



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

MS A ACHESON

AND

Respondent

AVON FIRE AND RESCUE
SERVICE

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 13TH / 14TH / 15TH / 16TH / 17TH / 20TH / 21ST / 22ND
/ 23RD / 24TH / 27TH / 28TH / 29TH / 30TH
NOVEMBER / 1ST DECEMBER 2023

EMPLOYMENT JUDGE MR P CADNEY
(SITTING ALONE)

MEMBERS: MR K GHOTBI RAVANDI
MS D ENGLAND

APPEARANCES:-

FOR THE CLAIMANT:- MR G PROBERT (COUNSEL)

FOR THE RESPONDENT:- MS D GILBERT (COUNSEL)

JUDGMENT

The unanimous judgment of the tribunal is that:-

1. The claimants claims of direct sex discrimination (identified below by reference to the numbering in the List of Issues) are well founded and upheld (in part where so identified):
 - 5.1.1 Upheld in part; / 5.1.2 (a) Upheld in part; / 5.1.2 (b) Upheld.
2. The claimants claims of harassment on the ground of sex as identified below are well founded and upheld:
 - 6.1.1 (a) / 6.1.1 (c) / 6.1.1 (d) / 6.1.4 / 6.1.7 / 6.1.11 / 6.1.14.

3. The claimants claims of harassment on the ground of sex as identified below are not well founded and are dismissed:

6.1.1 (b) / 6.1.1 (e) / 6.1.2 / 6.1.3 / 6.1.5 (withdrawn as duplicate) / 6.1.6 (withdrawn as duplicate) / 6.1.8 – 9 – 10 (upheld as claims of victimisation) / 6.1.12 (withdrawn as duplicate) / 6.1.13 / 6.1.15 / 6.1.16 -17 (withdrawn as duplicates) / 6.1.20 (as an allegation of sex related harassment but upheld as an allegation of sexual orientation related harassment- see below) .

4. The claimants claims of harassment on the grounds of sexual orientation as identified below are well founded and upheld;

6.1.18 / 6.1.20

5. The claimants claims of harassment on the grounds of sexual orientation as identified below are not well founded and are dismissed:

6.1.19 (withdrawn)

6. The claimants claims of victimisation as identified below are well founded and upheld:

7.2.1 / 7.2.2 / 7.2.3 / 7.2.4 // 7.2.7 / 7.2.8 / 7.2. 12 / 7.2.16

7. The claimants claims of victimisation as identified below are not well founded and are dismissed:

7.2.5 / 7.2.6 / 7.2.9 / 7.2.10 / 7.2.11/ 7.2.14 7.2.17 / 7.2.18 / 7.2.19 / 7.2 20 / 7.2.25

8. The claimants claim of constructive dismissal is well founded and is upheld.

Reasons

Rule 50 Order

1. By an order dated 20th October 2023 EJ Livesey issued a rule 50 anonymity order (a copy of which is annexed to this judgement). As is set out below four people (Persons A / B / C / D) have been anonymised during the course of this hearing in accordance with it. A draft of this judgement has been provided in advance to the parties who are content that nothing in it could lead to the identification of any of them. However, great care must be taken by anyone involved in the further dissemination of this judgment, or information as to this case generally, to ensure that nothing is disseminated which could lead to the identification of any of them.
2. Person A- is referred to in some documents (in particular in relation to the claimants grievance) and was factually involved in one of the allegations of post resignation

victimisation. As that allegation is no longer pursued it is not necessary in this judgment to make any reference to the evidence in relation to Person A.

3. Persons B / C/ D are all individuals who have (as we understand it) made allegations against CM Davies, one of which resulted in criminal proceedings. The fact of one the allegations being made is part of the factual background relating to the evidence Michele Crossman / James Coomber and Person D. We have heard no evidence as to the truth or otherwise of any of the underlying factual allegations and are not making or purporting to make any factual findings in relation to them.

Claims / Summary

4. By this claim the claimant brings claims of direct discrimination (s13 Equality Act 2010 (sex)); harassment (s 26 EqA 2010 (sex and sexual orientation)), victimisation (s27 EqA 2010), and constructive unfair dismissal. Claims of public interest disclosure detriment and automatic unfair dismissal, and the failure to make reasonable adjustments have been withdrawn and dismissed by an earlier judgment.
5. The claims arise from two claims forms, the first (1400826/2022) having been submitted on 28th February 2022; and the second (1402825/2022) having been submitted on 28th August 2022.
6. Mr Dean Davies was originally the second respondent to the claim. The claims have been withdrawn against him personally as a respondent, although the claims themselves are still pursued against the current respondent. References in the documents to R2 or the second respondent are references to Mr Dean Davies.
7. The claimant (referred to in the papers as Sasha) qualified as a firefighter in January 2020 having been employed by Gloucestershire Fire and Rescue Service from 2nd June 2017. She transferred to Avon Fire and Rescue Service, on the 4th January 2021. The claimant's first shift at Avonmouth Green Watch was on 16th March 2021. The Watch Manager (WM) was Simon Bailey. The Crew Managers (CM) were Dean Davis and Dave Smith.
8. In summary, her case is that she was subjected to direct sex discrimination and/or harassment related to sex /sexual orientation primarily by CM Dean Davis, and WM Simon Bailey; and that having brought both informal and later formal grievances she was subject to a number of acts of victimisation which led her to resign on the 25th April 2022. Originally she brought claims of a number of post resignation acts of victimisation but those are no longer pursued.

Evidence

9. On behalf of the claimant we have heard evidence from the claimant herself; Kevin Adcock; Alex Sienesi; Janette Morris; Rebecca Watts; Richard Basham; Iain Campbell; Michelle Crossman; and James Coomber.

10. On behalf of the respondent. The tribunal has heard evidence from. Lee Rogers; Tom Foley; Paul Westerside; David Burgess; Rachel Rind; Karen Shiel; and Angela Feeney.
11. The tribunal has considered a main bundle of some 850 pages, and a supplemental bundle of documents produced by the claimant.

Claimant's Supporting evidence

12. As set out above the claimant called evidence from Mr Kevin Adcock, Ms Alex Sienisi, Ms Jeanette Morris, Ms Rebecca Watts, Mr Richard Basham, Ms Michelle Crossman and Mr. James Coomber. None of them gave any direct evidence in support of the claimants claims. Their evidence falls relatively naturally into a number of groups.

Richard Basham/ Kevin Adcock / Rebecca Watts

13. Mr Richard Basham, and Mr Kevin Adcock and Rebecca Watts were former colleagues of the claimant in the Gloucestershire Fire Service. Kevin Adcock describes her as extremely confident enthusiastic, competent, and professional in her role as firefighter, and as having a good reputation as a hard working team player. Mr Richard Basham has been an Operational Watch Manager on Black Watch at Stroud Fire Station since 2018 when he first met the claimant. He describes her as keen, enthusiastic, and willing to learn and contribute to the watch, that she would receive guidance well and follow instruction. Ms Watts first met the claimant in February 2018 when she was also a firefighter in Gloucestershire Fire and Rescue service. She became the claimants mentor, and describes her as confident friendly strong and determined hard working honest had integrity and was very self-aware and she never once had any level of concern about her work ethic and confidence or ability to get the job completed; she absolutely trusted the claimant and she was a very competent firefighter.
14. The evidence of Mr Adcock and Mr Basham and Ms Watts is evidence from which we are invited to conclude that the claimant was a highly regarded, diligent, and committed professional firefighter; and that it follows that any allegation made during her service with Avonmouth Green Watch in relation to her attitude or alleged laziness is not simply incorrect, but not a genuine assessment of her and essentially a lie.

Alex Sienisi / Jeanette Morris

15. The evidence of Ms Alexandra Sienisi is that she had met the claimant at training school in June 2017, and was impressed by her, but had not worked with her operationally. The bulk of her evidence relates to events where she was the only female firefighter at Chew Magna Fire Station. She alleges that she was treated badly by the watch manager resulting in a grievance which was partially upheld and which

resulted in possible disciplinary proceedings at level 1. It is not known whether those proceedings ever took place or what with what consequence. She resigned, leaving on August 1st 2022.

16. The evidence of Ms Jeanette Morris relates to events in 2016 when she applied to be promoted from Station Manager to Group Manager within Avon Fire and Rescue service. She makes allegations against a particular individual, that she was offered promotion in return for sexual favours which she declined. She was unsuccessful in her application for promotion and subsequently submitted a formal grievance. She complains of delays in the grievance process and the fact that the person against whom she made the allegations, was only suspended shortly before retirement.
17. We are invited to infer from their evidence that Avon Fire Service did not take allegations of sexual harassment seriously, and that when the allegations were dealt with it effectively allowed the perpetrators to avoid punishment.

Michelle Crossman / James Coomber / Iain Campbell

18. The evidence of Michelle Crossman relates specifically to allegations made against Mr Dean Davis. In September 2020 she was at Yatton fire station when she was approached by a young woman identified before us as Person D (who was not an employee of Avon Fire Service) and who made serious allegations to her regarding Mr Davis. On the 16th of September 2020 she received call from Mr Davis demanding to be told what had happened which she declined. At 3:20 p.m. the same day Mr Davis attended Yatton Fire Station alleging that in fact he was the victim of events between himself and Person D. He said words to the effect, "remember who your friends are. I'll remember this when you're in trouble"; and when she told him to leave he repeated "I'll remember this" in a menacing way. On the 18th September she communicated with Karen Shields.
19. The evidence of Mr Coomber is that he was CM Davies's line manager at Yatton FS prior to December 2016. He became aware of the incident involving Michelle Crossman in September 2020 and notified the duty Group Manager. About a week later he was confronted by CM Davies. On 4th March 2021 he sent an email to Iain Campbell about the events of September 2020, and reported what he regarded as safeguarding concerns about CM Davies to an external body. Shortly afterwards he spoken to by Iain Campbell on the instructions of Karen Shiel about spreading "malicious rumours" about CM Davies.
20. The evidence of Mr Iain Campbell is that he worked for Avon Fire and Rescue from 1993 until he retired in September 2023. He did not work at Avonmouth or on Green Watch. He became involved in September 2020 with allegations made against CM Davis which were relayed to him by James Coomber. These are the events concerning Michelle Crossman which are described in greater detail below. In about March the following year he received an instruction from Karen Shiel to speak to Mr Coomber to inform him that he should stop spreading rumours about Mr Davies.

Respondents Evidence

21. Similarly the respondent's evidence falls into a number of specific groups.

Paul Westerside

22. FF Paul Westerside is the only individual against whom specific allegations of discrimination are made who has been called to give evidence by the respondent. He was a colleague of the claimant on Avonmouth Green Watch. His evidence as to the allegations is set out in relation to the individual allegations.

Rachel Rind / Tom Foley / David Burgess

23. These three witnesses are all firefighters and work colleagues of the claimant at Avonmouth Green Watch for various periods. FF Rind worked with her from her arrival in March 2021 until some point in May / June 2021 when she transferred to another station. FF Foley was appointed to Avonmouth Green Watch in April 2021 and remained a colleague of the claimant until her resignation. FF Burgess was a firefighter based at Avonmouth Green Watch throughout the claimants period of work there.

Lee Rogers / Karen Shiel / Angela Feeney

24. Lee Rogers was appointed Station Manager for Avonmouth Green Watch in December 2021 and was the recipient of the claimant's oral complaint on the 9th December 2021; and was subsequently involved in the investigation of her grievance. Angela Feeney that was the SPOC appointed to lead the grievance investigation and Karen Shiel was the HR officer dealing with both at the grievance and the employment tribunal litigation.

Credibility

25. The respondent invites us to conclude that all witnesses called by both parties have given evidence honestly to the best of their recollection, and in accordance with their perception of the events. Where the respondent disputes the claimants' witnesses recollection or interpretation of events it accepts that the evidence of the witnesses is an honest account. It invites the tribunal to conclude that that is also true of the respondent's witnesses.

26. The claimant does not accept this. She suggests that a number of the respondent's witnesses are lying. In particular it was put to Rachel Rind, and the tribunal has been invited to conclude, that she deliberately misled the internal grievance investigation and attempted in her witness statement to mislead the tribunal.

27. In our judgement the respondent is correct and we are entirely satisfied that all of the witnesses have given evidence honestly reflecting their genuine recollection of events or interpretation of those events.
28. In particular despite the claimant's criticisms of her evidence we accept that neither Rachel Rind nor Tom Foley had any reason to attempt to mislead the tribunal and were clearly at the time of the events themselves on good terms with the claimant. We have taken the view that the evidence of both is honest and reliable, and although called by the respondent FF Foley in particular is the nearest we have to an independent witness in this case.

Background Documentary Evidence

29. As is set out and summarised above, none of the claimant's supporting witnesses provide direct evidence in support of her claims. However in addition to them the claimant relies on a number of background documents as supporting her claim and/or as matters from which we can draw inferences as to those claims.
30. Baker report – We have been provided with extracts from the 2017 report from Dr Barbara Baker - Gender Study Fire Service England. We have been specifically drawn to the staff survey in which 18% of respondents stated they had been the subject of bullying and harassment. The claimant relies on this as evidence that when taken together with the cultural audit and cultural review referred to below, that there was an endemic and systemic problem with bullying and harassment for a significant proportion of staff, which had not been addressed or corrected following the Baker report, and which she suffered in 2021- 2022.
31. The claimant also relies on, in particular, the Avon Fire and Rescue Service Cultural Audit 2021, and Cultural Review 2021-2022 Staff Focus Group findings. From the 2021 Cultural Audit the claimant relies in particular on the finding that 25% of respondents to the survey, which in total was approximately one third of the workforce, reported personal experience of discrimination, prejudice, harassment, or bullying in the previous year. The survey itself is dated August 2021 although we do not know precisely when the survey was carried out. The claimant invites us to conclude that the figure of one in four employees reporting personal experience of discrimination, prejudice, harassment or bullying mirrors her own experience and provides evidential support for it. In addition the survey reveals that more than half 54% of the employees who had reported discrimination prejudice harassment or bullying did not agree that it had been dealt with effectively which again the claimant relies on to add support to her claims.
32. In addition the claimant relies on the cultural review 2021-2022 staff focus group report findings, which is dated the 11th May 2022, that covers the period during which the claimant was a part of Avonmouth Green Watch. There are a number of quotes from unnamed individuals within this survey at which the claimant relies on as a mirroring her experience (for examples see paragraph 3.4.2 a quote from a member

of corporate staff; 3.5.1 again a quote from a member of corporate staff; and 3.5.3 a quote from a member of the SLT).

CM Dean Davies

33. The claimant's primary claims, and the majority of the individual claims are specifically claims against CM Dean Davis. As set out above he was originally the second respondent to the claim but the claimant withdrew the claims against him personally; and he has not been called to give evidence by the respondent. The tribunal has therefore, not heard any evidence from him.
34. The consequence is that if we conclude that the claimant has established a prima facie case in respect of all or any of the allegations against him, at least sufficient to satisfy stage 1 of the Igen v Wong test, thereby reversing the burden of proof, that it is inevitable that those claims that will succeed in the absence of any explanation from or evidence from CM Davis.
35. In respect of whether the evidence is sufficient at to satisfy stage 1 of the Igen v Wong test the claimant relies not simply on the events themselves but other matters from which she submits we are entitled to draw inferences as to Mr Davies's behaviour and motivation whether conscious or subconscious.
36. That evidence falls into a number of categories. There are a number of serious criminal allegations made against Mr Davies which are referred to in the evidence, but in respect of which the individuals concerned have not been called to give evidence in the tribunal. As set out above their names have been anonymised, and they have been referred to as Persons A B C and D in these proceedings. In respect of the allegations made by these four people we have no direct evidence as to the allegations. In the circumstances it appears to us that it is not possible for us to make any primary findings of fact and certainly not any finding that any of the underlying allegations are true or untrue. In the absence of being able to make any primary findings of fact as to what did or did not occur, it follows automatically that we are not able to draw any inferences from those primary facts. In the end all we know is that allegations have been made, which we have no means of assessing.
37. The second source of information from which the claimant contends that we can draw inferences as to CM Davies's behaviour towards her, is his behaviour towards others. As set out above, the evidence of Michelle Crossman is that in September 2020 she was present at Yatton Fire Station when person D entered and made serious allegations against CM Davies. On 16th of September 2020 she alleges that she received a phone call from Mr Davis demanding that she told him what had happened. At 3:20 PM the same day he attended at the fire station and confronted her alleging that he had been the victim, and saying "Just remember who your friends are. I'll remember this when you're in trouble ." She felt that the comment was intimidating and disconcerting, and she demanded that he leave, at which point he said "I'll remember this" in a menacing way.

38. The claimant invites us to conclude that his behaviour towards Ms Crossman was aggressive and intimidating, and was similar to his behaviour towards her. That both supports and corroborates her evidence and allows us to draw the inference that his behaviour towards women in particular was aggressive and intimidating. The respondent points to the evidence of Mr. James Coomber, who in fact was a witness for of the claimant, who gives evidence of a very similar confrontation with CM Davies in respect of the events of September 2020, and therefore invites us to the conclusion that it was the events themselves, and/or the perceived participation of the witnesses in those events, which led to his aggressive and intimidating behaviour and there is no difference in the description of his behaviour towards Ms Crossman and that towards Mr Coomber: and that far from supporting the claimant's case it therefore contradicts the conclusion or inference that CM Davies behaved towards women differently to the way he behaved to men.
39. In our judgment it is extremely difficult to draw general conclusions as to CM Davies, particular a conclusion that he bore some general or heightened animosity towards women from this incident itself; and we bear in mind the evidence of Mr Coomber both as to his general impression of CM Davies and his specific evidence of being confronted by him which is very similar to that of the claimant and Michelle Crossman.
40. Thirdly the claimant invites us to draw the inference that in the light of the background documentary evidence set out above, that the claimant's allegations are consistent with other allegations made by a significant number of other female Firefighters and are likely to be true.
41. In our view, it is very difficult to draw inferences as to allegations against one individual on the basis that there have been other allegations of a broadly similar nature within the same organisation. Put simply, in our judgment the fact that other allegations have been made against other individuals does not prove, or even indicate, that the allegations against CM Davies are themselves necessarily true.
42. In our judgment, in the final analysis, the allegations must be judged on their own merits applying the appropriate legal tests. These include, most significantly in this case the reverse burden of proof provisions within the Equality Act, as CM Davies has not given evidence before us.
43. The respondent invites us to take into account CM Davies's responses in the grievance investigation in determining our factual conclusions as to what occurred or what was said and the inferences we can draw from those factual conclusions. As CM Davis has not given evidence it appears to us that we can draw no conclusions as to the truthfulness or accuracy of the accounts given during the course of the internal investigation, and that is simply not open to us either to make primary findings fact on the basis of what was said, or to draw inferences from what was said by him in the course of the investigation.

44. We have relatively sparingly used the notes of the Grievance investigation and the Grievance Report to confirm what was said at the time, which assists in evaluating the evidence before us, but we have not used them as evidence of their truth.

Grievance Process

45. In this section we will outline the grievance process prior to the claimant's resignation. Specific disputes of fact and interpretation relevant to the individual claims will be discussed in relation to the individual claims.
46. Following the incident on the 17th July 2021 the claimant made a further oral complaint to WM Bailey on the 29th November 2021. On the 6th December 2021 she emailed him referring to that conversation, and setting out allegations in general terms that she had been in receipt of direct and indirect discriminatory behaviour from CM Davis, one of which she alleges that WM Bailey had witnessed on the 17th July 2021, and asking whether he had spoken to SM Adrian Davis yet. On 13th December 2021 WM Bailey that replied stating that he had spoken to SM Davis on the 30th November 2021 and that SM Rogers was now the station manager.
47. Before that, on the 9th December 2021, the claimant had spoken to SM Rogers. It was a lengthy conversation in which she set out a number of allegations. He requested that she put this in writing, and on 12th December 2021 she submitted a written grievance to Ms Shiel. SM Rogers accepts that the substance of what he was told by the claimant is reflected in her written grievance. Ms Shiel had a number of queries about the grievance, in particular whether it was being pursued as a protected disclosure under the whistle blowing policy or as a grievance. At a meeting on the 21st December 2021 it was agreed that it was not being pursued under the whistle blowing policy but was in fact a grievance.
48. Under the terms of the grievance policy, in serious cases a Senior Point of Contact (SPOC) should be appointed and in this case it was agreed that the SPOC would be Ms Angela Feeney (Director for Corporate Services). She was very shortly going on leave and not returning until the middle of January 2022.
49. One of the claimant's allegations was that she had lodged an oral grievance with WM Bailey on the 29th November 2021, which she had followed up on the 6th December 2021 and to which by that stage she had received no reply. Ms Feeney took the view that she needed to know whether any informal investigation had in fact been that carried out by WM Bailey and appointed SM Rogers to interview him. SM Rogers interviewed him on 15th January 2022 and spoke to Ms Shiel. Ms Shiel took the view that WM Bailey had not been forthcoming in his interview and asked SM Rogers to ask him further questions at a second interview which took place on the 31st January 2022. In addition SM Rodgers was asked to question CM Davies. Whatever the precise nature of his instructions SM Rogers understood that he was to question WM Bailey and CM Davis about not simply what they had done in reaction to the allegations and whether they had been investigated, but the specific allegations

themselves. On the 11th February 2022 SM Rogers sent an e-mail summarising at his investigations to Ms Feeney and Ms Shiel.

50. In terms of contact with the claimant, Ms Shiel sent an e-mail on the 6th January 2022 and a further e-mail on 3rd March 2022 informing her that the investigating officers had been appointed by the SPOC. This followed a decision by Ms Feeney to appoint Stacy Hopkins (Health Safety Welfare and Well-Being Manager) and SM Rogers as the investigating officers. Ms Feeney herself wrote to the claimant on the 10th March 2022 setting out the appointments and the terms of reference for the investigation. However on 17th March 2022 she was informed by Ms Shiel that Ms Hopkins no longer felt able to be the investigating officer. Ms Feeney's evidence is that there is a limited group of senior managers able to undertake investigations of this kind alongside their other duties, and that she concluded by this point that she should appoint an external investigator. She made inquiries of and a subsequently entered into an agreement with Narrow Quay HR (NQHR) with whom they had previously worked. Following some preliminary matters, they were formally commissioned on the 29th March 2022, with signed agreements being entered into on 31st March 2022. The investigator subsequently appointed was Ms Sarah Martin.
51. On 18th March 2022 the respondent received the claimants first ET claim. For the reasons set out above Ms Feeney's evidence is that she had first made inquiries of NQHR on the 17th March 2022 prior to knowing that the claimant had issued a claim.
52. On 30th March 2022 the claimant's solicitors, who had recently been appointed, wrote to Ms Shiel, asking for a number of pieces of information to be supplied and notifying her of a subject access request. Ms Shiel's evidence is that she collated the evidence in her possession, in particular the policies that have been requested by the claimants solicitor and forwarded them to the respondent's solicitor who had been engaged following receipt of the claimant's claim, and in addition forwarded the data subject request to the appropriate team within the respondent.
53. On the 7th of April 2022 Ms Feeney sent an update to the claimant as to the progress of the grievance. Her evidence is that this whilst she was aware of the letter, this was not a specific reply to the 30th March 2022 letter, as it had been sent to Ms Shiel who was dealing with it.
54. On 12th of April 2022 the claimants solicitor wrote again repeating the requests for information, and informing the respondent of further allegations of rumours of the claimant being discussed on the watch.
55. On the 25th of April 2022 the claimant submitted her resignation.

Direct Discrimination

56. Section 13 (1) Equality Act 2010 provides – *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.*
57. This requires the tribunal to identify three elements of:
- i) Less favourable treatment; which is
 - ii) “Because of” a protected characteristic;
 - iii) In comparison with a an actual or hypothetical comparator.
58. Less favourable treatment – The test for whether treatment is “less favourable” is objective, although the tribunal can take into account the claimant’s perception that it was less favourable in determining whether objectively it was.
59. “Because of” – The nature of the requirement for a finding that any less favourable treatment was “because of” the protected characteristic was summarised by Linden J in *Gould v St John’s Downshire Hill 2021 ICR 1 EAT*: *“The question whether an alleged discriminator acted “because of” a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined the “reason why” question and the test is subjective... For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a “significant influence” on the decision to act in the manner complained of. It need not be the sole ground for the decision... [and] the influence of the protected characteristic may be conscious or subconscious.”*
60. Burden of Proof – S136(2) Equality Act 2010 provides: *‘If there are facts from which the court [or tribunal] 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.’* This is the requirement for the claimant to establish a ‘prima facie case’ of discrimination, ‘stage one’ of the test. If the burden does shift s136 (3) provides that s136(2) does not apply if ‘A shows that A did not contravene the provision’, “stage two’.
61. Evidentially the process required of the tribunal was summarised by Lord Nicholls in *Nagarajan v London Regional Transport 1999 ICR 877, HL*: *‘Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on [protected] grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances.*
62. However in this case in respect of a large number of the claims the alleged discriminator has not been called to give evidence. That in particular is true of the CM

Davis and WM Bailey. It follows that in respect of them at least, that if we conclude there is sufficient evidence to satisfy stage 1 of the test, and that the burden of proof has passed to the respondent it will follow that the respondent that has not been able to satisfy that burden and the claim will be made out.

63. This question is informed, at least in part, by the question of what inferences we can in our view, legitimately draw from the background and surrounding circumstances which are not directly relevant to the factual disputes.
64. Comparators – The nature of the relevant comparator is discussed in relation to each of the claims.

Direct Discrimination – Sex (s13 Equality Act 2010)

Allegation 5.1.1 – failure but to encourage support and facilitate the claimants requested development training and progression within our one and generally is a firefighter either at all or in accordance with normal or expected practise

a – on 18th of October 2021 R2 stopped the claimant from doing work required prior to the incident command course. R2 told the claimant that she must complete the homework at home despite allowing another male colleague to do pre- course learning on shift. R1 failed to advise on or support the claimant completing a practical exercise ahead of the training course.(Comparator D Burgess)

65. This allegation conflates two separate allegations. The first is the claimant's claim that on 18th October 2021 she was using a computer to do some pre-course preparation for the Incident Command course. FF Burgess was sitting in the same room as her also doing pre-course preparation for a Heavy Rescue course that he was due to attend. As she was doing so CM Davis entered the room and informed her that she must complete pre-course learning at home. He did not stop FF Burgess doing his own pre course preparation.
66. FF Burgess accepted that he may have been in the same room at the same time as the claimant using a computer, but denied that he was doing any pre-course preparation, as the heavy rescue course did not require any computer based pre-course learning. He had no recollection of the specific incident.
67. The task for the tribunal is firstly to identify the primary facts; and then to determine what inferences can be drawn from them in the absence of an explanation from CM Davies. The only primary evidence of fact we have comes from the claimant. We accept that her account is accurate, in so far as she and FF Burgess were both using computers in the same room at the same time. The question is whether any inference, and if so what, can be drawn from her account. Put simply if her account is correct, which we accept it is, she was treated differently, and clearly less favourably than FF Burgess, as she was directed to stop using the computer when he was not. Whilst a difference in treatment and a difference in status is not necessarily in and of itself

enough to raise an inference of discrimination, in this instance the claimant and FF Burgess were both ostensibly engaged in the same or very similar activity and the claimant was told to stop whereas he was not. In our judgement this is sufficient to satisfy stage 1 in that it is something from which we could draw an inference of discrimination without an explanation, and therefore is an inference we “must” draw (s136(2) EqA). As there is no explanation it follows that this claim is upheld.

68. The second allegation is that support was not provided to the claimant in respect of completing a practical exercise. The claimant alleges that she was not informed by either CM Davis or WM Bailey that there was a drill that she was required to undertake prior to participating in the incident command course. She contrasts this again with FF Burgess who she alleges was provided with training from FF Erskine prior to his participation in the heavy rescue course.
69. The respondent asserts that neither of these contentions is correct. Firstly it is the responsibility of the individual attending any course to identify the course requirements and fulfil them. It was not the responsibility of CM Davies or WM Bailey to do so and inform the claimant of them. Secondly FF Burgess disputes that he was provided with any training by FF Erskine in respect of the Heavy Rescue Course.
70. In respect of this allegation we are not satisfied that the stage 1 threshold has been reached in that the primary evidence before us it is simply that neither CM Davis nor WM Bailey informed the claimant of the constituent elements of the course she was to attend. However there is no evidence before us that they had any obligation to do so and in those circumstances we are not satisfied at that stage one threshold has been crossed in this case. Secondly and in any event, we accept the evidence of FF Burgess and in any event do not find that there has been less favourable treatment in comparison with the appropriate comparison. For both those reasons this element of this claim is not upheld.

5.1.2 – Belittling and failure to respect the claimant on her ability experience and contribution as a firefighter

- a) on 16th July 2021 R2 told the claimant in front of colleagues that this would be a learning experience for her. R2 ignored the claimants repeated efforts to point out at that she had located the engineers point and what the problem was and how to solve it. R2 listened and praised a male firefighter who repeated what the claimant had said
71. This allegation relates to a lift rescue incident attended by the claimant and FF Foley. On this occasion the fire appliance was being driven by another firefighter and the claimant FF Foley and CM Davis entered the building. There are in fact three separate allegations as part of this overall allegation. Firstly the claimant alleges that the use of the phrase “learning experience” by CM Davis was discriminatory. Secondly she contends that whilst in the building she shouted at down to him at to say that she and FF Foley had found at the engineers point. She received no response but when FF Foley shouted down to CM Davies he replied. Thirdly when CM Davis joined her

and FF Foley she pointed out the cause of the door not opening which was ignored by CM Davis. When FF Foley repeated what she had said he was praised by CM Davis.

72. In respect of the first allegation the claimant contends that she and FF Foley were being treated identically in that it was being contended that this would be a learning experience for them. However she was a firefighter of some years' experience whereas FF Foley was a firefighter in development. It was therefore demeaning for her to be put in the same category as him in relation to a "learning experience".
73. The respondent contends that firefighters of all length of service continually learn from different operational experiences. Whilst the claimant had more experience than FF Foley she had qualified relatively recently and for CM Davies to use the phrase "learning experience" in respect of both of them it is entirely innocuous.
74. In our judgement in respect of this part allegation we are not satisfied that it reaches the threshold from which we could conclude that it was discriminatory, in that the claimant was treated identically to FF Foley and we are not persuaded of the distinction between them drawn by the claimant. It follows that this allegation is not upheld.
75. In respect of the second allegation the facts are not essentially in dispute. It is accepted that CM Davies replied to FF Foley having not previously replied to the claimant. FF Foley's evidence is that he shouted more loudly than the claimant, but does not dispute that CM Davis replied to him and not to the claimant. The respondent submits that there are any number of explanations as to why CM Davies did not reply initially to the claimant. However whilst there may be a number of explanations, we do not have any from CM Davis himself and the question is whether the failure to reply to the claimant when he did reply to FF Foley is sufficient evidence from which we could conclude that it was an act of discrimination in the absence of an explanation.
76. In our judgment this incident should be seen as part of the wider event and in the context of the third allegation, set out below, which in our judgement is much clearer. Given the events of the third allegation which in our judgement we are entitled to have in mind in considering this allegation as it was part of the overall event, we do conclude that the failure to respond to the claimant, but responding to FF Foley, is sufficient evidence from which we could draw the conclusion that it was discriminatory, and therefore must draw it unless there is an explanation provided. As the only person who could provide the explanation it is CM Davis and he has not given evidence it follows that this claim is upheld.
77. In respect of the third allegation we accept the claimant's primary evidence as to what occurred. It follows that in essentially identical circumstances she was treated differently and less favourably than FF Foley. If her evidence is correct, which we accept it is, there is no obvious alternative explanation than that it was discriminatory; and in our judgement this is necessarily evidence from which we could conclude that

this was an act of discrimination in the absence of an explanation. As we have no evidence from CM Davis as to this it follows that this allegation is also upheld.

- b) On 20th of October 2021 R2 ignored the claimant 's attempts to volunteer to use the disc cutter and offered the cutter to FF DB instead. But R2 laughed and sarcastically said "ah sorry Sash at did you want to go next" (Comparator D Burgess)

78. On 20th October 2021 the claimant, FF Foley and FF Burgess were receiving training on the use of a disc cutter. The claimant alleges that she volunteered to go first but that FF Burgess was offered the disc cutter first by CM Davies and she was only permitted to use it after him. This sequence of events is not disputed but the respondent does not accept that this was less favourable treatment, nor that if it was it was because of the claimants sex.

79. The evidence of FF Burgess is that he was being trained on the use of the disc cutter and that he had no specific prior experience. In particular he did not understand that he was selected to go first in order to demonstrate the use of the disc cutter to the claimant and FF Foley. However he was selected by CM Davies to have the first attempt at using the disc cutter ahead of FF Acheson. The respondent contends that there is no magic in the order in which people receive training and that to go first second or third is neither favourable nor less favourable treatment. This is something of a double edged sword as it appears necessarily to follow that there was no reason not to select the claimant first if she had volunteered. In our judgement, on the evidence before us there is no evidence that there was anything to distinguish the claimant from FF Burgess and no reason to select him before her. Given that the claimant had volunteered first there was on the face of it no reason not to permit her the first attempt.

80. In our judgement this is sufficient to allow us to draw the conclusion that it could amount to discrimination in the absence of an explanation. Given that we have no evidence or explanation from CM Davies it follows that this allegation is upheld..

Harassment Related to Sex (s26 Equality Act 2010)

81. S26 Equality Act 2010 provides:

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

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

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

(i) violating B's dignity, or

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

(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.

82. "Related to" - No specific definition is given in the Act, but the phrase allows for a wider causal connection than the "because of" test for direct discrimination. In determining whether specific conduct is related to a particular protected characteristic the tribunal is entitled to take into account the context of the conduct alleged.

83. Harassment /Victimisation – Statutory Alternatives - Harassment claims are statutory alternatives to claims of victimisation by reason of the operation of s212 (1) Equality Act 2010 - "detriment" does not, subject to subsection (5), include conduct which amounts to harassment. As a result where the same allegation is relied on as amounting to both we have considered which it appears to fall more naturally as, and if upheld automatically dismissed the alternative allegation.

6.1.1 persistent sexual derogatory and offensive comments towards or about women so creating an openly and over sexist and discriminatory workplace environment:

a) male colleagues openly and frequently making openly sexist comments with managers joining in and even starting the banter

84. The respondent admits that this allegation is factually correct and that it constituted harassment related to sex. This allegation is therefore upheld on the basis that it is admitted.

b) In or around early June or early July 2021 FF PW referring to a senior female colleague as a "stick with tits" and stating she only got the job because she was female.

85. The claimant alleges that this comment was made by Paul Westerside in the presence of a number others, none of whom have given evidence. FF Westerside denies having said this but accepts having heard the similar phrase "snake with tits". Other witnesses also confirmed having heard the phrase "snake with tits" used as disparaging remarks in the context of some male firefighters discussing their ex-partners.
86. As a general example of the use of disparaging descriptions of women this to us to be an example of the type of behaviour accepted to have occurred in 6. 1.1 (a) above.
87. However, in respect of the specific allegation against FF Westerside the claimant in the course of the internal grievance accepted that she did not remember who had made the remark. It was put to a number of the respondents witness's, which they in general accepted, that her recollection as set out in her grievance and grievance interview closer to the events themselves is likely to be more accurate than current recollection. We also accept that as a broad point. Whilst for the reasons given above we are satisfied that the claimant's evidence is entirely truthful, we are not satisfied in the circumstances that her current recollection is sufficiently reliable to make a finding of fact that the remark was made by FF Westerside.
88. As we have not made a finding supporting the underlying factual allegation it follows that this allegation must be dismissed.
- c) On or around 15th of July 2021 CM Davies laughed in the claimant 's face while stating "If you want to progress I have a stack of paperwork for you to do"
89. It is accepted at that CM Davies made a comment of this type. The respondent submits that on the claimant's own case she was hoping to be promoted to Crew Manager, and an offer to assist in getting experience in the paperwork of a crew manager cannot be unwanted behaviour, nor related to sex, and that it would not be reasonable to consider it to have the proscribed purpose or effect as it is on the face of it clearly an attempt to assist the claimant rather than harass her.
90. In our judgement the respondent is possibly right and the offer may have been a genuine offer of assistance. Equally however it may be that it was, and was intended to be demeaning, as asserted by the claimant. In order to determine which of these is correct we need to be able to determine the context. The only evidence we have comes from the claimant herself and from text messages she sent to her partner at the time which clearly indicate that at the time she understood the offer to be intended to be demeaning. In our judgement if the context described by the claimant is correct, and we accept that it is, the comment could be demeaning and we could conclude in the absence of an explanation that it was discriminatory.

91. We are obliged in those circumstances to conclude that it was discriminatory as there has been no explanation put before us by CM Davies. This claim is therefore upheld.

d) On 16th July 2021 when discussing a new female recruit CM Davies said "is she fit?"

92. It is admitted that this is an act of harassment related to sex.

93. It follows that this allegation is upheld.

e) On 23rd of August 2021 WM SB and CM DS were discussing the fact that they had cheated on their wives. They were showing each other photos of ex-girlfriends on Facebook and insulting their appearance and personality. They were speaking about them in a very derogatory manner. The claimant intervened saying that she didn't think they could say these sorts of things. They claim it was ignored and they carried on talking in the same way

94. This is factually not admitted by the respondent. However the only account we have is that of the claimant, and we accept that it is factually accurate.

95. We accept that this was unwanted conduct. However the issue for us is whether it is related to sex. Of necessity two men who speak about ex-female partners will be referring to women. If they refer to them disparagingly they will equally of necessity be referring the same specific women. Whilst it may be offensive for individuals of whatever sex or sexual orientation to speak disparagingly about ex-partners at work the fact that these individuals were of a particular sex does not make the remarks themselves related to sex within the meaning of s26 in our judgement.

96. It follows that this allegation is not upheld.

6.1.2 persistent use of the term fireman as opposed to firefighter

97. It is not in dispute that the term fireman that was sometimes used. It is the respondent's case that a number of, particularly longer serving firefighters, still use the term fireman. It was also accepted that if used to refer to firefighters generically, including female firefighters, it was capable of constituting unwanted conduct related to sex in that it is capable of bearing the meaning, as the claimant asserts, that female firefighters were not the equal of male fighters. However the respondent contends that context is critical for such a determination. FF Rind gave evidence that she had heard the term being used apparently inadvertently by some male firefighters but that she had not taken offence as she did not view it as deliberate or designed to be demeaning or offensive.

98. The claimant's evidence is four firefighters in particular including FF Westerside and CM Davies used the term and that each time they used it she corrected them, but nothing changed. She was not, however, able to give specific examples of when the

term was used. The evidence others including in particular FF Foley was that he had not heard the claimant complain about the use of the term, although he accepted that this may have happened outside his presence. There is no evidence before us that the term was consistently or regularly used, other than from the claimant, or that she challenged its use on each occasion..

99. On the balance of probabilities we are not persuaded that claimant's account is accurate in this respect. Whilst, therefore it is clear that the term was used, we are not able in our judgment to make any primary findings of fact as to the circumstances of its use from which to draw any specific inferences; and it is not in our view sufficient to draw any such inference from the fact, as is accepted, of the term sometimes being used.

100. It follows in our judgement that in respect of this allegation the primary evidence is not sufficient to allow us to make findings from which we could draw an inference of discrimination; and this allegation is therefore not upheld.

6.1.3 FPW stating I will stop saying fireman when they stop specifically recruiting fire women

101. FF Westerside gave evidence that he used the term fireman in terms very similar to those described by the claimant, although he did not accept that he directed it towards the claimant or described her or any other female firefighter as a fireman. He fully accepted, however that the claimant may have overheard him using the term. He stated that he agreed that it would be appropriate for all firefighters irrespective of their sex to be referred to as firefighters. However he stated that senior management clearly had a policy of referring to female firefighters as "female firefighters" and distinguishing them by reason of their sex. In those circumstances he did not see how it could be objectionable to refer to male firefighters as firemen, and would and had continued to do so. We accept FF Westerside's evidence as to why and the context in which he used the term. Whilst not everyone would agree with his analysis or conclusion, and whilst the comments were clearly unwanted by the claimant and necessarily related to sex we are not satisfied (applying s 26(4)) that it was reasonable in the circumstances for the claimant to conclude that in those circumstances the use of the term create any of the proscribed environments or effects.

6.1.4 In May/June 2021 CM Davies telling colleagues that he and the claimant had watched porn together had a "bonding moment" they were now at "next level" whilst moving uncomfortably close, putting his arm around her or touching her so inferring an intimate relationship or closeness.

102. In respect of this incident there is no evidence other than that of the claimant, but she was able to provide a detailed account of the event and its context. If we accept her evidence it is either clearly sexual harassment, or very least it is something from which sexual harassment can be inferred in the absence of an explanation. In our judgement unless we reject the evidence entirely it is necessarily sufficient to satisfy the stage 1 test and reverse the burden of proof.

103. We accept the evidence of the claimant. In the absence of any evidence from CM Davis there is no explanation before us; and that this claim is upheld.

6.1.5 withdrawn as a duplicate claim

6.1.6 withdrawn as a duplicate claim

6.1.7 On 17th of July 2021 when discussing a female FF, Crew Manager from a previous watch said "yeah she's been in the gym, she should have been in the kitchen working up a sweat instead." Claimants male colleagues including WM SB laughed at the comment

104. It is not admitted by the respondent factually that this occurred. However we only have the claimant's evidence in respect of it which we accept. Whilst the phrase is capable of a number of interpretations, including the literal one that they were discussing a female firefighter who was in the gym when she should have been helping in the kitchen, it is equally possible that it simply reflects straightforwardly sexist assumption that a woman's place was in the kitchen.

105. In our judgement we could draw the inference that it was the latter in the absence of an explanation. As there is no explanation advanced it follows that we must draw that inference and this claim is upheld.

6.1.8 On 17th July 2021 CM Davies acted aggressively towards the claimant, shouting, moving overly close whilst waving his arms close to the claimant and making her feel physically threatened.

6.1.9 on the 17th of July 2021 CM Davies said to the claimant "he was not the worst for being sexist" and "if you don't want to work in a sexist organisation you're in the wrong job"

6.1.10 on 17th July 2021 CM Davies said "I have no problem saying this in front of our watch manager, if you think you're going to use me to get where you want to be you have another think coming".

106. Allegation 6.1.8 is also brought and admitted as an act of victimisation and therefore must fail as an allegation of harassment (Equality Act s212(1) above). For the avoidance of doubt the claimant has not invited us to dismiss the victimisation claim and consider this solely as harassment. In the circumstances, and given that these allegations are part of one course of conduct we have considered them firstly as acts of victimisation. For the reasons given below they are upheld as acts of victimisation, and claims that they are also acts of harassment are bound to be dismissed.

107. The factual allegations set out separately as 6.1.8 and 6.1.10 are both also included factually within allegation 7.2.2. The factual allegation in 7.2.1 is only brought as a claim of victimisation and is not also brought as an act of harassment. For the

reasons given above we have treated them as factually part of a course of conduct which amounted to victimisation.

6.1.11 - In or around end of July or early August 2021 CM Davies stated in front of male colleagues that "I would have you on a community visit but not on a fire call".

108. It is not in dispute that this was said, nor that it is unwanted conduct, nor that it could have the proscribed purpose or effect. The respondent submits, however, that it was not related to sex.

109. In our judgment, given that the claimant was a qualified firefighter, for CM Davies to say that he would not have her on fire call but on a community visit is necessarily unwanted conduct. The issue is whether it is related to sex. It is possible that it was simply personal to the claimant, or it may imply that he more generally made a sexist assumption that he did not want female firefighters on fire calls and thought them more suited to community visits. In our judgment we could infer the latter in the absence of an explanation; and it follows that we must draw that inference in the absence of any explanation from CM Davies.

110. This allegation is therefore upheld.

6.1.12 (withdrawn as a duplicate claim)

6.1.13 - On 28th of November 2021 when discussing a pregnant female firefighter a male fire firefighter said "Well knowing her, you won't see her again for three years."

111. Again the only evidence in respect of this remark being said comes from the claimant. FF Burgess, who accepts that he was present at Kingswood Fire Station with the claimant, but did not hear the remark. FF Westerside was not present but gave evidence that he knew the individual being referred to (which necessarily supports the claimants evidence that it was said but also implies that it was a reference to a specific individual)) and that it was true that she had previously been absent for three years for in similar circumstances. If this is correct the natural inference is that it was a specific, albeit potentially offensive remark about an individual firefighter and was not generally related to sex.

112. In our judgement in those circumstances we are not satisfied that we could draw the inference that this is related to sex without an explanation. This allegation is not therefore upheld.

6.1.14 on 29th of November 2021 CM Davies watching staring smirking and laughing at the claimant on three occasions while she was in the gym on her own

113. The only evidence in respect of this allegation comes from the claimant. If her description is accurate it is either self-evidently sexual harassment, or at very least an

allegation from which the inference that it was sexual harassment could be drawn in the absence of an explanation.

114. We do accept the claimant's evidence and in our judgement in the absence of an explanation from CM Davies this claim is upheld.

6.1.15 Discussing the claimant in derogatory terms such as lazy, withdrawn and quiet

115. It is not in dispute that a number of the claimant's colleagues did regard her as lazy, in the sense that she avoided certain duties. The evidence of FF Rachel Rind is that the claimant did not participate in the kitchen duties at the start or the end of shift and never did a kit check with her, and that "when people don't pull their weight on a watch it gets noticed". Similarly FF Foley also describes her as not doing kit checks and that "..in reality she avoided work". In respect of being withdrawn the evidence of FF Foley is that ".. it seemed to me that she was never there" and he describes her as spending a lot of time in her room.

116. The claimant does not essentially dispute this, but does dispute the timing. She contends that this only happened later on in a reaction to the discrimination she suffered, in particular from CM Davies. She relies on the evidence from her colleagues from Gloucestershire Fire Service and invites us to conclude that even if correct for the latter period of her service, this evidence is not accurate in relation to the earlier period.

117. The picture painted before us of the claimant during her service in Gloucestershire Fire Service is diametrically different to that in Avon. The question for us is whether we draw the conclusion that one or other set of firefighters is not telling the truth, and if so which; or that the claimant's behaviour was genuinely different or at least perceived to be different from the beginning in Avonmouth Green Watch. As is set out above we are entirely satisfied that all of the witnesses gave entirely honest and reliable evidence, and that significant weight can be placed on the evidence of FF Rind and FF Foley. As is set out above the claimant invites us to conclude that FF Rind has lied both to us and to the internal grievance investigation. In our judgement the basis for that assertion is extremely thin; and that it is notable that FF Rind's evidence in this regard is supported by FF Foley, against whom no such allegation is made.

118. We have concluded that we accept the respondents evidence in this regard, and accept that her colleagues genuinely held and expressed the view that she was lazy, withdrawn, and quiet.

119. Whilst this is necessarily unwanted conduct, it is necessarily not in our view related to sex as it was a view based on their own interactions with the claimant herself. This claim is therefore dismissed.

6.1.16 – Withdrawn as a duplicate.

6.1.17- Withdrawn as a duplicate

Harassment related to sexual orientation (s26 Equality Act 2010)

6.1.18 in November 2021 whilst discussing the international gay rugby team R2 put his hands over his bum and said I don't think that's for me what happens in the showers

120. The only evidence we have in respect of this allegation comes from the claimant. If we accept it the comment is on its face homophobic, even if intended as a joke or banter. We accept the claimant's evidence that it was said and that it was unwanted conduct. It is self-evidently related to sexual orientation and is clearly sufficient to satisfy stage 1 and require an explanation.

121. In the absence of an explanation from CM Davies this allegation is upheld.

6.1.19 – Withdrawn

Harassment related to sex and/or sexual orientation S 26 Equality Act 2010

6.1.20 - On 19th May 2021 CM Davies asking the claimant is FF TF "your type" whilst asking "Do men do it or not for you sexually"

122. It is accepted that a comment to this effect was made and that it relates to sex and/or sexual orientation, but not that it was unwanted, nor that it had the proscribed effect. The claimant is in a same sex relationship, as was known within her watch. In our judgement for CM Davies to ask an openly gay woman about whether she is sexually attracted to men, and to FF Foley in particular, is necessarily related to sexual orientation and we accept the claimant's evidence that it was unwanted. We also accept in the circumstances that that it was reasonable for it to have had the proscribed effect.

123. In our view the evidence is clearly sufficient to allow us to conclude that the comment could be discriminatory in the absence of an explanation. As none has been given before us, it follows that this allegation is upheld.

Victimisation

124. Section 27 Equality Act 2010 provides:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

- (a) bringing proceedings under this Act;*
- (b) giving evidence or information in connection with proceedings under this Act;*
- (c) doing any other thing for the purposes of or in connection with this Act;*
- (d) making an allegation (whether or not express) that A or another person has contravened this Act.*

125. The claimant originally relied on five protected acts (PA). PA 1 is no longer relied on. PAs 2-5 (set out below) are all accepted to be protected acts within the meaning of s27:

- i) PA2 – Allegations about alleged discriminatory conduct by CM Davies made to WM Bailey on 16th July 2021;
- ii) PA3 – The claimants written grievance of 12th December 2021;
- iii) PA4 – The claimants Teams meeting with Karen Shiel on 21st December 2021;
- iv) PA 5 - The claimant's first ET claim -28th February 2022.

Detriments

7.2.1 On 17th July 2021 on arrival CM Davies greeted everyone but the claimant.

126. As is set out below, the next allegation is admitted to be an act of victimisation. Given that this is essentially part of the same incident if the claimant's evidence is accepted, which we do, it raises the obvious inference that the reason that CM Davies did not greet her was also because of the earlier protected act, and was in fact the first detriment. For the reasons set out above in our view it is more realistic to treat all of the acts alleged against CM Davies on 17th July 2021 as a single course of conduct.

127. In our judgment this is sufficient to allow us to hold that we could draw the inference in the absence of an explanation that this was an act of victimisation. As CM Davies has not given evidence it follows that this claim must be upheld.

7.2.2 on 17th July 2021 DD acted in a physically threatening and offensive manner towards the claimant challenging her because of her protected act DD aggressively asserted I have

no problem saying this in front of our watch manager if you think you're going to use me to get where you want to be you have another thing coming

128. It is accepted at that this is factually accurate, and that it was an act of victimisation. For the avoidance of doubt, and as is set out above it includes the factual allegations of harassment contained 6.1.8 and 6.1.10 above, and we have treated it as a statutory alternative to them.

7.2.3 On 17th July 2021 WM SB knowingly denied he heard CM Davies say "is she fit" demonstrating his support for CM Davies and allowing the discriminatory conduct towards the claimant to continue

129. In our judgement just as the allegations against CM Davies should be treated as a single course of conduct so should those against WM Bailey, and this allegation must be taken in conjunction with the next allegation. We accept the claimant's evidence as to the factual allegations in both cases. In our judgement for the reasons set out below, the next allegation in particular requires an explanation. Given that in our judgement we are entitled to draw the inference that the explanation is the previous complaint, we are also entitled to draw the inference that the reason for the denial in this allegation was also the complaint.

130. It equally follows that in the absence of any evidence from or explanation from WM Bailey that we are bound to uphold this allegation.

7. 2.4 On 17th July 2021 WM SB failed to intervene when CM Davies threatened the claimant so disempowering her and creating a climate of fear for the claimant whilst at work

131. As is set out above it is accepted that CM Davies behaved aggressively towards the claimant and that that was an act of victimisation. We accept that SM Bailey was present and witnessed this, and it is not in dispute that the first protected act was a disclosure to WM Bailey about CM Davies the day before. Given that SM Bailey was now witnessing conduct of type alleged by the claimant the day before, thereby at least supporting if not confirming her account, and given that he necessarily had a duty of care to her, it is extremely difficult to understand why WM Bailey did not intervene. The failure to do so is so remarkable, and so beyond any reasonable management response that in our judgement we are entitled to infer that there must have been some specific reason for his failure to do so; and we could draw the inference that the reason was the complaint itself.

132. In the absence of any explanation from WM Bailey this allegation is also upheld.

7. 2.5 - On 26 July 2021 CM Davies belittling and laughing at the claimant for her efforts in saving a man's life.

133. The evidence in relation to this is not at all clear. In her witness statement the claimant alleges that it was members of her watch who were annoyed with her and

she makes no specific allegation against CM Davies in relation to this incident at all. Her criticism of him is confined to an assertion that he subsequently gave false information to the internal grievance investigation.

134. In the circumstances we are not satisfied that there is sufficient evidence before us to make the finding of fact that CM Davies acted as alleged.

135. This allegation is therefore dismissed.

7.2.6 in or around the end of July and beginning of August 2021 whilst complementing other colleagues DD stated I would have you on a community visit but not on a fire call so undermining the claimants ability as an operational firefighter.

136. This allegation has already been upheld as an allegation of sex related harassment and is bound to be dismissed as an allegation of victimisation (s212 (1) EqA).

7.2.7 in September 2021 despite providing permission for self-study R2 said in front of colleagues "Someone go and wake Sasha up". The claimant alleges that this led colleagues to believe the claimant was not pulling her weight.

137. The claimant alleges that she overheard CM Davies saying this whilst she was on the stairs. Whilst it is capable of being seen as innocuous, it is also capable of being viewed as part of a pattern of CM Davies demeaning the claimant following the earlier protected acts. In our view the inference that it was an act of victimisation could be drawn in the absence of an explanation, and it follows that as no explanation has been provided that this claim is upheld.

7.2.8 in or around 19th and 20th 4th September 2021 WM SB failed to ensure the claimants training requests were properly processed and misled the claimant by stating the requests had been chased on multiple occasions

138. The claimants evidence is that the training requests were signed off on 15th July 2021. She chased WM Bailey orally from mid-August and on 23rd August 2021 he told her that he had chased Resource Planning who were useless. In fact when she herself contacted Resource Planning by email on 19th September 2021 she was told the requests had not been received; and when she re-submitted them they were processed within a day.

139. We accept this evidence, and it is clear that WM Bailey did not tell the claimant the truth. There may be a number of explanations, but in our judgment it does require one. In the absence of any explanation we could conclude that this in an act of victimisation therefore this claim is upheld.

7.2.9 On 10th October 2021 WM SB and CM Davies selected the claimant to attend a routine course knowingly interfering with her preparation time for the Incident Command coursework.

140. The evidence is not in dispute that the claimant was required to attend an RTC OPS course on 10th October 2021 which she was not originally scheduled to attend having attended the same course some months previously.
141. In our judgment this does require explanation. In her evidence the claimant suggested that the male firefighters in fact wanted to remain in the fire station and not attend the course in order to watch a World Cup football match. If true that might amount to some form of discrimination, but not on the face of it victimisation.
142. The respondents explanation is that someone had to attend as it was necessary to send someone with the fire appliance. Ordinarily that would not have been the claimant as she had already been on the course. However the claimant was not trained in Heavy Rescue and in order to maintain a full complement of Heavy Rescue trained firefighters it was necessary to for the others to remain. It followed that the claimant was selected to go. If this is correct, even if the claimant perceived it as unfair, the decision was not causally connected to the protected act of 16th July 2021, which is the only protected act prior to this alleged detriment.
143. We accept this evidence and it follows that in respect of this allegation the respondent has satisfied the burden of proof, and that it is dismissed.

7.2.10 On 18th October 2021 CM Davies stopped the claimant from doing preparation for her incident command course whilst on duty despite allowing others to prepare in work time.

144. As set out above we have found that this was an act of harassment and it follows that it must be dismissed as a claim of victimisation as a statutory alternative (s212(1) EqA 2010).

7.2.11 At no point before the incident command course was the claimant told about the needs to carry out a practical exercise and no such exercise was arranged for her what management knew about this as it had been arranged for others attending

145. We have dismissed this allegation on the facts as an act of harassment for the reasons set out above. For the same reason, that there was on the evidence before us no obligation on the respondent to tell the claimant about, it must be dismissed on the facts as an allegation of victimisation. In our judgement in those circumstances there is no primary evidence from which we could conclude that the failure to do so was causally linked to the protected disclosure of 16th July 2021.
146. In those circumstances this claim must be dismissed.

7.2.12 on 18th of October 2021 DD threatened the claimant with a performance improvement plan

147. The evidence before us is that if there are concerns about a firefighter's performance the first stage is a Performance Development Plan during which specific aims or goals would be identified. If they were not achieved the next stage would be to consider a Performance Improvement Plan. In both cases there would be meetings arranged and the specific requirements set out. It is not in dispute that the claimant was never invited to any such meeting in respect of either a PDP or PIP, nor that CM Davies did not have the authority to impose one. It is equally not in dispute that he did inform the claimant that she would be subject to a PIP if she did not start to socialise the team.

148. In the circumstances we are satisfied that the threat of a PIP which CM Davies had no authority to impose is something from which we could draw an inference of victimisation. As we have no evidence or explanation from CM Davies this allegation must be upheld.

7.2.13 On 20th October 2021 DD humiliated and undermined the claimant during a training exercise.

149. This is the same factual allegation as 5.1. 2 (a) set out above which we have broadly accepted includes acts of direct sex discrimination. In the circumstances in our view whether or not it is also an act of victimisation adds nothing to the claim or the findings already made.

7.2.14 – On 22nd November 2021 the claimant was subject to aggressive and abusive behaviour by FF Erskine.

150. It is not in dispute that on 29th November 2021 Avonmouth Green Watch was moving to a new station. Whilst there is some dispute as to the precise language (whether FF Erskine described the claimant as fucking disgusting, or as he suggested in the internal grievance that he was “fucking disgusted”) it is not in dispute that he reacted aggressively and abusively upon discovering that the claimant was clearing her locker in her room and not assisting the rest of the crew.

151. The claimant's case is that his actions were a consequence of CM Davies's “narrative” that she was lazy and avoiding work and therefore a consequence of her protected acts. However for the reasons set out above in our view that opinion was genuinely widespread, and not related to the protected act. If therefore FF Erskine's behaviour was affected by this belief, there is no evidence that it came from CM Davies or was in any way linked to the protected acts.

152. This claim must therefore be dismissed.

7.2.15 – On 29th November 2021 CM Davies watched stared and smirked at the claimant with the intention of making her feel uncomfortable whilst that she was at the gym on her own.

153. We have upheld this actual complaint as an act of harassment related to sex. For the reasons set out above it follows that it must be dismissed as an allegation of victimisation (S212(1)) EqA 2010)

7.2.16 On 29th November 2021, 6th December and 13th December 2021 WM SB did not advance the claimant's grievance as he had promised and advised

154. As is set out above it is not in dispute that the claimant made a complaint about CM Davies to WM Bailey on 16th July 2021, nor that she complained again to him orally on 29th November 2021. Her evidence, which we accept, is that he said he would raise this with both CM Davies and SM Adrian Davies. On 6th December 2021 the claimant emailed for an update to which she did not receive a response until 13th December 2021.

155. Again as is set out above on 9th December 2021 she contacted the newly appointed SM Rogers. He immediately treated them as very serious allegations, but it is clear from his subsequent interviews with WM Bailey, that WM Bailey had taken no action in respect of them between 29th November 2021 and 9th December 2021.

156. In our judgement the failure to act by WM Bailey requires explanation. There may be a number of explanations but in our judgement we could conclude, particularly given his failure to act on the complaint and events of 17th July 2021 that the reason was the protected act itself. In our judgment this is sufficient to satisfy stage 1 of the test. As we have no explanation from WM Bailey it follows that this claim must be upheld.

7.2.17 On or around 26th of January and 29th of March 2022 a group of R1's firefighters were describing the claimant in derogatory terms such as lazy withdrawn and quiet.

157. For the reasons set out above we accept this view was genuinely held by a number of members of Avonmouth Green Watch. Equally the evidence before us, particularly from FF Burgess is that he had heard similar views expressed at other Fire Stations and it is clear that this view had circulated. The claimant's case is that the allegation in particular that she was lazy had itself been invented as a result of the protected disclosure, and that both the opinion itself and its wider dissemination are acts of victimisation. In the light of our findings as set out above, it follows that we do not in this case accept the basic premise of the claimant's case. There is in our view no evidence from which we could conclude that the opinion itself, or its circulation were causally linked to any of the protected acts and this claim must be dismissed.

7.2.18 on or around 18th of February 2022 the claimant's car suffered malicious damage which resulted in a flat tyre.

158. Overnight on 18th February the claimant's car tyre was slashed. CCTV footage from a neighbour's house showed the presence of a car of the same type and colour

as that owned by CM Davies in the vicinity. CM Davies had been interviewed by SM Rogers on 7th February about the claimant's allegations. The claimant's evidence is that she can think of no one else who would have done this. From this she invites us to conclude that the perpetrator was CM Davies and that it was a direct consequence of the protected act.

159. In our judgement if we could make a primary finding of fact on the balance of probabilities that CM Davies had been responsible then the conclusion that it was an act of victimisation could be inferred. However the question is whether those facts are sufficient to conclude on the balance of probabilities that he was responsible. In our judgment whilst they inevitably cause suspicion to fall on CM Davies, there is simply insufficient evidence for us to make a finding of fact that he was responsible.

160. It follows that this claim must be dismissed.

7.2.19 By a letter on the 7th April 2022 AF of R1 ignored and failed to respond to the claimant's request for details of what investigatory steps had been carried out into her grievance as set out in her solicitors letter dated 30th of March 2022.

161. This claim is based on two allegations. Firstly that Ms Feeny had failed to respond to the letter of 30th March 2022, and that she had done so because of one or more of the protected acts. Ms Feeny's evidence is that the letter of 7th April 2022 was not a response to the claimant's solicitors letter of 30th March 2022. She was aware of the letter, but it had been addressed to and was being dealt with by Ms Shiel. Her letter of 7th April 2022 was, amongst other things, an update letter as to the grievance investigation and to inform the claimant amongst other things of the appointment of the external investigator.

162. If Ms Feeny's evidence is accepted, the simple explanation as to why the information requested was not supplied in this letter was not because the claimant had done any of the protected acts, but because the letter had been addressed to Ms Shiel and was being dealt with by her. There was no causal link between any protected act and the response.

163. We do accept Ms Feeny's evidence, and this claim is dismissed

7.2.20 On or around 19th of April 2022 KS of R1 failed to respond to the claimant 's request for information and documents as sent by her representatives on 12th of April 2022

164. The letter of 12th April 2022 from the claimant's solicitor requested that the information be supplied by 19th April 2022. Again the basis of this allegation is that Ms Shiel did not supply the information by that date, and did not do so because the claimant had done one or more of the protected acts.

165. Ms Shiel's evidence is that in respect of the information sought, enquiries were already in hand as a result of the 30th March 2022 letter, that she had sent the SAR to the respondent's Data Protection Team, and that she was collating the policies

requested. Her evidence is therefore, that although not supplied by 19th April 2022 all of the claimant's requests were being dealt with. By this stage the claimant's first ET1 had been received and she was liaising with respondent's solicitors in respect of the response.

166. Again if her evidence is accepted the claimant's requests were being dealt with, albeit not in the timescale imposed by the claimant. There was no underlying failure to respond and she was dealing with the requests appropriately. We accept the evidence and in our judgment there is no evidence from which we could conclude that the failure to respond by 19th April was causally linked to any protected act.

167. This claim must therefore also be dismissed.

7. 2.21 - *withdrawn*

7.2.22 On or around 20th April 2022 claimant became aware that R1 aligned themselves with CM Davies and supported his version of events as opposed to the claimant's in the contents of R1 and R2's at ET3 response to the first claim

168. This claim is based on two allegations. The first is as set out above that in response to the first claim, that the respondent aligned its case that of CM Davies. The second is that even if that is wrong they supported CM Davies by providing him with legal representation, and in particular the same legal representation as the respondent, thereby causing the claimant to infer that they were supporting him.

169. This allegation is subject to the judicial process immunity argument which is dealt with elsewhere.

170. Irrespective of that argument the respondent contends that the first proposition is factually incorrect, as the Grounds of Resistance expressly do not adopt CM Davies's position, and make it plain that the respondent is specifically not supporting the denials of CM Davies as the internal grievance had not concluded. This appears to us to be factually correct.

171. In respect of the second their evidence is that at the point the ET3 was submitted, CM Davies was an employee of theirs who had not, at that stage been found to have committed any of the acts alleged against him. In those circumstances they could not assume that he was guilty, and were bound to provide legal representation unless and until he was found to have committed any of the acts alleged.

172. In neither case was the reason for the respondent's action because the claimant had done a protected act. We accept this evidence and irrespective of judicial process immunity argument are not persuaded that there was any causal link between these actions and any protected act. Therefore this claim fails.

7.2 .23 – *withdrawn*

7.2.24 *Her dismissal*

7.2.25- 7.2.28 *withdrawn*

Time Limits

173. The respondent submits that any claim relating to events prior to 22nd September 2021 are out of time (first claim); or 28th April 2022 (second claim).

174. In our judgement the bulk of the complaints we have upheld concern CM Davies and WM Bailey. In respect of both the last acts are in time in relation to the first claim. That raises the question of whether the actions of each of CM Davies and WM Bailey can be regarded as a continuing act. As was held in *Aziz v FDA* [2010] EWCA one relevant factor is whether the same individuals are involved in the series of events. This is not conclusive, and did not in *Aziz* itself result in a finding of a continuing act. The claimant contends, particularly in relation to CM Davies, that she was the subject of a longstanding campaign against her and the allegations are not separate individual events but necessarily connected and part of a continuing act. In our judgement the allegations we have upheld against both CM Davies and WM Bailey demonstrate a consistent pattern of behaviour by both over a relatively short period of time and do form part of a continuing act, and it follows that all of the claims that we have upheld have been presented in time.

Judicial Process Immunity

175. As set out above, we have not upheld any of the allegations to which the respondent asserts that Judicial Process Immunity attaches, and so the importance of this issue has fallen away. In brief, however, the claimant asserts that specifically in relation the ET3, that whilst immunity may attach to the contents of the ET3, that it does not attach to the decision itself of the respondent to support CM Davies; and that this is therefore an “underhand or improper means” of defeating the claimant’s claims (See: *Singh v Governing Body of Moorlands Primary School and others* [2013] EWCA Civ 909 – Lewison LJ at paras 71/72) taking this case outside the ambit of judicial process immunity. For the reasons set out above we have accepted the respondents evidence and reasoning and would not have found that the respondent had done anything underhand or improper in respect of this Had it been necessary we would have upheld the respondent’s contention that judicial process immunity applied.

Constructive Dismissal

176. The claimant relies on a number of separate matters as constituting individually or cumulatively a breach of the implied term of mutual trust and confidence in relation to the claim for constructive dismissal:-
- i) *The matters relied on individually or cumulatively as the last straw (see para 183 below) are in and of themselves breaches of the implied term and/or are capable of amounting to the last straw within the Omilaju definition (See para 184 below);*
 - ii) *That the conduct of the grievance investigation involved breaches of policy and/or failures promptly to investigate the grievance which are themselves breaches of the implied term;*
 - iii) *Even if she is wrong in respect of the last straw events and/or the allegations in respect of the conduct of the grievance investigation, that the underlying events relied on as acts of discrimination above are themselves necessarily breaches of the implied term and she had not affirmed the contract in respect of them (See Kaur below);*
 - iv) *Even if the events alleged to constitute direct discrimination and/or harassment and/or victimisation are not upheld as acts of discrimination they are individually or cumulatively capable of amounting to breaches of the implied term*

Implied Term of Mutual Trust and Confidence

177. The implied term of mutual trust and confidence is set out in Malik v. Bank of Credit; Mahmud v. Bank of Credit (19987 AC 20; 1199713 All ER 1; 119971 IRLR 462; 1199713 WLR 95; 119977 ICR 606 . An employer shall not:

"...without reasonable and proper cause, conduct itself in a manner calculated (or) likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

178. In his skeleton argument Mr Probert relies primarily on the fundamental breaches alleged at iii) and iv) above, on the basis that even if the last straws cannot amount to such and/or the complaints as to the grievance process do not amount to a fundamental breach, that the claimant is in any event entitled to rely on the underlying acts of discrimination as being in and of themselves fundamental breaches and/or breaches of the implied term as she had not affirmed the contract in relation to them.

179. In our judgement this must be correct, and the claimant's claim of constructive dismissal is bound to succeed, on this basis alone.

180. For that reason we will deal briefly with the other points.

181. Last Straw – As is set out in the List of Issues the matters set out at paras 15, 26(d), 28 and 31 of the second claim are those relied on as the last straw:

- i) Para 15 – The punctured tyre incident 18th February 2022;
- ii) Para 26(d) – This refers to part of the contents of the claimant’s solicitor’s letter to the respondent of 12th April 2022;
- iii) Para 28 – The claimant alleges that on 19th April 2022 she was informed that an FF from Avon FRS was spreading malicious gossip about her on a training course;
- iv) Para 31 – The claimant complains of the respondent’s failure to suspend CM Davies; and of supporting him and his version of events.

182. We are not satisfied that any of these in and of themselves amounts to a last straw within the meaning set out in *Omilaju v Waltham Forest LBC [2005] EWCA Civ 1493*. However, as for the reasons set out above we accept that the absence of a last straw is not itself determinative of whether there has been a repudiatory breach of contract (see: *Kaur v London Teaching Hospitals NHS Trust [2019] EWCA*), and as we have found that the acts of discrimination we have upheld were fundamental and repudiatory breaches, and that the contract was not affirmed by the claimant the absence of a final straw is not in our judgment in this case fatal to the claimants claim.

Affirmation

183. In our judgement the claimant cannot be said to have affirmed the contract in relation to those underlying breaches. She, as is accepted, made complaints amounting to protected acts in relation to them, she lodged a formal grievance on 12th December 2021, and brought tribunal proceedings on 28th February 2022. In those circumstances it is not possible, in our judgement to conclude that she affirmed the contract.

Discriminatory Dismissal

184. We are satisfied that dismissal was a discriminatory in so far as all of the fundamental breaches of contract that we have upheld are in and of themselves acts of discrimination. They necessarily sufficiently influenced the overall repudiatory breach so as to render the dismissal discriminatory: (*De Lacey v Wechsels Ltd [2021]*).

Employment Judge Cadney
Dated: 9th February 2024

Judgment sent to the Parties on the 20th of February 2024

For the Tribunal Office