RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Lewis**

Respondent: **London Fire Commissioner**

Heard at: **East London Hearing Centre**

On: **6th, 7th, 8th 9th June 2023 and 17 July 2023**

Before: **Employment Judge M Yale**
Members: **Ms Susan Harwood**
Mr Stephen Woodhouse

Representation:
Claimant: Mr Franklin, Counsel
Respondent: Miss Shepherd, Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

1. The Claimant's claim for Victimisation under Section 27 of the Equality Act 2010 is dismissed.

2. The Claimant's claim for Harassment under Section 26 of the Equality Act 2010 is dismissed.

3. The Claimant's claim for Constructive Dismissal is dismissed.

4. The Claimant's claims for Direct discrimination on the grounds of Race and Sex is out of time. It is not just and equitable to extend the time limit and that claim is therefore dismissed.

5. Claims 3205722/2022 and 3200355/2023 are dismissed on withdrawal.

REASONS

PRELIMINARIES AND CLAIMS:

1. The Claimant brought a total of four claims. On the first morning of the hearing, we were provided with a number of documents from the Respondent including an agreed List of Issues. In those documents it was made clear that the Claimant no longer pursued the third and fourth claims those being claims 3205722/2022 and 3200355/2023, and they were dismissed on withdrawal.

2. The List of Issues therefore focused on the first two claims, claim 3200021/2020 and claim 3205431/2021. We spent the rest of the first day reading the documents included in the Reading List, including a new two-page witness statement from the Claimant which remained relevant to the remaining proceedings.

3. It was rightly accepted that claim 3200021/2020 was brought in time. The list of remaining issues for claim 3200021/2020 was as follows:

3.1. Did the Respondent subject the Claimant to the following detriments, as set out in paragraph 2 of the Agreed List of Issues:

3.1.1. 29 July 2019, failing to deal adequately or at all with his complaint about back dated pay.

3.1.2 July 2019, not allowing the Claimant to take "Due to Service" sickness absence.

3.1.3. 2 September 2019, moving the Claimant to the North East Light Duties Team in Stratford.

3.1.4. 19 September 2019, the instruction to attend Stratford Fire Station before an Occupational Health appointment.

3.1.5. 25 September 2019, changing the Claimant's shift pattern.

3.1.6. 9 October 2019, being instructed to attend the Focus Group on core values the following day; and

3.1.7. 16 October 2019 not being permitted to withdraw his resignation.

Victimisation:

3.2. The Respondent accepted there were protected acts on 17 February 2015, 4 July 2018, 12 August 2018, 12 June 2019 and 11 July 2019.

3.3. If the Respondent acted in the ways set out in paragraph 3.1 above, was it because of the protected acts?

Harassment:

3.4. If the Respondent acted in the ways set out in paragraph 3.1 above, was it because of the Claimant's rejection of unwanted sexual conduct by Firefighter B that had the effect of violating the Claimant's dignity or creating a hostile or degrading, humiliating or offensive environment for the Claimant?

Constructive Dismissal:

3.5. If the Respondent acted in the way set out in paragraph 3.1. above, did the Respondent thereby act in a way which was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Respondent and Claimant?

3.7. If so, should the Claimant's resignation be construed as a dismissal?

3.8. If so, was there a fair reason for that dismissal?

3.9. Did any delay between the alleged breaches and the Claimant's resignation affirm the employment contract?

4. The second claim 3205431/2021 was solely a claim in relation to race and sex discrimination. The issues in that claim were:

4.1. Was the claim brought within time?

4.2. If not, was it just and equitable to extend the time limit?

4.3. Did the Respondent refuse to allow the Claimant to withdraw his resignation?

4.4. If so, was that refusal because of the Claimants race and/or sex?

5. During the course of the hearing, we were provided with witness statements from the following witnesses:

a. Anthony Lewis, the Claimant

b. Catherine Gibbs, Respondent's Head of HR and Employee Relations

c. Barrie May, Station Commander at the Respondent

d. Dominic Johnson, Head of HR Management at the Respondent

e. Rebecca Denton, North East Community Fire Team Leader at the Respondent

f. Gennaro Tumini, Sub Officer on Development for the Respondent and Claimant's Line Manager

g. Colin Digby, Station Commander for the Respondent

h. Narinder Dale, Borough Commander for the Respondent

6. Additionally, we heard oral evidence from each of those witnesses, with the exception of Rebecca Denton, who had since moved on. We were further provided with a bundle of documents running across four lever arch files and somewhere in the region of 1,970 pages. We also received extremely helpful oral and written submissions from both Counsel for which we are grateful.

FACTS:

7. The Claimant was employed by the Respondent as a Firefighter between 19 September 2011 and 17 October 2019. It was accepted that during the course of the Claimant's employment with the Respondent he was subjected to what can only be described as bullying at the hands of another firefighter. We shall refer to that firefighter as "Firefighter B", as he was not a witness in these proceedings and has had no opportunity to give evidence and defend himself. The conduct by Firefighter B included unwanted sexual conduct. On 17 February 2015 that bullying was reported to the Respondent and disciplinary proceedings followed for Firefighter B. This was the first of a number of acts that the Respondent accepts were protected acts within the meaning of the Equality Act 2010. As a result, Firefighter B was dismissed. Firefighter B subsequently appealed his dismissal, and his appeal was allowed. On 4 February 2015 Firefighter B was reinstated subject to certain conditions, one of which was that he was to be posted to a different station and watch from the Claimant. Firefighter B was also made the subject of a Final Warning, which was to last 18 months, and a Personal Development Plan to address the shortcomings with his conduct and behaviour.

8. On 4 July 2018, over three years after Firefighter B's reinstatement, the Claimant complained about a new posting for Firefighter B, which meant there was a greater risk of the two of them coming into contact. The complaint was not accepted as a grievance by the Respondent, rather, it was dealt with more informally.

9. On 12 August 2018 the Claimant raised a further complaint about the same. Again, the Respondent did not treat this as a grievance, saying pursuing a grievance was not, as this conduct related to Firefighter B's work conditions rather than the Claimant's. This was communicated by e-mail on 21 September 2018 and was entered on the Respondent's system on 19 December 2018. The Respondent accepts these were further protected acts.

10. The Claimant asserts that the Respondent failed to properly deal with these complaints and that supports his allegations of victimisation, harassment and constructive dismissal. It is right to observe that this topic was not covered in the list of detriments agreed at the Case Management Hearing in 2020 upon which each of the claims save for direct discrimination claim was based. There was an argument as to whether we should have regard to this evidence. This complaint was detailed in the statement of the Claimant, but the Claimant's statement was approximately 40 pages of solid type in extremely small font, and it would not have been realistic to cover all of what was said in cross-examination. It was important,

therefore, for the Claimant to identify the real issues. That said, this specific complaint was addressed in the statement of one of the Respondent's witnesses, Catherine Gibbs, and she was cross-examined on it. We therefore consider that it is appropriate to have regard to this evidence as part of the background when considering whether there was a climate of victimisation or harassment. However, we do not consider it appropriate to consider whether this was itself a breach of contract going to the constructive dismissal claim as the constructive dismissal claim was expressly limited in the List of Issues to conduct from 29 July 2019 onwards, a position that has remained since the Case Management Hearing in August 2020.

11. A firefighter employed by the Respondent was required to be assessed as "competent" within the first three years of their engagement. Five years thereafter, a firefighter is entitled to a pay rise. On 6 June 2019 the Claimant was notified that five years had passed since he was assessed as competent and, as a result, he was entitled to a pay rise. Dominic Johnson sent the Claimant a letter informing him his salary would be increased to the "Competent Plus" rate with effect from 24 June 2019. Mr Johnson said this was a standard letter, sent to every Firefighter five years after they achieved competency. Between 6 and 12 June 2019 the Claimant telephoned Mr Johnson saying he should have been made competent sooner. Mr Johnson asked the Claimant to put his complaint in writing which he did on 12 June 2019. The Claimant complained that he had been signed off as competent late because of the issues that had been ongoing with Firefighter B. Mr Johnson dealt with the initial complaint and provided the outcome on 26 June 2019. The Grievance Policy provides for any complaint to be made within 3 months but there is a discretion for that to be extended. Mr Johnson considered whether he should exercise that discretion but decided against it.

12. Mr Johnson said, in evidence, that he was concerned that, as a result of the issues with Firefighter B and others being raised, there may be a reason to extend the time for making the Grievance. As far as he was concerned, it was well out of time, dating back to 2015, but he said that he took the view that if the Claimant had raised at the time that he was concerned for his progression because of bullying there may be good reason to extend the time limit for submitting such a complaint.

13. Mr Johnson's evidence was that he found no indication in any of the paperwork that these issues had been raised previously and therefore decided there was no good reason to extend the time limit. The Claimant accepted in evidence that he had not complained about the bullying hindering his progression to "competent" five years earlier. The Claimant said that he was unaware he was to get a pay rise after 5 years and, hence, he only made the complaint when he received the correspondence from Mr Johnson. However, the Claimant accepted he received a pay rise when he initially became competent (bundle page 308) and it was set out in the Respondent's Staff Pay Policy on page 161 of the bundle, at paragraph 1.3 and page 163 appendix 1 that there would be further progression after 5 years.

14. The Claimant achieved competency in June 2014. Within the expected three years, albeit he took longer than the average firefighter. We find that Mr Johnson was entitled to arrive at the conclusion the complaint was made out of time. We do not accept the decision to move the Claimant to the "Competent Plus" pay grade was a decision made on 26 June 2019, as argued by the Claimant, as it was an automatic process triggered by the date of competency, a decision which had been taken 5 years earlier. The Claimant had already

received a pay rise when he was initially made competent in June 2014 and, from that point, he would have been aware that any delay in competency would affect, indeed had, affected his pay.

15. On 27 June 2019 the Claimant began sickness absence which was recorded in an online self-certification as stress due to work related issue. (Bundle page 449). The sick note, page 451, says he was off sick because of stress at work and was not fit to work for one month from 2 July 2019 until 2 August 2019. On 2 July 2019 the Claimant exchanged WhatsApp messages with Mr Tumini in which he said his sickness should be Due to Service ("DTS") and Mr Tumini seemingly agreed. Mr Tumini began to complete the relevant paperwork for the period of sick leave to be categorised as DTS, but it does not appear that was ever submitted. We do not find the failure to submit the paperwork was a deliberate act on the part of Mr Tumini. There is no evidence to support such a suggestion. Mr Tumini completed the paperwork and sent it to Mr Carpenter his informal mentor for feedback on 30 July 2019. It would be surprising for Mr Tumini to go through all that effort and then not submit it on purpose. On that paperwork Mr Tumini recorded, on 27 June 2019, the qualifying event as "stress due to pay related HR". The form went on to say the Claimant became stressed and agitated due to the response he received from HR on the handling of his PDR.

16. On 11 July 2019 the Claimant made a formal complaint to Mr Johnson in relation to the five years pay increase.

17. On 15 July 2019 Mr Johnson passed his complaint to Miss Gibbs, as he had dealt with the initial complaint and he felt this was effectively an appeal against his decision. Miss Gibbs provided an outcome to the Claimant on 29 July 2019 saying she agreed with Mr Johnson's decision and rationale. We find that Miss Gibbs was equally entitled to arrive at the decision she did and there was no obligation on her to extend the time for lodging a complaint.

18. On 22 July 2019, the Claimant was seen by Occupational Health. He appeared stressed and anxious at the consultation. Occupational Health concluded that the Claimant was not fit for operational duties but was likely to be fit for a substantive role. A review was to take place in six weeks. On page 515 of the bundle there was a comment that he was unfit for work and likely to require time off work while the work-related issues were addressed. The review was initially scheduled for 16 September 2019 (page 525), but this was later moved to 23 September 2019.

19. In support of his victimisation claim, the Claimant relies on an e-mail dated 22nd August 2019 from Mr Tumini to Mr Digby, in which Mr Tumini refers to what they have had to "endure" over the last "5 months at least". It is clearly in the context of a conversation between Mr Digby and Mr Tumini. It refers to numerous perceived shortcomings in the Claimant. The e-mail makes reference to the bullying and how the Claimant felt it was not adequately dealt with by management. It refers to the Claimant "overanalysing" and "dwelling" on things. We accept this could be interpreted as referring, at least in part, to the protected acts and could provide evidence of victimisation.

20. On 31 August 2019, the Claimant arrived at Harold Hill and there was communication between Mr Tumini and Mr Digby in his presence. The Claimant was told he must report to light duties on 2 September 2019, which is when he was due back to work on the expiry of

a sick note from his General Practitioner. He had been assessed by his General Practitioner as fit for light duties from 1 September 2019.

21. The decision to put the Claimant on light duties was that of Mr Digby. Mr Digby was cross-examined on the Managing Attendance Policy, specifically paragraphs 14 and 15. He was cross-examined on the basis that paragraph 14.1, with reference to the obtaining of a further Occupational Health Report before returning the Claimant to full duties was permissive not mandatory. Criticism was made of Mr Digby that he had insisted on a further Occupational Health Report. However, the fact that it was permissive allowed Mr Digby discretion on how to approach the issue. He was entitled to require a further Occupational Health Report before returning the Claimant to full duties, so long as it was not for a reason prohibited under the Equality Act. He explained he insisted on a further report to ensure the Claimant's fitness to return to full duties, so as not to expose him to further stresses. We accept this was the reason and we find that this was a very sensible approach.

22. On 28 August 2019, Mr Digby e-mailed Essex to see if the Claimant had been working for them whilst off sick. Mr Digby said he did this to see whether there were any other stressors operating on the Claimant. It was suggested that Mr Digby was looking for reasons to get rid of the Claimant because he was perceived a troublemaker and was in fact trying to catch the Claimant out on a disciplinary point. We have some reservations about the explanation given by Mr Digby and whether it was truly to assess further stressors or whether it was to see whether the Claimant was engaging in misconduct by working for another fire service when signed off sick. We find that the enquiry is perfectly legitimate for either purpose, so long as the reason for the enquiry was not one prohibited under the Equality Act.

23. During the course of the Claimant's employment with the Respondent, on 28th May 2014, the Claimant became a retained Firefighter for Essex County Fire and Rescue Service, which he did alongside his full-time role with the Respondent. In the late summer/autumn of 2019 the Claimant applied to move to Essex County Fire and Rescue Service on a full-time basis. The Claimant lived in Essex albeit taking that role would mean a reduction in his salary.

24. On 12 September 2019, the Claimant was offered a permanent full-time role with Essex County Fire and Rescue Service, which he ultimately accepted. This was a Conditional Offer subject to the usual checks.

25. The Claimant said that on 19th September 2019 he was required to drive to Stratford before his Occupational Health appointment, which was a detriment because it was of significant inconvenience to him, and was because of victimisation or harassment. The witness concerned in this allegation was Ms Denton. She no longer works for the Respondent, did not attend the hearing and was not cross-examined, so we approached her evidence with caution. However, the Claimant's evidence is contradictory on this point. In the ET1 at page 19, the Claimant said he was told he would have to report to Stratford *after* his Occupational Health appointment and that he was advised to park there and take public transport to the appointment. This is very different from the alleged detriment which was that he had to go to Stratford before the appointment.

26. On page 528 of the bundle, it confirms there are no parking facilities at the location where the Occupational Health appointment was to take place, which is consistent with Ms

Denton's evidence that she advised he may be better off parking at Stratford and taking public transport from there. Despite Ms Denton's absence from the hearing, her evidence makes logical sense, and we accept it. There is nothing to suggest he was required to go to Stratford before his appointment, just that he would have to go there afterwards given it was a morning appointment.

27. On 20 September 2019 Maria Apostole sent an e-mail saying the Claimant's sick leave was not classified as DTS, as it was more to do with home related factors rather than work. We are not satisfied that the DTS policy was properly followed by the line management of the Claimant. The relevant form was not submitted, that HR were not properly notified in accordance with the relevant policy and meetings that should have taken place did not take place. However, the decision-maker, Ms Apostole, was not involved in the original harassment complaints or the protected acts. There is no evidence to suggest she had any reason to be motivated by them or even knew of them.

28. At 8pm on 25 September 2019, the Claimant, having been assessed as fit to return to full duties, attended on a night shift at Harold Hill. He had been assessed as fit to return to full duties with one or two hours of operational light duties. He was allowed to complete training. However, at midnight he was sent home so as not to be left in the fire station alone during the standdown period.

29. Mr Digby found out that the Claimant had been rostered for nights on 27 September 2019 and spoke to Mr Tumini. Mr Digby then changed the Claimant's shifts. He said to adhere to the Lone Worker Policy. Mr Digby explained that the day shifts meant more daylight hours, and this was more conducive of the Claimant completing the necessary training. The Claimant said this was a detriment because it interfered with arrangements he already had made in his home life. The Occupational Health Report on 23 September, said the Claimant should undertake 1 – 2 tours of operational light duties before returning to full operational duties.

30. Whilst Mr Digby does not appear to have held a meeting with the Claimant, as required by the Policy and associated Handbook, and the Claimant was unhappy with the shift change, we find that putting the Claimant on a different shift pattern was a reasonable action to take. It was not done because of, or partly because of, a protected act or because of the rejection of sexual conduct by Firefighter B. In fact, the Managing Attendance Handbook on page 1,431 says the station-based staff on light duties for 2 tours or less would normally involve working day shifts.

31. On 9 October 2019 the Claimant was notified by Mr Digby that he would be attending Core Values Focus Group the following day. Mr Digby had sat with the Claimant when he completed a Stress Questionnaire on 16 September 2019, during which the Claimant had flagged cultural issues within the Fire Brigade. Mr Digby said that this was in the context of a report by Her Majesty Inspectorate of Constabulary and Fire and Rescue Services. Focus groups were set up to improve the culture within the Brigade. Mr Digby said that the focus group was a positive opportunity for the Claimant to have an input on the behavioural framework and share it in a meaningful way, especially given that during the completion of the at work questionnaire on 16 September 2019 the Claimant had raised concerns of bullying and the culture within the Brigade. Mr Digby said he did not recall selecting the Claimant. However, he did provide a list of attendees on 9 October 2019, the day after an e-mail requesting volunteers had been circulated. The Claimant's evidence was that he did

not want to go on the focus group and this was another example of a detriment as a result of victimisation and/or harassment.

32. We accept Mr Digby's explanation that the reason the Claimant was put forward for the focus group was that there were cultural issues within the Respondent that needed to be addressed. The Claimant had been the victim of bullying and had direct experience of some of those cultural issues. Therefore, the Claimant's input in that focus group would have provided a valuable insight into the issues the Respondent needed to address.

33. On 10 October 2019 the Claimant resigned his employment with the Respondent. This was done via an on-line form and in the box where the Claimant could provide a reason, he asserted that he would prefer not to disclose his reasons. It is in relation to this resignation that the Claimant now claims Constructive Dismissal.

34. On 11 October 2019 the Respondent acknowledged the Claimant's resignation. The evidence suggests the Claimant's superiors did not take that resignation at face value and did try to make some enquiries as to why he was leaving.

35. On 15 October 2019 the Clamant, having reflected, made enquiries about withdrawing his resignation. There is a dispute on the evidence as to whether this was just an enquiry or an actual request to withdraw his resignation. The Claimant's line manager said this was a decision made by the Borough Commander. The Borough Commander said in evidence she did not recall saying the Claimant could not withdraw his resignation, she was on a course when she was asked, she was told it was just an enquiry and therefore she did not make any decision or take the matter further.

36. However, in a letter to the Tribunal on page 1,372 the Respondent asserts in relation to a disclosure request "the Respondent does not keep telephone records and in any event the Respondent agrees that the Claimant did telephone to withdraw his resignation, the issue is not in dispute, this point is not disputed and it is therefore not necessary to obtain incoming and outgoing calls". We feel bound by that express concession and, in any event, faced with conflicting evidence from the Respondent, we find that on 16 October 2019 the Claimant was told that he would not be able to withdraw his resignation.

37. Following the Claimant's resignation, his employment came to an end on 17 October 2019, and he took up his employment with Essex County Fire and Rescue Service the following day, the 18 October 2019. The Claimant signed his contract of employment with Essex County Fire and Rescue Service on 21 October 2019.

38. The direct sex and race discrimination claim arises from the Respondent's refusal to allow the Claimant to withdraw his resignation. It is in respect of this claim that there is a time limit issue. The Claimant says he came across an e-mail in disclosure for his original claim that gave rise to the inference that the reason the Respondent refused to allow him to withdraw his resignation was his race and/or sex.

39. In that e-mail, dated 13 October 2019, the Borough Commander stated she wished to backfill the vacancy left by Mr Lewis with a "woman or BAME individual which take priority". At the time that e-mail was sent, the Claimant had not sought to withdraw his resignation. The Borough Commander confirmed that at the time she drafted the e-mail she was not aware of any enquiry or application to withdraw the resignation. The e-mail must therefore

relate to backfilling the position left vacant by the Claimant's resignation, where such considerations may be legitimate (subject to the provisions of the Equalities Act 2010), rather than directly to any enquiry or application to withdraw the resignation. However, the complainant relies on that e-mail as evidence that there was a discriminatory reason for the Respondent refusing his request to withdraw his resignation, suggesting it shows an underlying desire by the Respondent to employ someone of a difference sex and race rather than allow him to withdraw his resignation.

40. It is agreed that the unredacted version of that e-mail was only provided during disclosure in relation to the first claim on 29 June 2021. Therefore, it would not have been possible for the Claimant to bring the Discrimination claim before that date. ACAS was engaged on 6 August 2021 and a certificate provided on 9 August 2021. The discrimination claim form was received by the Tribunal on 16 August 2021.

LAW:

41. Section 27 of the Equality Act 2010 reads as follows:

> **27 Victimisation:**
>
> (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.
>
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
>
> (4) This section applies only where the person subjected to a detriment is an individual.
>
> (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

42. Section 26 of the Equalities Act 2010 reads as follows:

26 Harassment

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

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

age;

disability;

gender reassignment;

race;

religion or belief;

sex;

sexual orientation.

43. Section 13 of the Equalities Act 2010 reads as follows:

13 Direct discrimination

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

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex—

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

44. Section 123 of the Equalities Act 2010 reads as follows:

123 Time limits

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a)the period of 3 months starting with the date of the act to which the complaint relates, or

(b)such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of-

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

45. Section 136 of the Equalities Act 2010 provides:

136 Burden of proof

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

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

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

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

(b) the Asylum and Immigration Tribunal;

(c) the Special Immigration Appeals Commission;

(d) the First-tier Tribunal;

(e) the Education Tribunal for Wales;

(f) the First-tier Tribunal for Scotland Health and Education Chamber

46. Section 95 of the Employment Rights Act 1996 reads as follows:

95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—

> (a)the contract under which he is employed is terminated by the employer (whether with or without notice),
>
> (b)he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or
>
> (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.

(2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—

> (a) the employer gives notice to the employee to terminate his contract of employment, and
>
> (b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;

and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

47. In *Western Excavating (ECC) Ltd v. Sharp* [1978] ICR 221, Lord Denning said:

> *If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.*

CONCLUSIONS:

***29 JULY 2019, FAILING TO DEAL ADEQUATELY OR AT ALL WITH THE COMPLAINT ABOUT BACKDATED PAY*:**

48. There is no evidence that the Claimant suffered a detriment as a result of the protected acts. If anything, Mr Johnson investigated further than he needed to as a result of his concerns over the allegations of bullying to ensure the Claimant had been treated fairly.

49. We do not find that the way this complaint was handled was a detriment because of a protected act, nor was it harassment. There was no evidence that the Claimant was treated less favourably because of the protected acts or because of the rejection by him of Firefighter B's unwanted sexual conduct, which occurred a number of years earlier. In fact, Mr Johnson investigated further specifically to ensure there was fairness, given the background to the Claimant's employment.

50. Reliance has been placed on the fact Miss Gibbs was involved in Firefighter B's earlier appeal, but she was not the decision-maker. Further reliance is placed on the fact that Miss Gibbs was involved in a decision to redeploy Firefighter B to a Watch and Station more likely to bring him into contact with the Claimant. We do not accept that any restriction on Firefighter B's redeployment would last for the remainder of what may be the very long careers of the Claimant and Firefighter B. Firefighter B was redeployed three years after his dismissal and reinstatement and long after his 18-month final warning had expired. Further, it was not reasonable for Miss Gibbs to be excluded from any further decision making in relation to the Claimant for the rest of his career. That, of itself, is not evidence of victimisation or harassment.

51. We do not conclude that the way the Respondent dealt with this complaint was because, or partly because, of victimisation or harassment. There is no evidence from which we could conclude, in the absence of any explanation, that the decision was made because, or partly because, of a protected act or rejection by the Claimant of the unwanted sexual conduct by Firefighter B.

JULY 2019, NOT ALLOWING THE CLAIMANT TO TAKE DUTY SERVICE SICKNESS ABSENCE

52. We conclude there was a detriment in the manner in which the Claimant's absence was categorised, as the relevant policy was not followed. However, we do not find the failures to follow policy were in any way because of the protected acts or the Claimant rejecting the sexual behaviour of Firefighter B.

53. The decision maker in relation to how the Claimant's sickness should be categorised was Maria Apistole. There is no evidence she was involved in the original harassment complaints or protected acts and there is nothing to suggest she knew of them.

54. We have considered the background to this case but there is no evidence to suggest that any such omissions were because of, or partly because of, a protected act or the rejection by the Claimant of Firefighter B's sexual conduct.

2 SEPTEMBER 2019, MOVING THE CLAIMANT TO THE NORTHEAST LIGHT DUTIES TEAM IN STRATFORD

55. The e-mail from Mr Tumini to Mr Digby dated 22 August 2019 causes us concern. The sentiments expressed in that e-mail suggest the Claimant was viewed as a difficult member of the team and there is reference to the Claimant's complaints in that e-mail. The e-mail was only six days before the enquiry to Essex.

56. Given the contents of the e-mail dated 22 August 2019, there are facts from which we could decide, in the absence of an explanation, that Mr Digby's decision was because of a protected act. However, we accept Mr Digby's explanation that the real reason the Claimant was sent to light duties was that Mr Digby was concerned about the Claimant's fitness to return to full duties, as confirmed by the paperwork, and the reason the Claimant was put on light duties was therefore not because of a protected act. There is no evidence from

which we could conclude, without explanation, that this alleged detriment was because of, or partly because the Claimant rejected unwanted sexual conduct by Firefighter B.

19 SEPTEMBER 2019, INSTRUCTION TO ATTEND STRATFORD STATION BEFORE AN OCCUPATIONAL HEALTH APPOINTMENT

57. We conclude that the information provided to the Claimant by Ms Denton was provided in order to assist him with the practicalities of attending the Occupational Health appointment. In our judgment it was sensible advice, intended to assist the Claimant with the logistics of attending the Occupational Health appointment in the morning, where there was no parking, and then returning to work for the rest of the working day.

58. There is no evidence from which we could conclude, in the absence of an explanation, that this alleged detriment was because, or partly because, of the protected acts or the rejection of Firefighter B's sexual conduct.

25 SEPTEMBER 2019, CHANGING THE CLAIMANT'S SHIFT PATTERN

59. Mr Digby made the decision to change the Claimant's shift pattern on 25th September 2019. There are facts from which we could decide, in the absence of any other explanation, that the decision was because of, or partly because of, a protected act, namely the e-mail dated 22nd August 2019, of which Mr Digby was a recipient.

60. However, there is a wealth of evidence to support Mr Digby's explanation and we accept that explanation. Therefore, we find this alleged detriment was not because, or partly because, of a protected act. Further, there is no evidence from which we could decide, in the absence of any other explanation, that this alleged detriment was wholly or partly because of the rejection of Firefighter B's sexual conduct.

9 OCTOBER 2019, INSTRUCTION TO ATTEND THE FOCUS GROUP ON CORE VALUES THE FOLLOWING DAY

61. Determining whether something amounts to a detriment requires a two-stage approach. Firstly, whether it was a detriment in the opinion of the Claimant and secondly, whether a reasonable person or reasonable worker would view it as a detriment. The Claimant said he viewed it as a detriment, and we can understand why someone who had been through what the Claimant had been through may view attending such a course as a detriment because of the strong feelings and emotions that it is likely to evoke.

62. Again, we bear in mind the e-mail from Mr Tumini to Mr Digby, which made apparent they had been discussing the Claimant's behaviour and what they had to "endure". From that e-mail, we could decide, in the absence of an explanation, that the Respondent had made the Claimant attend the focus group because of the protected acts.

63. However, we accept the explanation given by Mr Digby that the Claimant was sent on the course to enable the Respondent to better understand how they could improve the culture within the Fire and Rescue Service in light of the report by Her Majesty Inspectorate of Constabulary and Fire and Rescue Services.

64. There is no evidence from which we could conclude it was because of the Claimant's rejection of Firefighter B's sexual conduct.

65. In our judgment, the reason the Claimant was sent on the course was not because of any protected acts within Section 27 of the Equality Act 2010, or because of the Claimant rejecting the sexual conduct of Firefighter B, but because the Claimant had been bullied and the Respondent wanted to improve the culture within the Brigade. The reason for sending the Claimant on the focus group was that the Claimant *had* been the subject of bullying, not because he had *made complaints* about that conduct.

16 OCTOBER 2019, NOT BEING PERMITTED TO WITHDRAW HIS RESIGNATION

66. Litigation requires the parties to make clear their cases so as to focus on the relevant issues in pursuance of the overriding objective. In our judgment, whether or not there was a request to withdraw the resignation is not therefore in dispute and we must look at why the request was refused. We observe from the outset that the Respondent was entitled to accept the resignation and so long as the refusal was not for reasons prohibited under the various legislative provisions, the Respondent would have had complete discretion as to whether to allow the Claimant to withdraw his resignation.

67. So far as we can ascertain from the evidence, the decision-maker in this regard was not Mr Tumini, who had been involved in the e-mail exchange to which we referred earlier. Mr Tumini was involved in the discussions, but this was more as a conduit or a go between, between the Claimant and those making the decision. Those involved in any decision-making would either have been Ms Dail or Mr May. Neither Ms Dail nor Mr May were involved in the original investigation into bullying or any subsequent issues arising from it and there is no evidence from which we could conclude, in the absence of any other explanation, that the refusal to allow the Claimant to withdraw his resignation was because of the protected acts or rejection of sexual conduct by Firefighter B.

CONSTRUCTIVE DISMISSAL

68. The Claimant submits that the alleged detriments set out above, individually and/or cumulatively, amount to the Respondent conducting itself without reasonable and proper cause in a way which was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Respondent and the Claimant.

69. In our judgment, for the reasons set out above, there was reasonable and proper cause for the way the Respondent acted on each occasion. Therefore, there was no significant breach going to the root of the contract of employment entitling the Claimant to treat himself as discharged from any further performance.

70. We are fortified in that conclusion by the fact that soon after the Claimant tendered his resignation he sought to withdraw that resignation. In our judgment seeking to withdraw the resignation undermines any assertion that the Respondent had committed such a fundamental breach of contract so as to allow the Claimant to consider himself discharged from it.

71. In our judgment the reason for the termination of the contract was that the Claimant had decided to go and work for Essex County Fire and Rescue Service which was closer to his home. The Claimant had gone through a recruitment process over a number of weeks, this was not a spur of the moment decision, it was something he had thought carefully about, even though it appears he soon came to regret it.

RACE AND SEX DISCRIMINATION:

72. The time limit for a direct discrimination claim is three months, unless the Tribunal considers it just and equitable to extend the time limit. This claim is solely in relation to the refusal by the Respondent to allow the Claimant to withdraw his resignation. The refusal to allow the Claimant to withdraw his resignation occurred on 16 October 2019. At that stage however, there was no evidence to suggest that there might have been an element of direct discrimination in that decision. It is accepted that the Claimant did not know of the potential for such a claim until 29 June 2021 when the e-mail dated 13 October 2019 was disclosed. That e-mail was from Borough Commander Dale. The e-mail discussed backfilling the Claimant's post and contained the following words "Ideally, we need a woman or BAME individual which take priority".

73. On 6 August 2021 the Claimant engaged ACAS and an ACAS Certificate was issued on 9 August 2021. The ET1 claim form was then lodged on 16 August 2021. As we have observed it would have been impossible for the Claimant to even know this potential claim existed until 29 June 2021 and therefore had it been that time period alone, the application for an extension of time would have had some considerable force.

74. The position from 29 June 2021 onwards however is different. From that moment, the Claimant was armed with the evidence that would have enabled him to make the discrimination claim. The Claimant was asked in evidence why he had not submitted the claim earlier. He said that at that time he was unrepresented. He said they were trying to put together a bundle, he was writing a witness statement and he thought that would be sufficient as it was all part of the same narrative. He said, he then put it in an ET1 to make sure. The Claimant said that he did not think he needed to make a further claim, but it dawned on him that he might not have captured it, so he submitted the ET1 to ensure he had.

75. In cross-examination, he accepted he was familiar with the time limits, from his other claims, but thought that if this was progressing, he could just add it as it was in the same time frame. He accepted that he had had a Preliminary Hearing in August 2020 in relation to other claims, when some his claims had been struck out as being out of time and it had been made clear to him that he could only proceed with claims that were on the ET1 Claim Form. He then said he had not made the discrimination claim within time, as he did not have the e-mail but when he received the e-mail he knew that it was not before the Tribunal at that time. He said he thought that he could just include it as part of the Victimisation.

76. We considered all the relevant factors and we kept in mind that the factors are not a checklist to be slavishly followed. The length of the delay after 29 June 2021 is 48 days, just under seven weeks. The Claimant was not unfamiliar with the Tribunal processes, he

had experience of claims being struck out because they were out of time. Some of his claims had been struck out by Employment Judge Russell in August 2020 for that very reason. Following that judgment, we would have expected the Claimant to have been more diligent in ensuring that he complied with the relevant time limits and procedures.

77. The Claimant appears to be well able to conduct research. He had submitted a number of claims previously against the Respondent and at that time he had submitted claim against a second Respondent. We do not find the Claimant acted promptly when he knew of the facts giving rise to the cause of action and it does not appear he sought any further advice in relation to bringing the claim. The first contact with ACAS in relation to this claim was 38 days over six weeks after the e-mail was disclosed. At the time the Claimant was bringing a claim against a second Respondent, Maximus UK Services Limited (Health Management). In the ET1 Claim Form in relation to the direct discrimination claim he refers to engaging ACAS in relation to the claim against the second Respondent on 29 June 2021 the same day as he received the e-mail giving rise to this course of action. There is no reason why if he was engaged with ACAS at that time in relation to a claim against a second Respondent that he would have taken so long to have engaged ACAS in relation to the discrimination claim against this current Respondent.

78. In August 2021, the Respondent was first put on notice that their witnesses would have to recollect the events in this context from October 2019, nearly two years earlier. The delay is bound to affect the extent to which they could recall those events. We have regard to the fact that this evidence was contained within an e-mail and the Respondent knew the refusal to allow the Claimant to withdraw his resignation was in issue, as it formed part of the harassment and victimisation claims. The Respondent therefore knew the reasons for that refusal would be scrutinised and they would have to provide an explanation for it. The e-mail giving rise to this claim was also in the Respondent's possession throughout.

79. However, at that time, the Respondent's focus would have been on the Victimisation and Harassment claims, not on the direct discrimination claim. Direct discrimination has very different ingredients and therefore there is likely to have been an impact on the witnesses' evidence. On that basis and because this claim relies on different evidence, we do not accept that this was simply a relabelling of an existing claim.

80. Further, it is right to observe that the e-mail in question, giving rise to the direct discrimination claim, was in relation to recruitment to backfill the Claimant's post, where positive action may have been legitimate under Sections 158 and 159 of the Equality Act 2010. The e-mail was sent two days before the Claimant even asked to withdraw his resignation and was done not directed in any way towards the Claimant's request. There is a difference between legitimately seeking to take positive action for the purpose of recruitment and the refusal to allow an existing member of staff to withdraw their resignation on the basis of their race or sex. It does not follow that, just because there is positive action in recruitment, the same factors would necessarily influence a decision on the request to withdraw a resignation. In our view therefore, contrary to the Claimant's assertions this was not such a clear-cut case of discrimination where the strength of the case would weigh heavily in favour of allowing it to proceed.

81. The Claimant asserts that the Respondent did not co-operate with his request for information. Had the Claimant submitted the claim soon after 29 June 2021 this argument may have had some force but no reliance is placed on any document disclosed after that date and therefore this does not explain the delay of some further seven weeks.

82. Refusal to extend the time limit in relation to this particular head of claim did not prevent the Claimant advancing a number of other claims including claims in relation to the Respondent's refusal to allow him to withdraw his resignation and had there been merit in those claims, he could have succeeded despite us not extending the time in relation to this particular course of action.

83. The purpose of the time bar is to promote finality in certainty in the proceedings and the onus is on the Claimant to satisfy the Tribunal that it is just and equitable for the time limit to be extended. We do not find that the delay is adequately explained, there is likely to have been prejudice to the Respondent, the Claimant was not prevented from bringing other claims in relation to the same alleged detriment and there is no evidence that the Claimant made any efforts to seek advice or help bringing the claim in a timely manner, despite already being in contact with ACAS in relation to the claim against the former second Respondent. For those reasons, whilst there would have been some force in an application to extent the time limit to 29th June 2021, when the e-mail was disclosed (or soon after), we do not find it just and equitable to extend the time limit for submitting the direct discrimination claim for many more weeks and that claim is dismissed as being out of time.

Employment Judge M Yale

6 September 2023