is whether Mr Pritchard's decision nevertheless formed part of a totality of conduct which, viewed cumulatively, amounted to a repudiatory breach of the implied term. There is some artificiality in this case in the distinction between the third and fourth questions because the last straw event relied on is essentially a repeat and extension of the same decision of some of the earlier acts relied on as part of the cumulative breach. Our analysis of the decisions on the two key issues is the same as that applied in Mr Pritchard's. That is, both Mr Sharman and Mr Coleman's decision on the secondary employment and Mr Coleman's decision on the flexible working request

7.20 On the question of whether there was a reasonable expectation of being granted permission to continue with secondary employment, we cannot accept that was the case. We rely principally on Mr Wright's own evidence of his understanding of the relevant policy framework that he could not hold a legitimate expectation of maintaining permission to undertake secondary employment at any time and particularly in the context of a lengthy period of sickness absence.

7.21 We have addressed the individual acts or omissions relied on as cumulatively amounting to a breach so far as they were restated as detriments under the two other heads of claims. Allegations such as the reference to the absence of any re-application for the cattery, the comments of Mr Pritchard during the hearing or Ms Jenning's email being terse fall away as facts and, in any event are insufficient to amount to, or particularly contribute to, a breach of the implied term of trust and confidence. We therefore do not accept that they amount to a breach of contract. The high point of the claimant's case is Mr Coleman's decision on 11th October 2019 to leave the reinstatement of secondary employment to a review after 6 months. We restate out conclusion that, contrary to how the case was put, the second limb was not made out as a fact. It was not affirmed. What is left is the underlying decision on grievance and appeal on the two central issues. The first of which overlaps with Mr Sharman's decision.

7.22 We understand why Mr Pritchard felt this warranted challenge but we are satisfied that it was a conclusion Mr Coleman was reasonably entitled to conclude within the context of the wholly discretional scheme for permission to undertake secondary work and was therefore with reasonable and proper cause. In respect of Mr Pritchard's decision to change it in the claimant's favour, as opposed to affirming it as alleged, we have already recorded how the second part of the allegation necessarily fails as matter of fact. The essence of both decisions was in the context of the discretion that exists for the permission to undertake secondary employment and was governed only by

considerations of the claimant's ability to successfully return to his primary occupation before consideration was given to any secondary employment. Putting its focus on him recovering and restoring normal work as a priority is not an irrelevant consideration. The difference between the two decision makers is that Mr Pritchard took the view that that assessment could be made as part and parcel of what is broadly the same assessment that would need to be undertaken at the time of his return to work.

7.23 The last straw allegation has failed but clearly is of a nature in the Omilaju sense to relate to the totality of the main allegations relied on by the claimant. However, we are simply not satisfied that the matters in isolation or viewed cumulatively can amount to a breach of the implied term of trust and confidence.

7.24 The final question is whether these matters, had they amounted to a breach, were the reason for the claimant's resignation. We have no doubt that the two key decisions were the reason for his resignation. We are not satisfied that the allegations of the terse email (7.1), the alleged "suggestion" of wrongdoing (7.v) or Mr Pritchard's alleged flippant or dismissive comments (7.viii) feature as a fact in the claimant's reasoning irrespective of their status in law as amounting, or contributing, to a breach of contract. However, that would not matter if the totality of the situation otherwise amounted to a breach of contract and the total effect was the reason or part of the reason the claimant resigned. As we are satisfied that the reason was based on what are arguably the two most important aspects of his dispute, we would have been satisfied that the resignation was in response to the breach, if that is what we had concluded.

7.25 For completeness, the case is squarely focused on the two central themes of flexible working and secondary employment. When we look at the totality of the events, without viewing them as any form of last straw case we reach the same conclusion that these were discretionary decisions within an explicit area of the employment relationship. We are satisfied the respondent dealt with both issues in a manner that was open to it in the circumstances. There may have been other options to some of the issues and we do not say it took the only course open to it. It did, however, exercise the discretion as to the course it did take in a manner that considered the relevant factors for both Mr Wright and its own needs and the totality of where the parties got to in mid-October 2019 was such that there was no repudiatory breach of contract entitling the claimant to resign without notice.

7.26 Finally, we have had to remain focused on the claims before us and not any wider view that might exist about the benefits of part time working in the fire service. As to the general theme advanced in the claimant's case that this employer, and for that matter all fire and rescue services, ought to try harder to review the barriers to part time working to make it more achievable, that is a sentiment many might agree with.

However, we are limited to express ourselves through our judgments only and, in this case, we do not regard any of the three causes of action before us provide a vehicle for us to say anything more than that.

Employment Judge Clark

14 December 2021

Sent to the parties on:

17 December 2021

…….

For the Tribunal:

…….

APPENDIX

LIST OF ISSUES

Out of time

1. Are any of the Equality Act 2010 ("EqA") allegations out of time?
2. If so, would it be just and equitable to extend the time limit to allow those out of time complaints to proceed?

Victimisation (s.27 EqA)

3. Whether the Claimant did a protected act, as defined in s.27(2) EA 2010, by raising a grievance on 3rd September 2019 about his mental health.

4. Whether the Claimant has suffered a detriment as follows:

i. The rejection of the grievance on 16th September 2019;
ii. The rejection of the grievance appeal on 11th October 2019;
iii. The decision, on 16th September 2019 and the affirmation of that decision on 11th October 2019, to remove the right to undertake secondary employment until a review after 6 months;
iv. The suggestion of wrongdoing (by way of a failure to re-apply for permission regarding the cattery business);
v. By decisions on 16th September 2019 and 11th October 2019, the rescinding of the initial agreement to accommodate to flexible working;
vi. ~~The alleged 'terse' response of Ms Jennings in the email dated 23rd July 2019~~[i]; and
vii. Alleged 'flippant and dismissive remarks' in the meeting of 7th October 2019 and the letter of 11th October 2019.

5. If so, has the Claimant showed that he was subjected to the detriment because of his protected act(s).

Detriment (s.47E ERA 1996)

6. Has the Claimant suffered a detriment because of his Flexible Working Request as follows:

i. The decision on 6th August 2019 to prevent secondary employment;
ii. The rejection of the grievance on 16th September 2019;
iii. The rejection of the grievance appeal on 11th October 2019;
iv. The decision, on 16th September 2019 and the affirmation of that decision on 11th October 2019, to remove the right to undertake secondary employment until a review after 6 months;
v. The suggestion of wrongdoing (by way of a failure to re-apply for permission regarding the cattery business);
vii. By decisions on 16th September 2019 and 11th October 2019, the rescinding of the initial agreement to accommodate flexible working;
viii. The alleged 'terse' response of Ms Jennings in the email dated 23rd July 2019; and

ix. Alleged 'flippant and dismissive remarks' in the meeting of 7th October 2019 and the letter of 11th October 2019.

Constructive unfair dismissal and automatic unfair dismissal

7. Whether the Respondent engaged in a series of acts as follows:

i. The decision on 6th August 2019 to prevent secondary employment;
ii. The rejection of the grievance on 16th September 2019;
iii. The rejection of the grievance appeal on 11th October 2019;
iv. The decision, on 16th September 2019 and the affirmation of that decision on 11th October 2019, to remove the right to undertake secondary employment until a review after 6 months;
v. The suggestion of wrongdoing (by way of a failure to re-apply for permission regarding the cattery business);
vi.[ii] By decisions on 16th September 2019 and 11th October 2019, the rescinding
of the prior agreement to flexible working;
vii. The alleged 'terse' response of Ms Jennings in the email dated 23rd July 2019; and
viii. Alleged 'flippant and dismissive remarks' in the meeting of 7th October 2019 and the letter of 11th October 2019 (that letter being said to be the 'last straw').

8. Whether the Respondent was in breach of the implied term of 'trust and confidence' by virtue of any/all of the aforementioned series of acts;

9. Whether the principal reason for the Claimant's resignation was the alleged fundamental breach of contract such that he was constructively dismissed;

10. In the event that the Tribunal determines that the Claimant was constructively dismissed, then the Tribunal shall determine:

i) Whether the dismissal of the Claimant was automatically unfair having regard to the provisions of ss. 104 or 104C Employment Rights Act 1996 ("ERA 1996");
ii) If not, whether there was a potentially fair reason for dismissal, and whether the dismissal was fair;
iii) What, if any, compensation the Tribunal should in those circumstances award to the Claimant having regard to those factors set out in s.123 ERA 1996 (including any reduction to be applied by reason of the contributory fault of the Claimant and whether the Claimant would have been fairly dismissed for non-discriminatory reasons in due course in any event); and
iv) Whether it is just and equitable for compensation to be adjusted pursuant to s.207A Trade Union and Labour Relations (Consolidation) Act 1992 because of any unreasonable failure by the Claimant/Respondent to comply with the ACAS Code on Disciplinary and Grievance Procedures and, if so, by what percentage (subject to a maximum of 25%).

~~Wrongful dismissal~~

~~11. If the Claimant was dismissed, was he dismissed in breach of his contract by a failure to pay notice pay?~~[iii]

[i] Withdrawn. Detriment pleaded occurs before the alleged protected act.
[ii] incorrectly set out /numbered in the original list of issues
[iii] Withdrawn.