EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Harman	**v**	**TMD Technologies Limited**

Heard at: Watford **On**: 2, 3 & 4 May 2017

Before: Employment Judge R Lewis
Mr S Bury
Mr W Dykes

Appearances

For the Claimant: In person
For the Respondent: Ms S Keogh, Counsel

JUDGMENT

1. The respondent did not discriminate against the claimant because of his age, and his complaint of age discrimination fails and is dismissed.

2. The respondent's application for an order for costs succeeds.

3. The claimant is ordered to pay to the respondent costs in the sum of £5,000.00.

REASONS

1. Counsel for the respondent asked for these reasons in writing at the end of the hearing. This was the hearing of a claim presented, significantly out of time, on 9 September 2016. The claimant at all material times was represented by Messrs Setfords, solicitors. Neither the tribunal nor the respondent received any indication that the claimant would act in person until the first morning of the hearing, 2 May 2017.

2. There had been a preliminary hearing on 1 December 2016 (Employment Judge Bedeau) at which the unfair dismissal claim had been struck out for lack of jurisdiction (presented out of time) and time had been extended for presentation of the age discrimination claim. Judge Bedeau's order (43) set

out that the sole question before the tribunal was whether the claimant had been the victim of direct discrimination because of age in his selection and dismissal for redundancy.

3. The parties presented an agreed bundle of approximately 400 pages. Witness statements had been exchanged in good time before the hearing. The claimant was the only witness on his own behalf. The respondent had served the statements of two witnesses, both of whom in the event were called. They were Mrs Tracey Ledwell, engineering and programmes director and Mr David Brown, managing director. The respondent's side produced a cast list and chronology, and skeleton arguments.

4. We record a number of case management and related issues which arose:-

   4.1 Judge Bedeau had ordered the respondent to serve details of any defence of justification to be relied upon. Ms Keogh confirmed that the defence of justification was not relied upon.

   4.2 The judge explained that he was not available on the third morning of the hearing due to another listing commitment. It was agreed that the claimant's case would be heard first, and that as indicated by Judge Bedeau liability would be determined before a remedy hearing, which was timetabled for the afternoon of the third day and the fourth day if required.

   4.3 The claimant gave no indication of being unprepared to proceed. In recognition of any difficulties which he might experience we took a number of breaks in the course of the hearing. In particular, after Ms Keogh had finished closing submissions, we adjourned to enable Mr Harman to complete his preparation of his submissions.

   4.4 At the start of the hearing, Ms Keogh sought clarification of whether any named comparator was relied upon. She told the tribunal that the claimant's solicitors (who had been on record from commencement of this matter until the start of the hearing) had never clarified the identity of any actual comparator. In reply the claimant named Mr Robert Dent as comparator. Ms Keogh told the tribunal that Mr Dent had not previously been identified as a comparator.

   4.5 In the event, we dealt with the matter pragmatically, and record our appreciation of the assistance given to the tribunal by the respondent. During the break taken by the tribunal to read statements and a selection of the bundle, the respondent was able to give Ms Keogh sufficient instructions to enable her to cross-examine about Mr Dent. As a matter of formality, the tribunal permitted the claimant to amend his claim to rely upon Mr Dent as comparator, while stressing that that was an exceptional and generous exercise of discretion at the start of a long prepared hearing. In consequence, Mrs Ledwell was permitted to provide a supplemental statement, answering the case on Mr Dent and

explaining why the respondent did not regard him as an appropriate comparator.

4.6 A more serious difficulty arose in and after cross-examination. The claimant questioned both witnesses about a number of aspects of the process which had been followed in the redundancy exercise. Many of his questions would have been more appropriate to a claim of unfair dismissal.

4.7 The claimant did not ask either witness about age discrimination. While do not expect a member of the public to follow the practice of counsel or solicitor by formally putting challenge to his opponent's case, the claimant simply did not ask either witness a single question which touched in any respect on the discrimination case, or in any way engaged the language of equality or discrimination law. It was in response to concern about this omission that the judge formally in his questions asked each witness whether age had played a part in the events in question. Both witnesses denied that it had.

4.8 Before submissions therefore, Ms Keogh asked the tribunal to seek clarification of the discrimination case to be met, asserting that as she was to give the first submissions, it was not clear which part of the respondent's case had been challenged on grounds of discrimination. After a short adjournment, the tribunal asked Mr Harman again to clarify who on behalf of the company had discriminated against him (meaning which named individuals) and what had each done which was discriminatory. In reply, the claimant stated that Mr David Pike, his former line manager, had discriminated against him by in effect intermeddling with the redundancy process and tainting it against him. He said that he did not alleged that either of the respondent's witnesses had individually discriminated against him.

4.9 The allegation against Mr Pike had not been raised in the claim form, before Judge Bedeau, or in the claimant's witness statement. The claimant had not made the allegation during any of the consultation meetings or his appeal meeting: with some assistance from Ms Keogh we found one reference to Mr Pike in the minutes of one of those meetings, which referred to a previous work disagreement, but did not allege discrimination (220).

4.10 We could not permit the introduction of a wholly new allegation, at the end of the evidence. We found that to introduce that allegation against Mr Pike would require amendment; that the claimant had been refused permission to make such amendment; and that that allegation was not before the tribunal.

4.11 That left a position which was less than satisfactory. The claimant's case to the tribunal remained one of direct discrimination in selecting him for dismissal and then dismissing him. The claimant had, however,

failed to put that case to the two witnesses for the respondent, as described above.

5. We preface our findings of fact with general observations. As is not unusual in the work of the tribunal we heard evidence about a range of matters. We heard some of it in some depth. Where we make no finding about a matter about which we heard, or make a finding but not to the depth to which the parties went, that should not be taken as oversight or omission, but as a true reflection of the extent to which the point was of assistance to us.

6. Secondly, we have taken care not to approach this case with unfair or unrealistic expectations of the claimant. He represented himself at this hearing, as he was entitled to. We sought, in accordance with the overriding objective, to give him such assistance as was compatible with our duty of objectivity and fairness. Those said, the claimant had been professionally represented up to the moment when the hearing began, and we could make no allowances for any shortcomings in the case prepared for hearing.

7. Thirdly, we noted in the contemporaneous records the emotions expressed by the claimant, and it seemed to us at times during this hearing that his emotions remained as painful as they were at the time of redundancy. That is not a factor to which we attach weight, save to recognise that it could not fail to cloud his ability to analyse the events in question.

8. The tribunal made the following findings:-

    8.1 The respondent is a specialist engineering business, created as a management buy out from the former Thorn EMI. We accept that in its specialist area it is a world leader, and that it had a workforce notable by length of service and by an unusual age demographic. We accept the evidence of both the respondent's witnesses, to the effect that the respondent found recruitment of staff difficult, given a competitive market for highly specialist skills.

    8.2 The claimant, who was born in 1954, joined the respondent in 2003 or 2004, and in 2008 was promoted to the post which he held at the time of his dismissal, Production Engineering Manager. The claimant was a committed and respected employee, justifiably proud of his achievements within the business. We accept that at the time of these events, when he was aged 60, he had a young family and wished to spend the rest of his working life with the respondent.

    8.3 The bundle contained (77A) a breakdown of the respondent's 204 employees as at 1 May 2015 set out in age bands. It shows a workforce significantly skewed (in Mr Brown's word) in favour of older workers. One can interpret the document a number of ways: one striking figure is that the number and percentage of employees between the ages of 20 and 35 (36 employees, about 17% of the workforce) are effectively the same as those aged between 61 and 75 (35 employees). The table shows about 58% of employees over the

age of 51 and 17% over the age of 60. It shows that the assertion in the claim form that "the vast majority" of the respondent's employees "are under 50 years of age" is wrong. About 41% were aged 50 or younger.

8.4 While we take care, in any direct discrimination case, in the weight to be applied to general figures or statistics, the respondent's age demographic is at odds with any case advanced on the footing that age was a factor in the security of employees, or that the respondent was a workplace which did not welcome older employees.

8.5 Mr Brown joined the company as managing director early in 2013. He gave evidence, tactfully expressed, of the challenges which he identified when he came to grips with his new responsibilities. He was struck, once he had looked into the matter, by what he regarded as a demographic bombshell, arising out of the bias in favour of older workers in the respondent's workforce, and what he saw as the complete absence of succession planning.

8.6 In his first weeks in post, Mr Brown arranged to meet every employee individually, allocating five minutes to over 200 one-to-one meetings. It was common ground that when he met the claimant in the course of March 2013, he asked him what his age was (a matter which of course he could have found out from records) and asked him what his plans were. Mr Brown gave evidence that he put that question in similar terms to a number of older employees. He explained that he did so because he understood that employees aged 55 and above might be able to draw pensions, that they might wish to step down from full time work, and move to part time or flexible or consultancy work, and that there might therefore be scope for a meeting of individual plans with the company's needs, which would form part of succession planning. His evidence showed recognition that the former choice between either working or being retired, with nothing in between, no longer prevailed.

8.7 The claimant regarded the question as inappropriate, and as the start of a process by which he was targeted on grounds of age. We do not regard the question as objectionable in the slightest. We accept that it was put to a number of employees, in professional language, for professional reasons, and we do not criticise Mr Brown for doing so in the slightest.

8.8 Although the claimant's case was in part that the first meeting with Mr Brown was the start of a sequence of age discrimination, he could point to no specific event of discrimination for another two years. Although in evidence he complained of being excluded or marginalised from meetings, he was, as Ms Keogh rightly pointed out, unable to point to any identifiable or specific meeting from which he was excluded; or to identify any change in practice in relation to his participation in meetings before Mr Brown had joined and after Mr Brown had taken post.

8.9 We accept that there may have been occasions when the claimant perceived that he had not been invited to a work event to which he thought he should have been invited. There was insufficient evidence of any specific occasion to enable the tribunal to make a finding about any such occasion. There was no evidence of his having pursued any question or issue about the matter at the time. There was no evidence that any such matter was related to age. We do not accept that any such event was related to the question which Mr Brown had asked in the one-to-one meeting. The only event of which we heard after the meeting, and before the redundancy, was that Mr Brown approved a pay rise for the claimant in September 2013. That would not have been consistent with trying to ease him out.

8.10 The redundancy process which was at the heart of this case arose in late 2014 and early 2015, some two years later. We add the comment that it arose for objective reasons which were not challenged before us (a financial crisis) and were unrelated to the case that the claimant was in some way targeted by the respondent after his first meeting with Mr Brown.

8.11 We accept, and the claimant did not challenge, that the respondent saw an unexpected downturn in sales and income in the year ending March 2015, and as it entered the financial year beginning 1 April 2015 it identified a risk of further difficulties. We accept that the summary set out in the document entitled "Business Case" prepared in spring 2015 accurately summarises the position (71-72). We note that the respondent's sales in the year 2014-2015 were about 70% of budgeted, and the company expected a loss in that year, with a knock on similar effect into the year 2015-2016.

8.12 We accept that a reduction in headcount was in principle considered by Mr Brown as one of the means of managing the company through the difficulty. Mr Brown understood the sensitivity of selection, and in particular, the need to do so in a manner which would cause the least insecurity to the workforce. He was aware of the need not to unsettle the great majority of skilled specialist employees.

8.13 The directors below Mr Brown were tasked with meeting and formulating responses. Each was to formulate how his / her Directorate would contribute to making financial savings. We accept the evidence of Mrs Ledwell, who was a Director and attended the meetings, that there were two meetings of which there was, and is, no documentary record. While understand the wish of directors to maintain stability by reducing the risk of information leak about redundancy, it is troubling in principle that discussions about the job security of a large number of people were undocumented.

8.14 We accept Mrs Ledwell's evidence, which was that one undocumented meeting had discussed roles which might be made redundant, and that

a further and crucial meeting took place on 19 March 2015, of which the bundle contained Mrs Ledwell's handwritten note (78). The meeting was entitled "Headcount Review" and Mrs Ledwell explained that each director had been tasked with making proposals for redundancies in his or her directorate, reporting them to fellow directors in meetings, at which the proposals were discussed and challenged. We attach no weight to the fact that the note made by Mrs Ledwell refers to names rather than roles: we accept that in this relatively small business, the directors understood that each role to be made redundant was filled by an individual of whom most directors had personal working knowledge.

8.15 Mrs Ledwell's evidence was that as indicated by the note, she had identified the indispensible areas of work within her directorate, and the employees whom she considered indispensible to serve those areas. When she came to consider the claimant's area of work, which was production engineering, she identified the possibility of splitting the claimant's team (the claimant had five direct reports) so that the team members were allocated to other specialist teams where they would be line managed; and the claimant's role, as manager of the team, became redundant. We add the comment, that although the claimant may have been unaware of it, removing a layer of management is in our experience not an uncommon means of implementing a redundancy proposal.

8.16 We accept that there was discussion of whether that left the claimant effectively in a pool of one for consideration for redundancy, and that the directors considered whether Mr Challis or Mr Ranzetta should be considered with him. Mrs Ledwell's evidence was that no consideration was given to pooling the claimant alongside Mr Challis, whom she described as a national and international leader in his field of expertise, with whom the claimant or indeed few of his colleagues could be compared.

8.17 It is clear from the note and from Mrs Ledwell's evidence that there was discussion of the claimant alongside Mr Ranzetta, but it was a curious discussion. Although Mrs Ledwell's note had the appearance of a comparison within a pool (the comparison being in Mr Ranzetta's favour) her evidence, which we accept, was that the discussion was actually about whether the two should be placed in a pool at all, and the conclusion was that there were so many points of distinction between the claimant and Mr Ranzetta that Mr Ranzetta should not be placed at risk of redundancy in a pool with the claimant, and therefore the claimant was left in a pool of one. While the record indicates consideration of a number of objective factors in that process, there is an overarching point found in the note (70B). It was that the meeting did not have confidence that the claimant could take up and cover Mr Ranzetta's role.

8.18 Mr Pike attended the meeting. We accept that there is a reference in the note to there having been complaints in the past from Mr Pike's team about the claimant's interpersonal skills. We accept Mrs Ledwell's evidence that that was the information which the meeting was given. If we had been asked to consider that that indicated tainting of the meeting through discrimination, we would have rejected the submission. There was no evidence that any contribution by Mr Pike to the meeting was in any respect tainted by any protected characteristic. There was no evidence that Mr Pike's one documented contribution was material to the ultimate decision.

8.19 By the end of the meeting of 19 March 2015 a decision had been taken that the claimant's role was at risk of redundancy, because in consequence of the need to reduce head count, his five direct reports would be disbanded as a discrete team, allocated to other teams, and managed by other managers.

8.20 Those were decisions which seem to us well within the range of management discretion, and it is not for us to comment on whether they were the "correct" way of dealing with the matters before the respondent. We accept that the decisions were economic and related to the role, and not personal or related to the claimant.

8.21 There was then something of a lull, caused by, we understand, the need to prepare the formal business case, and complete reports from the directors to Mr Brown, and prepare individual redundancy notifications. We accept Mrs Ledwell's and Mr Brown's evidence that Mr Brown had at an early stage been excluded from the detailed redundancy process, it being generally understood that any redundant employee who wished to appeal against redundancy would have his or her appeal heard by Mr Brown. In the event, only the claimant exercised a right of appeal.

8.22 On 18 May 2015, in Mrs Ledwell's absence, Mr Pike and a member of HR told the claimant that he was at risk of redundancy (194); HR confirmed the meeting in writing the same day (197). On 21 May the claimant attended a first consultation meeting with Mrs Ledwell and HR. He was accompanied by a colleague, Mr Warren, who is many years his senior, and who was not placed at risk (200). The claimant was invited to a second consultation meeting on 28 May, also with Mrs Ledwell and HR, and attended without the companion (206); and after an unsuccessful interview for another post (which we deal with below) he had a final meeting with Mrs Ledwell and HR on 22 June (212A) at which he was given a letter of dismissal (213). On 24 June the claimant submitted a formal appeal (215) and had a meeting with Mr Brown on 30 June to discuss the appeal, following which on 8 July Mr Brown confirmed rejection of the appeal (222). At this hearing the claimant agreed that all notes of all meetings were broadly accurate.

8.23 We do not consider it necessary to set out in these reasons a summary of each meeting. We take a number of broad, general points.

8.23.1 We accept that the decision to dismiss was that of Mrs Ledwell alone, uninfluenced by any other person. If we had accepted jurisdiction to consider that she was in some way improperly influenced by Mr Pike, or manipulated by him, we would have rejected that submission. There was no evidence that it happened. We accept that the decision to reject the appeal was that of Mr Brown and nobody else.

8.23.2 We noted and attached weight to the first recorded exchange between the claimant and Mrs Ledwell. After the opening of the meeting on 21 May, the clamant summarised his achievements and experience, concluding "he feels personally victimised". Mrs Ledwell's prudent reply was "we need to de-personalise this". Our view is that throughout the procedure and indeed throughout these proceedings there was a mismatch of perspective between the two parties, the claimant bringing a personal and emotional view to a matter which the respondent regarded as professional and economic.

8.23.3 We accept that the claimant was properly advised of the nature and structure of meetings, properly permitted a right of accompaniment, and given such information and opportunity as he might require to enable him to present his case.

8.23.4 On 28 May there was discussion about a role which was available for a senior programme manager. Although there were some doubts as to the claimant's suitability for the role, we accept that Mrs Ledwell encouraged the claimant to apply for it and gave him such assistance as she could. She knew that there were already two external candidates and that it was a key role. The claimant was fast-tracked for interview. He agreed to take part in an online psychometric assessment (211E – 211AL) and he was interviewed on 9 June. We accept that Mrs Ledwell, who was one of the interviewers, put standard competency based questions (211D) as she did with external candidates. The interview summary (211A) is uncomfortable to read. It is sufficient to say that on an overall score of 1-10 (10 being high) the claimant scored 3 and was regarded as unappointable to the post. We accept that the claimant's failure to progress to the senior programme role was as a result of his assessment at an objective professional interview and unrelated to age.

8.24 The claimant made the first reference to age being a factor in his experience in his letter of appeal (215). He wrote: "I believe that the grounds for my selection for redundancy were unfair and that actually I have been discriminated against on the basis of my age. This is further

supported by the fact that of 18 people selected for redundancy, most were in the over 50 category, with myself being 60 years old." Our finding (77K) is that of the 17 selected, 5 were aged 49 or younger; the claimant was the tenth oldest. The overall age range of those made redundant was 23 to 71.

8.25 At the appeal hearing (217) Mr Brown asked the claimant for evidence of age discrimination. The claimant replied that most of those redundant were over 50, to which the note records the following: "Mr Brown states that half the workforce are over 50. Mr Brown states that we need to look at the demographic of TMD and look at the redundancies. Mr Brown states that by the fact of the number of staff we have over 50, more will be reflected in the pool… we have a demographic time bomb." The discussion then veered into a related topic, which was the claimant's experience and his sense that the respondent could not have properly valued his contribution to the company.

8.26 We turn to a number of other points:-

8.26.1 The claimant asserted that Mr Dent, who was retained, was a comparator. Mr Dent was, at the time of the claimant's redundancy, a direct report of the claimant, earning over £10,000 a year less than the claimant. He was one of the claimant's team who was reallocated to another team to be managed.

8.26.2 The claimant alleged further that Mr Dent was groomed to replace him, and indeed had been promoted to replace him after his dismissal. We accept Mrs Ledwell's evidence that Mr Dent has achieved personal educational and professional development, and as a result has achieved seniority in title, but has not been promoted to the claimant's post or level. At time of this hearing, he is paid nearly £9,000 less than was the claimant at time of his dismissal. We agree with the respondent that he was not comparable to the claimant.

8.26.3 The respondent's assertion that Mr Elliott was a comparator, ie a manager aged 39 who was also dismissed for redundancy, did not seem to us to assist. We noted (77M) that the claimant was not the oldest of those dismissed.

8.26.4 We understand the claimant's concern that he was placed in a pool of one. We accept that there was no evidence that he was placed in a pool of one because of his age. He was placed in the pool of one because his team was split up and his layer of management was removed. He was the only person of any age employed in that layer.

8.26.5 At one of the consultation meetings, Mrs Ledwell told the claimant that she was aware of a comparable vacancy with another company in Wales. The claimant did not contemplate relocating his family to Wales, and did not pursue the opportunity. We cannot see the relevance of this exchange to any complaint of discrimination. Mrs Ledwell was not at fault for telling the claimant about the vacancy; the claimant was not at fault for not wanting to relocate.

8.26.6 In consultation the claimant proposed the creation of a new role of Supplier Developer. The respondent took the view that a redundancy situation was no time to create a new role. We can see no aspect of that decision which was tainted by age. It was an assessment well within the range of reasonable management.

8.26.7 At this hearing the claimant repeatedly suggested that a higher financial saving could have been achieved by retaining the claimant and dismissing two of his direct reports. The respondent's reply was that that approach was personalised, and therefore wrong. Their approach was objective and economic, and accepted that the respondent needed to retain the skills of the direct reports, but could find a different structure within which to use them. The only question for us is whether the failure to consider or implement the claimant's approach was on grounds of age, and we can see no element of age which entered into that decision.

8.26.8 The claimant felt that his experience and knowledge had been disregarded by the respondent. We have emotional sympathy, but the question for us is whether that itself is an indication in the circumstances of age discrimination and we find that it is not.

9. We turn to our conclusions. This was a claim of direct age discrimination. As Ms Keogh's closing skeleton helpfully summarised the position, we must start by considering whether the claimant has proved facts which in the absence of explanation caused the burden of proof to be shifted. We find that he has not. He has proved a negative event (dismissal) and he had a protected characteristic (age). He has failed to show any causal link between the two.

10. We find with Ms Keogh that the claim fails because the burden of proof does not shift. If we had found otherwise, and had found that it had shifted, we would unhesitatingly have accepted the respondent's explanation of the treatment of the claimant, namely that he was selected and dismissed by reason of redundancy and/or restructuring, without any taint of his age being a factor.

11. After we had given judgment on liability, the respondent made an application for costs. We heard Ms Keogh's application straightaway, and read a modest bundle of correspondence which she had prepared; and then adjourned for over two hours to permit the judge to deal with a preliminary hearing on another matter which had had to be listed urgently. This timetabling enabled the claimant to have time to prepare his reply.

12. We explained to the claimant, before hearing Ms Keogh, three steps in the costs application. The first was for the respondent to prove that the claim had been brought or conducted unreasonably, within the meaning of Rule 76. Secondly, the respondent would have to show that it was in the interests of justice to make an award of costs. We explained that the interests of justice in context included a balancing exercise between a claimant's right of access to justice; the rights of a respondent not to be burdened with unmeritorious claims; and the duty of the tribunal to use its finite resources effectively. We explained further that a costs award in the tribunal is to be regarded as exceptional, and not a matter which follows the event. At the third step, we would deal with the amount of payment. Although we explained the system of assessment, the respondent's application was for a fixed figure in any event, of £20,000.

13. Ms Keogh submitted that the claim was fundamentally misconceived. She submitted that until late in the hearing the claimant had not asked himself basic questions about the constituents of a claim of discrimination. He had for example not identified any comparator until the start of the case and at the end of the evidence he had placed the case on an entirely new footing. It did not matter whether or not his approach was sincere (for the purposes of the test of unreasonableness). She said, rightly as we find, that whatever advice he had received, he was fixed by that advice.

14. Secondly, Ms Keogh submitted that the claim had been brought significantly out of time through the fault of Messrs Setfords. She submitted that the claimant had been lucky to be permitted to proceed with the discrimination claim, but presenting the claim with such delay was unreasonable.

15. Thirdly and finally Ms Keogh referred to a history of settlement offers made to the claimant, and outlined sums which had been offered. The bundle which she produced contained reference in correspondence to what was said at judicial mediation. We could not in principle entertain submission based on what was said at judicial mediation, and noted only that offers well into five figures had been made and rejected. Ms Keogh also told us of attempts to settle the case during the reading time on 2 May.

16. In dealing with the interests of justice, Ms Keogh submitted that while there was no challenge to the claimant's right of access to the system of justice, the plain fact of this case was that basic concepts of law had not been addressed by the claimant in preparation, and in light of that failure, the claimant could not be said to have had a reasonable belief in having been discriminated against. She asked the tribunal to make an award of £20,000,

which, according to the schedule of costs produced, was less than one third of the actual costs plus VAT which had been incurred.

17. She submitted that the claimant had, to the respondent's understanding, four income streams: the respondent's pension scheme; pension from previous employment; his wife's income from his own company; and rental income.

18. The claimant in reply stated that he had always believed he had a genuine claim and had not acted unreasonably. He was entitled to bring the claim and had always relied on his solicitor for guidance. There had been settlement discussions but the amounts offered had been too low in terms of the losses he had sustained and the costs he had incurred.

19. The claimant gave a little information about his personal finance and circumstances. He has a young family, and two mortgaged properties. He agreed that he had had some income after dismissal, some of which had been paid through his wife, but he had been unemployed for the last year. He had not made any pension arrangements before joining the employment of the respondent in his late 40s. Since dismissal he had claimed no benefits and had no entitlement to state pension. Neither side produced any documentation to the costs application for the purposes of consideration of means.

20. In finding first that the claim was conducted unreasonably, we take care to avoid the wisdom of hindsight, and have sought rather to focus on matters which were within the actual or constructive knowledge of the claimant in preparing this case. In so saying, we attribute to him the professional and objective analysis to be expected from his solicitor. In that context, we base our finding of unreasonableness on the following matters:-

    20.1 The claimant had written in the claim form that "the vast majority" of the respondent's employees were under 50. The correct figure was about 41%. The information was available to him in the bundle well before this hearing.

    20.2 While the claimant was correct in the claim form to write that the average age of those made redundant was 55, the piece of information was so incomplete as not to found any reasonable analysis. The claimant failed to mention that there were nine redundancies of people younger than himself (77K). Certainly this information should have been known to him at an early stage.

    20.3 Although the claimant attributed the start of his troubles to the conversation with Mr Brown in early 2013, he could not point to a single act of specific age discrimination in the ensuing 26 months before the at-risk meeting. In his emotional reaction to being placed at risk, and in alleging age discrimination, he gave no thought or analysis to that absence of discrimination, and failed to weigh in the balance that the

one specific interaction with Mr Brown had been that the claimant had with Mr Brown's support received a pay rise in September 2013.

20.4 The claimant asserted in the claim form that he had never received "adequate explanation" of the risk of redundancy. The claimant knew of the financial difficulties faced by the company at the time. He had never at any stage, including at this hearing, challenged the existence of the financial difficulties or of the redundancy situation. The claimant has spent a lifetime in engineering industries, and although the matter was not explored, we are confident that the risk, concept and management of restructuring and redundancy must have been familiar to him.

20.5 The claimant was present at the preliminary hearing in December 2016 after which Judge Bedeau's Order referred twice to the Equality Act phrase of 'less favourable treatment'. The claimant must be taken to have understood that at the heart of a claim of direct discrimination lies comparison between the complainant and some other person who has not been disadvantaged. The claimant had brought no analysis to bear to identifying either that person as a named individual; or to identifying the characteristics of a hypothetical comparator. When he was asked to name a comparator, perhaps feeling under pressure, he named Mr Dent, who was both named late and was plainly not a comparator. The point is not that we expect of a lay claimant the skill and knowledge of the Equality Act of a barrister. The point is the failure to analyse the basic concept of less favourable treatment in his own experience.

20.6 Likewise, the claimant must have appreciated that a limited company can only make decisions through human beings, and that therefore if the company discriminated against him, it was through human actions. It was only at the end of evidence, as described above, that the claimant in fact named the human being in question, but by doing so mentioned a claim which had been prepared.

21. We do not in our consideration of unreasonableness attach weight to the fact that the claim was presented out of time. It does not seem to us right to do so. It was Judge Bedeau, who having heard all the evidence in submission on extension of time, was in a position to do so. We heard no evidence on those matters.

22. In considering the question of offers of settlement, we do not think it right to base a finding on a particular figure which should or should not have been accepted; clearly one view of our judgment is that any settlement offer should have been seized upon. We make a broad general finding that it was unreasonable not to settle this claim in light of its manifest weaknesses.

23. We consider that the interest of justice falls in favour of the respondent. We find that the respondent's interest in not having to defend this unmeritorious claim far out balances the claimant's right of access to the tribunal. If we ask ourselves about exceptionality, it seems to us an exceptional factor in

this case that the weaknesses and flaws in the claimant's case were manifest at an early stage, and were not the product of the battle of litigation or unexpected cross-examination.

24. We have received no satisfactory information from either side as to the claimant's ability to pay. The figure which we have set approximates to about two months' net pay at time of dismissal. In setting the figure, we have regard to information received through the claimant as to earnings immediately or shortly after dismissal; we noted a CV of some distinction spent in the engineering industry; we noted that the respondent shared the claimant's view of the claimant's high level of skill, and that it found its skills difficult to recruit; and we express greater confidence and optimism than did the claimant in his future earning capacity. We do not accept the claimant's assertion that he could not work again. We bear in mind further the evidence given by the respondent that specific engineering skills are in demand, as evidenced perhaps by the age demographic of its own workforce. We note that the claimant lives within distance of Greater London. Accordingly we set the figure at £5,000.00.

25. We conclude with one matter for the record. Ms Keogh stressed the gravity of the allegation. While we accept that any allegation of discrimination is a serious matter, we note the particular sting of this allegation at this workplace, in which there is a high proportion of older workers, compatible with a working ethos where age and experience are valued. So that there is no doubt about it, our finding is that the protected characteristic of age played no part whatsoever in any of the matters which were before us for decision.

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Employment Judge R Lewis

Date: ……25 May 2017……..

Sent to the parties on: .....

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For the Tribunal Office