EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr P Mundin	v	**Beal Developments Limited**

Heard at: **Leeds** **On:** **22 & 23 August 2017**

In Chambers: **5 September 2017**

Before:

Employment Judge J M Wade

Ms J Lancaster

Mr G Corbett

Appearances:

For the Claimant: **Mr S Rice-Birchall (solicitor)**

For the Respondent: **Ms A Tusien (solicitor)**

RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal is well founded and succeeds.

2. The claimant's complaints that a 2014 comment and his dismissal on 22 February 2017 were acts of direct age discrimination are dismissed.

3. The claimant's complaints that a proposal to reduce his hours on 12 January 2017 and a letter giving notice to terminate his contract of employment dated 16 January 2017 contravened sections 39 and 13 of the Equality Act 2010 (direct age discrimination) succeed.

REASONS

Introduction

1. The parties were both represented by solicitors. At a preliminary hearing on 22 May 2017 the claimant, a former director of the respondent building firm, clarified his complaints as direct age discrimination, unfair dismissal and breach of contract, the latter later confined to an alleged breach of an obligation to pay him a bonus.

2. These complaints were heard by the Tribunal over two full days. The Tribunal had time to deliver an extempore judgment upholding the breach of contract complaint on 23 August 2017, which was sent to the parties on 24 August 2017. No request for written reasons was made in respect of that Judgment. There being no time for further deliberations, the Tribunal's decision in relation to the age discrimination and unfair dismissal complaints was reserved.

3. The alleged acts of age discrimination and other issues arising appear as headings to our discussion and conclusions below. At all times the claimant asserted that his ultimate dismissal, in circumstances of allegations concerning his conduct, was an unfair dismissal, and that prior to that there had been a number of acts amounting to age discrimination. The claimant was over the age of 65 at the time of his dismissal and he asserted that he was treated less favourably than those who belonged to a younger age group were, or would have been, treated.

Evidence

4. The Tribunal had before us a helpful bundle of relevant documentation running to some 200 or so pages to which there were two additions during the course of the hearing. We heard from Mr Mundin, the claimant, and then from Mrs Waudby, who dismissed the claimant, Mr Beal the Managing Director of the respondent, Mrs Garnett who provided HR advice to the respondent, Miss Connell who is the PA to Mr Beal, and Mr Jewitt, the claimant's younger successor at the respondent business.

5. There were a limited number of conflicts in the parties' account of the chain of events, which the Tribunal resolved only as necessary using all the tools available to it, including the contemporaneous documentation at the time.

6. As to the oral evidence, the claimant struck the Tribunal as giving honest evidence and to be broadly reliable in his recollection of events. His answers to straightforward questions exploring his witness statement at times posed some difficulty. One such exchange was particularly surprising, but revealed more about the workings of the respondent's mind than it did about the claimant's reliability:

   Mr Rice-Birchall: "so even on your story you lied to Richard Beal?"

   Claimant: "Yes I told him I was at my solicitors – I wasn't thinking straight - as I have said to Pauline, my father died of a heart attack at aged 68 and I did not want to go the same way and I wasn't thinking straight"

   Mr Rice-Birchall "Maybe it was time to retire then?"

   Claimant: "You are suggesting I am too old to work, I was quite capable of working if not put under the stress that I was put under",

7. Our overall assessment of the claimant was, though broadly reliable, he lacked insight into the way in which his conduct was reasonably perceived by others in the situation in which he found himself.

8. We considered that Mrs Waudby's recollection of events was mixed and not necessarily reliable given the documented chain of events; Mr Beal was greatly assisted by his own note taking at various points; where notes were not available, his memory was, like others, fallible. We considered that Mrs Garnett,

Miss Connell and Mr Jewitt were all doing their best to be straightforward with the Tribunal and were reliable witnesses of truth.

Findings of fact

Background and the contract of employment

9. The claimant was the Managing Director of a group of companies which included a house building company, a fellow Director at the time was a Mr Costall. Mr Costall was 67 in 2014; the claimant turned 65 in 2014. That group of companies ran into difficulties and the house building division was sold to the respondent, which operates as a builder and developer of both commercial and residential properties. The claimant and Mr Costall joined the respondent as directors at the time of its acquisition of the previous company.

10. There was no contract of employment between the claimant and the respondent other than those terms proposed in an offer letter dated 28 August 2007 and accepted by the claimant. Those terms included a salary, then at £50,000 per annum reviewed at Christmas each year; "1% of net profit of Beal Developments Limited and Eastman Security Limited"; a £12,000 per annum car allowance, provision for holidays (23 days plus bank holidays); and membership of the respondent's private health and death in service schemes. There was no provision concerning pension.

11. The contract (that is comprising terms offered by the respondent and accepted by the claimant) was also silent as to the length of the contract or to retirement age and to the way in which the contract could be brought to an end. The offer letter did not refer to a Company Handbook which was in place at that time for all other staff, but by 2014 the claimant was aware of the respondent's Company Handbook.

12. For seven years or more all went well. The claimant worked alongside a colleague, Mr Jewitt, and they worked to their respective strengths. The respondent was a family business owned solely by the Beal family, had offices in Hessle, just north of the Humber near Hull, and in Lincoln, not far from the claimant's home (south of the Humber).

Succession planning and implementation

13. Mr Beal became Managing Director of the respondent when he was 26, and that was before the claimant and Mr Costal joined in 2007. Some years later in 2010, Mr Beal's father sold him his shares and Mr Beal Snr remained involved in the respondent to the extent of attending to chair Board meetings and his broad family interest.

14. On the Board of Directors by 2014 were Mr Beal Snr (aged 75); Mr Costall (aged 67); the claimant (aged 65); Mrs Waudby (Sales Director then aged 61) and Mr Goodfellow (aged 62 and Construction Director). A Mr Williams, the group Accountant, also attended Board meetings.

15. By 2014 Mr Beal became concerned about the aging nature of the Board and succession, and the prospect that in the light of the ages of all of the Board members other than himself, the Board come become rapidly depleted should incapacity affect those other Directors: he could find himself a sole Director very easily, he thought.

16. The Company Handbook for employees at that time contained a retirement policy with a mandatory retirement age of 65 with the ability to seek an extension to working age within the then statutory provisions. Evidently those Handbook retirement provisions had not been applied to the Board members in 2014, albeit other employees had reached the age of 65 and had retired in accordance with the Handbook provision.

17. The claimant happened to be away at a Board meeting which took place on 5 September 2014. At that Board meeting Mr Beal tabled, for approval at the next Board meeting, a retirement policy for Board members. It specified a retirement age of 65. When the Board minutes were later provided to the claimant the retirement policy for the Board was not attached to it. The reason for that was simply that Mr Beal had sought advice from Mrs Garnett, a Human Resources Consultant, who had been recommended to him by a Non-Executive Director. She had advised that a fixed retirement age for the Board would be unwise. Mr Beal then went back to the drawing board, and it was agreed that instead of a fixed retirement age the respondent would develop an academy programme for up and coming talent within the business, to ensure that there was sufficient succession planning with identified successors for key posts on the Board.

18. When the claimant returned from his holiday and saw the minuted item concerning retirement ages, he went to see Mr Beal to ask what that was all about. The claimant considered that as he had turned 65 in May of that year the new policy was directed personally at him. His fears were not allayed when Mr Beal replied to his enquiry with the words simply and curtly “you can’t work forever”.

19. For the reasons above, Mr Beal’s original proposal was abandoned and Mr Garnett assisted in putting in place the recommended Management training to skill up the tier of staff below Board level, including Mr Jewitt the claimant’s colleague, so that he and others could step up to Directorships in the future as part of a structured succession plan.

20. Mr Beal’s practice was to discuss with each of the Directors their team in December of each year and to take notes of those discussions, which included impressions of the Director’s own performances and achievements during the year, and expectations for the following year.

21. During those December discussions Mr Beal starting talking about succession plans with both the claimant and Mr Costal to ensure that Mr Jewitt, and the equivalent individual in Mr Costall’s department, Mr Murphy, would be encouraged to apply for the new training academy programme and indeed would be supported in their efforts in that respect by both the claimant and Mr Costall.

22. Both at the end of 2014 and at the end of 2015 Mr Beal proposed to both Mr Costall and to the claimant that their hours would reduce in the future to enable the development of their deputies and both were agreeable to that in principle.

23. The extent of the detail of those discussions varied as between Mr Costall and the claimant; Mr Costall took more leave in 2015, albeit he did not wish that to be transparent necessarily to all employees as its purpose was to enable Mr Murphy to take charge for longer periods of time. There was no reduction in Mr Costall’s pay or benefits as a result of that arrangement.

24. The claimant did not agree to reduce his hours in 2015, but at the end of that year, in December 2015, Mr Beal discussed with him and with Mr Costall a potential four day week for the following year. There was no discussion either with Mr Costall or with the claimant of any reduction in pay arising from the proposed four day week. Mr Costall considered it too soon to be reducing to that level at that stage. From Mr Beal's notes of his discussion with Mr Costall it was apparent the latter would consider a full reduction from 4 days in 2017 "although for ease of dealing with PM will say RAC (Mr Costal) on 4 days from this year" (ie 2016). Mr Beal's explanation of that note was that Mr Costal's arrangement was to take longer holidays rather than be in the office four days a week. That may well be right, rather than a more sinister explanation that Mr Costal would not really be reducing to the equivalent of four days per week. Nevertheless the significance of the comment is that it acknowledged the importance of fair dealing as between colleagues who were the subject of the same kind of succession thoughts, but also that Mr Beal anticipated that the claimant would be resistant to the proposed reductions.

25. Mr Beal was also having discussions about delegation to more junior colleagues with Mrs Waudby.

26. Mr Beal then discussed the need for a succession plan for the claimant to provide information on the matters on which he considered Mr Jewitt needed development, and other matter of details, but there was no discussion about a reduction in salary with either Mr Costall or the claimant at that time (that is December 2015).

27. In the event Mr Beal did not implement a reduced four day week for the claimant in 2016, because he himself was too busy and the claimant was concerned with a particular project. Nevertheless the claimant did respond to Mr Beal's wish that responsibilities and tasks were gradually moved to Mr Jewitt and in identifying any particular training needs there. As a result of the transition of work it became apparent to the claimant that Mr Beal was dealing more and more directly with Mr Jewitt on various matters, and that was a fair perception and consistent with the transparent succession plan in place.

28. In the latter half of 2016 Mr Beal proposed accelerated and formal succession plans, in the sense that he had minuted his thoughts in respective documents, for both the claimant and for Mr Costall. The proposals proceeded at a different pace and with different measures, but the overarching intent was the succession of Mr Jewit and Mr Murphy to the respective posts.

29. The proposal for the claimant was that there be a pro rata reduction in salary based on a three day week from 1 January 2017, whilst maintaining the 1% bonus from January to June of 2017. From 1 July 2017 Mr Beal proposed a Consultancy role for the claimant on an "as a when required" basis.

30. For Mr Costall, on the other hand, the whole of 2017 was proposed to be on a three day week, with no reduction in salary mentioned, and a Consultancy to be agreed in 2018. There had been no reduction in Mr Costall's salary in 2016, despite him taking more holiday to equate to a four day week as agreed with Mr Beal.

31. There was a brief discussion between the claimant and Mr Beal about the proposed succession plan on 30 September 2016 and by mid October the

claimant had sought legal advice and documented a counter proposal (page 131).

32. The claimant was frank that he had taken legal advice which vindicated his belief that the company could not unilaterally vary his terms and conditions of employment which included full time working, nor could any form of retirement be imposed. That was his view. He proposed that he continued full time until 31 December 2016. That from 1 January 2017 to 31 December 2017 he would work a four day with a reduced salary pro rata, but current bonus intact. From 1 January 2018 through to his 70th birthday he wished to work on a consultancy basis but with a guaranteed income of £50,000 per annum, but he indicated his willingness to resign from his Directorship to enable Mr Jewitt to step up to that post. He also indicated his willingness to talk with Mrs Garnett.

33. That proposal was not welcome to Mr Beal, who considered that the claimant had reneged on the spirit of their previous discussions. When he was asked about the apparent inequity in treatment as to salary, Mr Beal's explanation was about the contribution made by Mr Costall out of hours, the inference being that the claimant's workload was considerably less. Mr Costall turned 70 in 2017 and the claimant was due to turn 70 in 2019.

34. At the end of November 2016 Mr Beal rejected the claimant's proposals and confirmed in a letter dated 28 November that the company too had taken legal advice and that the claimant's proposals were not agreeable. Mr Beal's letter to the claimant mis-represented the detail in which matters have been discussed in December 2015, albeit his notes recorded that a phased exit strategy had been discussed. The claimant accepted he had discussed a phased exit plan in principle at that time, but without any degree of detail attached to it.

35. Mr Beal also took issue with the transfer of work to Mr Jewitt: he considered that he could not permit transfer of work to have happened without the consequent reduction in the claimant's working hours. Mr Beal wrongly suggested in his November letter that the proposals he put forward on 30 September had previously been agreed by the claimant in December 2014 or December 2015. They had not. Unsurprisingly the parties took up their respective positions and correspondence became fractious.

36. Mr Beal's letter of 28 November then gave the claimant formal notice of the original proposals, to be accepted by the claimant by Friday 9 December 2016 saying that if they were not accepted the company would serve the claimant with three months' notice to terminate his current contract, and would offer a new contract. That was after one discussion about detailed changes in contract terms.

37. That letter resulted in a reply rejecting many of the assertions made by the claimant dated 8 December 2016, and indicating that he considered that he was being marginalised because of his age. The difference in recollection between Mr Beal and the claimant was then aired again in further correspondence dated 13 December 2016 and the claimant was to attend a meeting on 12 January 2017 when Mrs Garnett was present. He was told that he had the right to be accompanied at that meeting and that "you should be aware that following the end of the meeting if we cannot reach agreement, the company proposes to serve you with three months' notice to terminate your current contractual arrangements, and to offer you a new contract reflecting the arrangements,

upon expiry of three months' notice, as set out in my letter of 28 November 2016."

38. Two matters for discussion put by Mr Beal were either his proposals, or the claimant's proposals but with the commensurate reduction in salary and reward "to reflect the value you currently offer to the business".

39. The discussion on 12 January 2017 with Mrs Garnett took place late in the day. The claimant was not accompanied. Mrs Garnett attended and the claimant advised that there would have to be some guaranteed hours or days for a consultancy arrangement to work and Mr Beal said that that would depend on the work that was available, by implication there could be no guarantee. They reached an impasse by reason of the claimant's perceived need for guaranteed income after his employment ended. The claimant confirmed he would not accept the original proposals.

40. There was also a discussion about the passing of work to Mr Jewitt, and the claimant's belief that Mr Jewitt was not ready to fully take on the role. Mrs Garnett explained that even if notice was served the company would continue to consult to make an amicable arrangement.

41. On 16 January 2017 the respondent served notice to terminate the claimant's contract of employment, offering replacement terms, that is, 6 months on a 3 day week (and pro rata salary) if accepted by 31 January 2017.

42. On 31 January 2017 the claimant emailed to confirm that he did not accept those proposals and that his employment would therefore end on 15 April 2017. Again he said he would be taking advice and considered that his dismissal was both unfair and discriminatory.

<u>The hard drive incident and the claimant's summary dismissal</u>

43. On 2 February Mr Beal asked the claimant to come to Head Office before heading to Lincoln because Mr Jewitt had told Mr Beal that he had not been able to locate some required information, but believed it was on the claimant's external "hard drive". Mr Beal had not been aware of the claimant's use of an external hard drive and wanted to make sure that any company information on that hard drive was available to the company, not least in circumstances where the claimant anticipated his employment ending in less than three months.

44. When Mr Beal and the claimant met on 2 February, Mr Beal asked the claimant to leave his hard drive with him. The claimant refused. Mr Beal said he would contact IT and there was something of an altercation with the claimant leaving Mr Beal's office with the hard drive, despite being told to stay where he was by Mr Beal in angry terms. That produced from the claimant "who do you think you are talking to".

45. The respondent had no express prohibition on the use of external hard drives in its policies, but Mr Beal had not been aware of the claimant's use and thought it was a matter of common sense that the claimant would be prepared to let the company recover company information from the drive in these circumstances.

46. There then followed attempts by Mr Beal to contact the claimant by telephone, to establish his whereabouts and further their discussions, during which the claimant said he was at his solicitors when he was not. Mr Beal said that the police would be called (having himself taken legal advice) if the claimant did not return his laptop to the Lincoln office which he did later that day.

47. The altercation and events on 2 February resulted in the claimant emailing Mr Beal later that same day to enquire if he was to consider himself on garden leave. In the Tribunal's judgment in the circumstances that was the red rag to the proverbial bull in these circumstances and Mr Beal responded by letter saying that having taken legal advice he was suspending the claimant.

48. The respondent's disciplinary procedure provided for a full investigation before any disciplinary proceedings were commenced in such circumstances, and Mrs Garnett advised Mr Beal that that is what should happen. Instead, Mr Beal invited the claimant to a disciplinary hearing on 10 February, the invitation to which included four allegations of gross misconduct: the failure to comply with a reasonable management request, insubordination in hanging up the phone on Mr Beal and leaving the office on 2 February, misuse of confidential information, and unauthorised absence. The letter said that Mrs Waudby had been asked to conduct that disciplinary hearing on 10 February, but it did not request that the claimant bring to the meeting the hard drive which he had been using.

49. Mrs Waudby said she expected the claimant to bring the hard drive to the hearing, but the invitation letter did not invite him to do so and he he did not do so. Instead when they met he offered to meet her off site to show her the information that he had on the hard drive, which she did not progress.

50. At the disciplinary hearing they discussed the events of 2 February and Mrs Waudby, having previously wanted to keep matters confidential, then talked to Mr Jewitt, Mr Beal, Mr Costall (who had collected the claimant's laptop from him), Miss Connell, Mr Beal's PA, Miss Garwood, a Mr Bennett, a Mr Carratt and a Mr Fawcett, all who were said by the claimant to have had potentially seen or overheard events, or otherwise had some involvement in events on 2 February.

51. Mrs Waudby then called the claimant by telephone to clarify some further matters on 16 February 2017.

52. On 22 February 2017 Mrs Waudby sent a decision letter to the claimant terminating his employment summarily on 22 February and giving her three reasons for dismissal as: his hanging up the telephone on Mr Beal on 2 February, being untruthful with her in the disciplinary hearing and discussion by telephone on 16 February, about his whereabouts and the altercation on 2 February, which she characterises attempting to mislead her; and his refusal to let the IT team work to download the company information on 2 February.

53. Mrs Waudby had reasoned that as she considered the claimant had not been truthful with her about his whereabouts and the chain of events on 2 February, (which was the case), she preferred Mr Beal's account of the altercation to the effect that he had simply asked the claimant to let IT work to download the company information (rather than the claimant's account which was that he had instructed him to leave the hard drive with Mr Beal, which the claimant considered unreasonable).

54. The letter to the claimant was headed up 'Immediate Dismissal' and he was offered the right of an appeal, which it said would be heard by a Non-Executive Director of the company but the claimant did not take up that right of appeal; he considered that as the disciplinary process had been unfair it was unlikely that any appeal would change the outcome.

55. Mrs Waudby made the findings she did in possession of telephone records about events on 2 February, the claimant's and Mr Beal's discussions with her, and statements taken from the witnesses she interviewed after the disciplinary hearing.

The Law – Unfair Dismissal

56. The parties were familiar with the Employment Rights Act 1996, section 94: the right not to be unfairly dismissed and the relevant provisions for the Tribunal to apply in determining that complaint in section 98 (1), (2) and (4). We relevantly include Section 98(4) below

> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)--
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.

57. The Tribunal reminded itself that the band of reasonable responses test applies to all aspects of section 98(4) determinations, including for example whether a particular investigation in any particular case was unreasonable.

The Law – Age Discrimination

58. The relevant statutory provisions are:

Section 39 of the Equality Act 2010:

> (1) An employer (A) must not discriminate against a person (B)--
>
> (a) in the arrangements A makes for deciding to whom to offer employment;
> (b) as to the terms on which A offers B employment;
> (c) by not offering B employment.
>
> (2) An employer (A) must not discriminate against an employee of A's (B)--
>
> (a) as to B's terms of employment;
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
> (c) by dismissing B;
> (d) by subjecting B to any other detriment.

Section 13 of the Equality Act 2010

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

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

Discussions and Conclusions

Unfair dismissal

59. The claimant did not pursue an unfair dismissal complaint in relation to the respondent's letter to him dated 16 January 2017. That letter gave notice of the termination of his employment ostensibly for reasons of succession planning and adjustment of his hours and salary and so forth. He did pursue an unfair dismissal complaint in relation to his summary dismissal ostensibly by Mrs Waudby in her letter dated 22 February 2017.

What was the reason for the dismissal on 22 February 2017, of if more than one the principle reason?

60. It was clear from the chronology of events in this case that the events on 2 February and the altercation concerning the hard drive are an unfortunate matter of happenstance, almost entirely unrelated to the events prior to that date. The use of that hard drive was unknown to Mr Beal; his reaction to it was no doubt coloured by the fact that the claimant had previously signalled his rejection of an offer and that his employment would end in early April.

61. In those circumstances, notwithstanding that the relationship was strained, and Mr Beal's reaction to the altercation on 2 February was in that context, the principal reason for the respondent's 22 February decision to summarily terminate the claimant's employment was, on our findings entirely related to his conduct on 2 February, 10 February and 16 February. That conduct was the altercation itself, and the claimant's account of communications with Mr Beal and his whereabouts on 2 February to Mrs Waudby at the disciplinary hearing on 10 February, which she reasonably considered to be untruthful, and again continued untruthfulness on 16 February in a telephone conversation.

Did Mrs Waudby have a genuine belief, based on reasonable grounds after such investigation as was reasonable, that the claimant had engaged in the conduct in question?

62. The Tribunal considers that Mrs Waudby's belief that the claimant's conduct was lacking was a genuine belief in a dishonest account of events (namely the sequence of telephone calls and his whereabouts after he left the office on 2 February).

63. That was a reasonable belief based on the telephone records available and the claimant's and Mr Beal's own account of the exchanges between them: the claimant maintained that he was at his solicitors when he was not, and he maintained a version about the sequence of events which was not sustainable on the telephone records. He had two opportunities to be very frank and honest with Mrs Waudby both on the 10th and on the 16th and he chose not to do so.

64. As to the claimant's conduct during the altercation on 2 February, again much of that was not in dispute, Mrs Waudby had reasonable grounds for her findings

as to the chain of events on the basis of the claimant's account and that of Mr Beal.

65. As to whether the investigation conducted by the respondent was reasonable in all the circumstances of this case, including the context in which these matters arose, the Tribunal was not persuaded by the respondent's submission that, in the round, the investigation and dismissal were reasonable, albeit conducted after the disciplinary hearing.

66. The investigation did not correspond to the published practice set out in the respondent's disciplinary procedure or Mrs Garnett's advice: it was conducted after disciplinary charges had been formulated. Why does this matter? Or better put why could it be said that the respondent acted unreasonably in treating its reason as sufficient reason to dismiss in these circumstances?

67. An investigation taking place at an earlier stage is required by the disciplinary procedure. That implicitly acknowledges that even the formulation of disciplinary charges is prejudicial to an individual. The fact that there was no prohibition on use of external hard drives and that Mr Jewitt had used them on occasions would have come to light, with the result that that particular disciplinary charge could not reasonably have formed part of the charges.

68. Similarly, had matters been discussed with the claimant as part of a preliminary investigation, rather than after a suspension by Mr Beal, the formulation of disciplinary charges by Mr Beal, and an invitation to a hearing from Mr Beal, connected as he was to these events, the claimant might have given a truthful account to an investigation about his whereabouts and vulnerabilities and behaviour on 2 February (a concern for his heart and health issues), with an opportunity for the real issues to be discussed, namely the wish that he bring the hard drive to a meeting for it to be examined by IT.

69. We accepted Mrs Waudby's somewhat surprising evidence that she was not aware at the time that she was asked to conduct the disciplinary hearing by Mr Beal or Mrs Garnett, that the claimant was, at the time, subject to notice to terminate his employment.

70. In our judgment, it was outside the band of reasonable responses for the respondent, the controlling mind of the respondent being Mr Beal, to fail to take into account that these events were happening at a time of some strain in his relationship with the claimant, and that was all the more reason to observe the respondent's procedures, containing, as they did safeguards as to natural justice. That was the advice that he received from Mrs Garnett, i.e. that an investigation should be undertaken before any disciplinary charges were framed.

71. We did not accept Mrs Waudby's evidence to the effect that the reason an investigation was not conducted first was to protect the claimant and his privacy, given his seniority. It was starkly apparent in this chain of events that Mr Beal took the decision, no doubt angered by the claimant's email to him enquiring about garden leave, that a disciplinary hearing should be arranged in very short order. In these circumstances it was clear to us that it was Mr Beal's decision to reject Mrs Garnett's advice and to press on with that disciplinary hearing come what may. It may well be that he had overarching commercial considerations relating to the information he believed may be on the hard drive and we take that into account. However, had that been the case, the

disciplinary invitation would sensibly have been drafted so as to invite the claimant to attend with his hard drive in order that an examination could take place and to attempt to address the clearly reduced level of trust between the parties.

72. Weighing all the circumstances in the round, we also found that the claimant's privacy was not respected in the wide ranging and subsequent discussions with a whole number of members of staff that took place in February, further rendering unreliable the explanation we received from Mrs Waudby about the reason for failing to observe the respondent's procedure.

73. We further consider that the order in which events occurred meant that the claimant had no real opportunity to address the witness statements or phone record evidence before charges were formulated, or to understand that what he had said to Mr Beal (that he was at his solicitors) had been taken at face value and when that was established could not have been the case, his honesty was also in issue and he needed to provide a compelling reason in mitigation for saying what he said in the circumstances.

74. We take into account the size and resources of the respondent's business including the sound, but unheeded, advice from Mrs Garnett. We weigh in the mix the overarching nature of Mrs Waudby's conclusion that she rejected the claimant's version of Mr Beal's instruction about the hard drive (because the claimant was demonstrably unreliable about his whereabouts during her interactions with him). We take into account that neither the respondent nor the Tribunal can know for certain what the outcome would have been had a reasonable investigation been undertaken before the framing of disciplinary charges, and our rejection of Mrs Waudby's explanation for that.

75. In all these circumstances we have concluded that the respondent did not act reasonably in treating its reason as sufficient reason to summarily dismiss the claimant by letter dated 22 February 2017. The unfair dismissal complaint is well founded and succeeds.

76. The primary remedy for successful complaints of unfair dismissal is reinstatement or re-engagement. The respondent opened the hearing by requesting that the Tribunal did not address remedy as part of its conclusions, even if there were time, on the grounds that it would seek to prove that the claimant had engaged in blameworthy conduct in his dealings with the respondent's confidential information.

77. The Tribunal does not consider it consistent with the overriding objective for matters to be delayed for that purpose, given the essential chain of events in relation to the claimant's conduct on 2 February was not in dispute. The Tribunal has not heard final argument on blameworthiness or indeed made any findings about the blameworthiness of the claimant's conduct on 2 February or subsequently. The likelihood of the employment ending was certain in any event (as to which see our findings as to discrimination). It may assist the parties in addressing remedy issues by agreement if the Tribunal indicates that it would be likely to consider the claimant's conduct in relation to the hard drive and toward Mr Beal to be blameworthy such that it would be likely to reduce any orders for compensation. The state of affairs generally on 2 February was of the claimant's own making in failing to recognise the need for the information to be promptly delivered up, and his subsequent conduct only compounded that.

Age discrimination – Mr Beal's comment to the claimant in or around October 2014 that "he can't work forever".

78. The respondent advanced a limitation argument in relation to this complaint of direct discrimination.

79. The respondent's submissions identified that this complaint was clearly out of time. Had ACAS Conciliation been entered into in 2014, the Equality Act section 123(1)(a) limit would have expired in early 2015. The claimant did not advance section 123(3) arguments that there was continuing discriminatory conduct extending over a period.

80. The section 123(1)(a) time limit having expired, the Tribunal considered whether it should fix such other limitation period as it considered to be just and equitable and whether it was just to exercise its discretion to do so.

81. We take into account that the claimant was consulting lawyers in relation to proposals that his working hours reduced in October 2016, nevertheless the complaint was not presented until 29 March 2017, albeit that ACAS Conciliation was commenced on 3 February 2017 and was closed with the issue of a certificate on 24 February 2017.

82. We take into account that this complaint is a complaint about a single comment and there are real issues about whether that true statement could be said to be a detriment. In all these circumstances the Tribunal did not exercise its discretion to fix such other period as it thought just and equitable. That complaint is dismissed by reason of limitation.

The dismissal of the claimant on 22 February 2017

83. The claimant's case in relation to this dismissal is not consistent with our findings of fact. The claimant's assertion is that the decision to summarily dismiss him, which followed the events of 2 February was materially influenced by his age, that is his membership of the over 65 age group.

84. We found that the decision to dismiss him was taken by Mrs Waudby, and that she had a genuine belief in his misconduct, albeit that Mr Beal had set those disciplinary proceedings in motion against advice that an investigation be conducted first.

85. In a direct discrimination case, we have to focus on the minds and thought processes of the decision makers and in this respect we have considered both the minds of Mr Beal in setting those proceedings in motion, and Mrs Waudby in taking the ultimate decision.

86. We accepted that Mrs Waudby did not know the letter had been sent to the claimant seeking to reduce his hours, albeit it was within the knowledge of Mr Beal. The fact that employment was already likely to end in strained circumstances could suggest an inference in both directions: namely that age was an influence (because there was nothing to lose), or it was not, because employment was ending in any event.

87. On the balance of probabilities on our findings, the claimant's membership of the over sixty five age group had no bearing whatsoever on the decisions taken in relation to his conduct on 2 February and subsequently.

88. In focussing on the "reason why" the claimant was dismissed summarily in these circumstances, it is patently clear to the Tribunal that the "reason why"

was his conduct in response to Mr Beal's request concerning the hard drive. In order to test our conclusions in that respect, the Tribunal has considered a hypothetical comparator, that is a Director in her forties, who, for whatever reason had been the subject of notice on a current contract in order to reduce hours for the future, and who in those circumstances responded in the way that the claimant responded concerning the hard drive and subsequently sent an email asking if she was to be treated as being on garden leave. The Tribunal has no doubt that a younger Director in those circumstances would similarly have been subject to the knee jerk institution of disciplinary proceedings, and the rejection of HR advice to carry out an investigation, and an unfair summary dismissal. This age discrimination complaint fails.

<u>The proposal on 12 January and the letter on 16 January "forcing the claimant to reduce his working hours in favour of an ad hoc consultancy role in the near future" – alleged contraventions of Section 39 and Section 13 – Direct Age discrimination</u>

89. It was apparent from Mr Beal's evidence that the chronological age of the Board was for him an issue of great concern. His concerns carried with them a stereotypical assumption that those over sixty five are more likely to suffer incapacity, leading to him being left a sole Director. His honest evidence to the Tribunal was that he wished to lessen that perceived risk, and to enable the effective planning and recruitment of staff for the purpose of succession planning.

90. Mr Beal accepted in evidence, given the previous contribution and age of his father (over seventy at the material times), that chronological age was not necessarily an indicator of either contribution or performance. Nevertheless he applied that stereotype to the claimant and there was really no doubt that the claimant's membership of the over sixty five age group was a material influence on Mr Beal's proposal to the claimant on 12 January and the giving of notice to terminate his existing contract on 16 January.

91. The claimant was subject to less favourable treatment than would have been experienced by younger colleagues such as Mr Jewitt and Mr Murphy, and even Mrs Waudby who was under sixty five at the material time. That less favourable treatment involved the proposal and imposition of reduced working hours and pay, when no agreement had been reached in the past as to the details of that, albeit there was a willingness to agree something in principle, and ultimately the termination of his employment contract.

92. We asked ourselves whether, in similar circumstances but perhaps for different reasons, there had been discussions about future exit with Mr Murphy and Mr Jewitt, but no details had been agreed and the parties were in discussions, but on different terms, whether Mr Beal would have given notice to the one who was clearly resisting proposals and not to the other, and we consider he would not have done so. In our judgment the less favourable treatment of the claimant in comparison with a director in his thirties or forties, was materially influenced by the claimant's chronological age, and in particular his membership of the over sixty fives, because of Mr Beal's stereotypical approach to that age and his willingness to feel he could ride roughshod over an ageing director. That approach was reflected in Mr Rich-Birchall's cross examination question: "perhaps it was time to retire" extracted above.

93. As to the respondent's defence, justification for the two acts of less favourable treatment, the respondent's core submissions were that the respondent had made out a legitimate aim, and that in context, the proposal on 12 January and the giving of notice on 15 January were a proportionate means of achieving that aim. With regards the law, section 13(2) of the Equality Act relevantly provides:

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

94. The section 39 treatment or contraventions alleged by the claimant fall within section 39(2)(c) and (d) of the Act: "an employer (A) must not discriminate against an employee of A's (B) – (c) by dismissing B: (d) by subjecting B to any other detriment.

95. The context of the meeting on 12 January and giving of notice on 15 January are described in our findings of fact.

96. The Tribunal has concluded that effective succession planning for, and recruitment and retention of staff to its senior leadership team, and indeed to the office of "director" of the company, with all that that entails, were legitimate aims of the respondent.

97. The real issue between the parties is whether the respondent's means of achieving that aim were proportionate. The claimant submitted that the principles of Seldon v Clarkson Wright & Jakes 2012 ICR 716 SC were relevant and we have directed ourselves in accordance with Baronness Hale's analysis, and drawing on the authorities that in this context "proportionate" means "appropriate and reasonably necessary". At paragraph 64, Baroness Hale said:

> **"64. The answer given in the Employment Appeal Tribunal [2009] 3 All ER 435, para 58, with which the Court of Appeal agreed [2011] ICR 60, para 36, was:**
>
> > **"Typically, legitimate aims can only be achieved by the application of general rules or policies. The adoption of a general rule, as opposed to a series of responses to particular individual circumstances, is itself an important element in the justification. It is what gives predictability and consistency, which is itself an important virtue."**
>
> **Thus the appeal tribunal would not rule out the possibility that there may be cases where the particular application of the rule has to be justified, but they suspected that these would be extremely rare.**
>
> **65. I would accept that where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it. …"**

98. Seldon is concerned with materially different facts. In outline the firm in that case had a deed which required partners to retire at sixty five and the firm's actions implemented that requirement. In this case the respondent had no such agreement from the claimant that he would retire at 68 or 69 or 70 or indeed any age, and in fact on Mrs Garnett's advice, the respondent did not seek to introduce such a general rule for directors.

99. The Tribunal was not therefore concerned with the justification of a policy implementing legitimate aims, but of two acts of discriminatory less favourable treatment where a balancing exercise is required between the discrimination and the legitimate aims. The gist of the extract above is important: in implementing the legitimate aims in this case, proportionate, appropriate and reasonably necessary, includes elements of fairness and consistency of

treatment, even in the context of a relatively small employer without any policy to assist, but with specialist human resources advice.

100. We take into account the Board decision, on advice, not to adopt a particular retirement age, but to work with individuals to equip successors accordingly. That was a process that was well under way. We note our findings that before late 2016 there had been no agreement about the specifics of either a reduction in hours, or more significantly a reduction in pay, or a reduction in bonus, or the fulfilment of the duties of a director.

101. It was also apparent that Mr Beal was taking soundings from both the claimant and Mr Costall in relation to the duties and capacities of members within their teams.

102. We take into account that a reduction to four days in 2016 for the claimant was not implemented and that Mr Beal knew the claimant had dependents and needed an income. We also take into account that there did not appear to be any real discussion of reductions in pay or bonus as far as Mr Costall was concerned. The respondent did not lead any evidence about these matters. It was only in response to the Tribunal's questions that Mr Beal said he believed that in 2017 Mr Costall had been subject to pro rating of his salary despite having reduced his hours in 2015 and 2016.

103. The discriminatory effect of the two discriminatory acts on the claimant was that it was proposed his income be drastically reduced, and he was on notice that his contract of employment, and therefore income, would end shortly. We weigh in the mix that it was intended he contribute less hours for that reduction in pay, and potentially not at all after the end of his employment, after a very short period of time, and well before his seventieth birthday, with the only opportunity for income on a "needs must" consultancy basis.

104. We also take into account that individual circumstances, responsibilities, contributions, resilience and so on are not determined by chronological age, and that this was a relatively small business dealing with individuals. Nevertheless the respondent did not treat Mr Costall and the claimant equitably at all, but insisted upon the acceleration of the claimant's winding down, reductions in pay, and ultimately terminating his previous contract of employment at a far faster pace than the approach with Mr Costall.

105. The question of whether the discriminatory acts were an appropriate means of achieving the respondent's aims, having engaged in discussions since October, with both parties seeking advice, and also conducting their day jobs, without any conclusion by Christmas, is of course a matter of judgment. Clearly Mr Beal felt that the claimant was not honouring the spirit of their earlier discussions nor the handing over of work which he believed had taken place to Mr Jewitt. Nevertheless, in ten year's service, which all appeared to have gone well for all parties, even during a period of recession and difficulty for house builders during 2008, 2009 and 2010 and so forth, there had been no year in which the respondent had not made profits. The relationship had endured and appeared to have created value for all. That may also explain Mr Beal's decision not to seek a reduction in hours for the claimant in 2016, or in pay for the claimant and Mr Costall in 2016.

106. For all the reasons above, the Tribunal did not consider the discriminatory acts appropriate means, balancing the effects of discrimination on the claimant with

the respondent's legitimate aim, in these circumstances. The actions are best described as a flexing of metaphorical muscle, or show of power in bringing matters to a head, when there was clearly compromise to be had. The apparent loss of patience vis a vis the claimant had not been visited upon Mr Costall and there was no real explanation for that.

107. Was it reasonably necessary for the respondent to conduct itself in the way that it did? We again consider relevant the profitability of the business, that there was no apparent reduction in Mr Costall's benefits during 2016, the respondent's broad statement that it could not sustain the excess of capacity in the claimant's area, the claimant having passed work to Mr Jewitt – it was said, in effect, that the respondent could not afford to pay the claimant to do nothing. The claimant's evidence in this respect appeared to be that he was entitled to an ongoing remuneration from the respondent business to recognise the contribution that he had made in the past. These are difficult inter-generational arguments of fairness between those whose contribution is not so valued going forward, because there are others who are perceived as making a greater contribution or capable of making that greater contribution if given the chance.

108. We note that a means must be "reasonably" necessary, as opposed to "absolutely" necessary and no other means will do. This was not an employer implementing a policy involving great issues of principle, with huge numbers of potential retirees. It was a business in which the chairman (Mr Beal senior) had continued to play a role into his seventies and was perceived to be active and contributing, and where the emphasis was very much on the individual. Proportionality nevertheless involves equity and fair dealing.

109. In all these circumstances the respondent has not established that the two discriminatory acts were a proportionate means of achieving a legitimate aim, or even part of a proportionate means of achieving a legitimate aim in this case. The claimant's age discrimination complaints in relation to his treatment on 12 January and his being served notice on 15 January are well founded and succeed.

110. Two of the complaints of age discrimination having succeeded and the Tribunal having given what we hope are helpful indications in relation to remedy in the claimant's unfair dismissal complaint, it is to be expected of two parties sensibly advised that they ought now to be able to agree remedy in this matter. In default of agreement, and within 28 days of this judgment being sent to them, the parties shall apply for a remedy hearing if required.

Employment Judge J M Wade

24 October 2017