EMPLOYMENT TRIBUNALS

Claimant:	Mr W Cook
Respondents:	1. Beckford Silk Limited 2. James Gardner
Heard at:	Bristol
On:	13 & 14 December 2017 21 February 2018 (in Chambers)
Before:	Employment Judge Christensen Miss R Keeping Ms Y Ramsaran

Representation

Claimant:	Miss Bowen of Counsel
Respondent:	Mr Ross of Counsel

RESERVED JUDGMENT

1. The claim for indirect discrimination based upon the protected characteristic of age is dismissed on withdrawal

2. The claim for direct discrimination based upon the protected characteristic of age does not succeed and is dismissed.

3. The claim for unfair dismissal succeeds. The Tribunal is satisfied that the claimant has been unfairly dismissed.

4. The Tribunal anticipates that the parties can now calculate and agree the compensation to which the claimant is entitled as findings are made in principle in relation to each of the issues relevant to that calculation. In the event that the parties are not able to so calculate this figure they should revert to the tribunal so that this matter can be further addressed.

REASONS

The Claims & Issues

Age Discrimination

1. The claimant brings a claim of direct age discrimination contrary to S13 Equality Act based upon

- Being given a contractual retirement age in 2012
- Being compulsorily retired in 2016 contrary to the claimant's wishes
- There being no consultation with the claimant prior to his dismissal
- Being demoted upon being given notice of dismissal

2. In issue are the following

2.1 Because of the claimant's age, did the respondents treat the claimant less favourably in relation to these events, than they treated or would have treated other younger employees?
2.2 What are the correct characteristics of a real or hypothetical comparator?
2.3 In relation to 1, if yes, was this treatment a proportionate means of achieving a legitimate aim?
2.4 If the claimant has suffered discrimination, what compensation is he entitled to?
2.5 Are any claims out of time and, if so, should they be permitted to proceed?

Unfair Dismissal

3. The claimant brings a claim of unfair dismissal. The respondent advances a potentially fair reason for the claimant's dismissal in accordance with S98(4) Employment Rights Act. The reason advanced is some other substantial reason of a kind such as to justify the dismissal, namely that the notice was in accordance with a previously agreed contractual retirement date.

4. In issue are the following

4.1 What was the reason, or if more than one, the principal reason for the claimant's dismissal?
4.2 If the claimant was dismissed because of his age/the retirement age set out in his contract of employment was this a fair reason; namely some other substantial reason (SOSR)?
4.3 If yes was the decision to dismiss for SOSR reasonably in the all the circumstances?

4.4 If the claimant has been unfairly dismissed what compensation is he entitled to?

5. An issue arose during the hearing relating to whether the claimant had properly advanced his claim on the basis that he argued that there had been a contractual variation to his retirement age by reference to discussion with Mr Robbie Gardener in 2016. This possibility was clearly ventilated at the Case Management Hearing on 20 April 2017 as it is referred to in paragraph 5 under the heading of "Issues". Neither of the representatives before me today had been present at that Case Management Hearing.

Amendment

6. The claimant's representative confirmed during closing submissions that to the extent that it was necessary to formally do so she wished to apply to amend the claimant's claim to include this possibility, although her primary position was that this was always properly part of the claimant's claim. The respondent objected but did not press the point. The respondent argued that it would be prejudiced if the tribunal permitted the claimant to advance his claim on that basis. The tribunal has determined that it is proper for the claimant's claim to proceed on the basis set out in paragraph 5 of the Case Management Order of 20 April and without any need to grant a formal amendment to do so. This issue clearly formed part of the discussion at the Case Management Discussion and the tribunal cannot discern any prejudice to the respondent in proceeding in this way as Robbie Gardner was present at the hearing and gave evidence in relation to the conversations that he had with the claimant at this time.

Findings of Fact

7. The second respondent (R2) is a small company formed by James Gardner (R1) in November 1975. When it was originally set up it operated from outbuildings in Mr Gardener's garden in the village of Beckford. The company was set up to screen print silk and make silk scarves and ties to be mainly sold to museum shops and other specialist outlets.

8. By 1989, Mr James Gardner and his wife Marthe, opened a small shop and were outgrowing the outbuildings in their garden. The second respondent subsequently moved to its present premises outside of Beckford Village. Mr & Mrs Gardner have three children, Charles, Anne and Robert.

9. The claimant's date of birth is 20 July 1944. The claimant started work for R2 on 9 July 1981. The claimant was dismissed on 29 December 2016. His hours of work varied. He originally started work for 3 days a week, that increased to 4 days and then to 5 days. By 2011 the claimant had dropped to 4 days a week because of a reduction in work. The claimant worked alongside R1 from whom he learnt the skill of Silk Screen Printer. The claimant and R1 had a good working relationship. When

there were quiet times with the silk screen printing, it was understood that the claimant would carry out handyman and DIY duties.

10. As a family business R1 had endeavoured to bring his oldest child, Charles, into the business to take over from him as Managing Director. However, that did not prove successful and R1 took back control. His daughter, Anne, did the marketing and sales functions for R2. His other son, Robert, came into the business about 3 years before the claimant was dismissed. Robert Gardner developed the digital side of silk screen printing which formed an increasingly large proportion of R2s business.

11. Apart from the claimant, R2 had 2 other employees who were both in their 30s, Rob Flory and Victoria Sargeant. Rob Flory was employed in or around 2010 to learn silk screen printing from the claimant. He also developed skills in digital screen printing and worked with Robert Gardner. Victoria Sargeant was employed in the design workshop.

Notice of retirement 2009

12. The claimant was sent a notice of retirement on 16 April 2009 in accordance with the statutory procedures in place at that time which enabled employers to retire their employees by reason of retirement upon reaching the age of 65. The claimant was approaching his 65th birthday. It states

> "*I am advised that I must send you this formal notice of retirement from Beckford Silk to take place six months from the date of this letter. We are then required to have a meeting where we discuss your plans and ours for future employment…..as you know from informal discussions we have had, I hope that we can continue to offer you full time employment on existing terms of pay and holiday entitlement that you have at present"*

After sending that letter, no steps were taken by R2 to proceed with the claimant's retirement at that stage.

13. The default statutory retirement age of 65 was abandoned in 2011 and attendant changes were made to the relevant statutory provisions.

2011 – reduction to 3 days a week

14. In October 2011 R1 spoke to the claimant about R2's difficult financial situation. R1 explained that it was necessary for R2 to save money in what were difficult financial times. It was agreed that the claimant would temporarily reduce his hours to 3 days per week.

2012 – continuing financial difficulty

15. In February 2012 R1 spoke again with the claimant about R2's financial difficulties and explained that it would not be possible to return the claimant to 4 days a week. The claimant was concerned about a permanent move to 3 days a week. He took legal advice which was that he should seek certainty regarding the future from his employer. The claimant wrote to R1 on 19 February

> "A*s we discussed in October last year I intend to carry on working, health permitting, until I am at least 70. My finances have been structured on my continuing to work on a 4 day week for the foreseeable future. The reduction in hours will put me under some considerable strain"*

16. R1 responded on 23 February:

> "N*either of us is sure exactly what contractual obligation Beckford Silk has in offering to continue to employ you and for how long. I suspect there have been recent changes in employment law on just this point so I intend to pass this correspondence to our solicitor for his comments and guidance"*

17. R1 wrote again on 21 March and told the claimant that his solicitor had advised that the national retirement age of 65 had been abolished and that employers were now free to set a contractual retirement age subject to the requirements of a fair procedure and objective justification. At that stage the claimant was approaching his 68th birthday.

18. Thereafter the claimant and R1 met at the beginning of April and agreed that he would be provided with a Written Statement of Terms and Conditions in which his contractual retirement date would be age 72.

April 2012 – terms and conditions of employment

19. The claimant was given a written statement of his terms and conditions in a letter dated 16 April.

> *"You have been employed by the firm for some 32 years. As far as we can establish you started full time employment with us on the 9th July 1981. Although I believe that you were probably provided with a letter outlining the terms of your employment, due to the length of time I cannot now locate a copy….your job title is senior printer and dye maker although you also work in other areas as a joiner and general handyman".*

It sets out a notice period of 12 weeks and provides the normal place of work in Beckford and the normal hours of work and hourly rate of pay. It provides both for a 3 and a 4 day week.

> *"On the 1st November following your 70th birthday you will be on a three day week until retirement two years after that date. This year you will recommence a four day week from Friday 20th April and until week commencing 2nd November and then a three day week until week commencing 5th April 2013. (if we have sufficient work to keep you on four days during this winter we will be pleased to offer it to you). I record your agreement that the number of days that you work may fluctuate between three and four…."*

The letter provided that *"the retirement date agreed between us is 1st November following your 72nd birthday.* It is agreed that that date is 1 November 2016.

20. The letter is signed by R1 and the claimant on 19th April 2012. The claimant has portrayed C1 as being a forceful personality and with whom it was difficult to disagree. The claimant portrays the events in April 2012 as ones that he had no option but to agree to. The tribunal does not consider this to be the correct characterisation of events. The claimant and R1 had a good working relationship, the claimant had already taken legal advice in early 2012 and we are satisfied that, if the letter of 19 April was not one that the claimant agreed to then he would have taken issue with R1.

21. At that time R1 did not insert a contractual retirement clause into the terms and conditions of the other two employees of R2. They were both in their 30s and he considered that it would be otiose to insert a retirement date upon employees who were so far away from any potential for retirement.

The claimant's performance

22. The respondents have sought to argue that in the last few years of the claimant's employment his performance started to deteriorate. The tribunal is satisfied that this is not a correct characterisation of the facts.

23. In March 2013 the claimant was issued with a written warning by R1 in relation to the percentage of seconds that had been produced by the claimant on one particular run of silk scarves. He had not previously been issued with any warnings in relation to the standard of his work.

24. The tribunal is satisfied that that incident was a 'one off' in that is was not repeated. The claimant's performance levels thereafter remained the same as both R1 and Rob Flory. The tolerance levels for seconds varied in relation to different jobs – in some a seconds rate of up to 70% could be tolerated and in others a seconds rate should not be above 2%. The claimant's level of production of seconds, other than in relation to the incidence in 2013 remained within these levels of tolerance.

25. This is supported by the evidence of Robert Gardner whose evidence was that from March 2014, when he became a Director of R2 and one of the claimant's day to day managers, he had confidence in the claimant's ability and that he produced good work.

February 2014

26. In February 2014 R1 stepped back from his day to day running of R2 and appointed his son Mr Robert Gardner and his daughter Anne Hopkins to take over his duties. R1 remained as Managing Director but took a less active role in running the business. Robert Gardner took over production and Anne Hopkins dealt with the retail side of the business. During this time Rob Flory concentrated on the digital printing which was being developed by Robert Gardner.

Summer 2016 – reassurances about the future

27. The claimant turned 72 in July 2016. No steps were taken to trigger the contractual retirement date in his contract. R1 had left the overall management of the business with his son and daughter. The claimant approached Robert Gardner in the summer of 2016 and was reassured that there were no plans to bring his employment to an end, that his job was secure and that he could plan to take a holiday in December 2016 to visit his son in Canada. The claimant was concerned about the cost of travel to Canada and was not certain that he could afford to if R2 was going to trigger the retirement clause in his contract. Robert Gardner commented to the claimant in these conversations that he admired the claimant's work ethic and wished that other younger people had his work ethic. The claimant was very reassured and went ahead and booked his holiday to Canada.

28. We do not regard any of these conversations as being consistent with a variation of the contractual retirement date set in the claimant's contract. That remained set at age 72 but with no obligation on the claimant to retire on that date if both parties were content for it to continue. We regard the comments by Robert Gardner to be no more than confirmation that R2 was content to continue to employ the claimant and was not intending to trigger the contractual retirement date of 1 November 2016 by giving the required 12 weeks' notice set out in the contract. This would have required notice to have been given in or around August.

September 2016 – financial problems and cost cutting

29. In September 2016 R1 decided that he must resume an active role in the running of R2. He had become concerned at the financial difficulties that faced R2 since his son and daughter had taken over and decided that he needed to step in. This was caused by an increased price of silk because of a fluctuation in exchange rates following the decision of the UK to leave the EU. Orders were down by 30%. R1 concluded that it would be necessary to reduce R2's costs including a reduction

in wages. He did not wish to ask Robert Gardner and Anne Hopkins to conduct the cost cutting exercise and so resumed a direct role himself to do so.

30. At a meeting of the Directors in September, R2's Directors (R1 & his wife, Robert Gardner and Anne Hopkins) all agreed to reduce salaries or monthly drawings by 20%. However, in itself that was not enough to cover the reduction in costs that R1 considered necessary to safeguard R2. R1 concluded that it may be necessary to ask all employees to reduce their working time by 20% until things improved. Upon taking advice from ACAS he discovered that to do so would require a period of consultation with his staff that would take some months to conclude. He also considered whether he could make one of his 3 members of staff redundant. R1 concluded that it would be possible to make Victoria Sargeant redundant by closing the design department; however this possibility was resisted by his two children who argued that the design department should stay open.

31. In the light of the resistance from his Co-Directors to closing the design department and not wishing to wait some months to conduct a consultation with his staff to reduce their working hours, R1 decided instead to utilise the retirement clause in the claimant's contract as a means to dismiss him and thus reduce costs.

32. His evidence was, and we find, that he believed that the retirement clause entitled him to terminate the claimant's employment without more at that stage. His evidence was, and we find, that were it not for the severe financial difficulties faced by R2 no steps would have been taken to dismiss the claimant by utilising the retirement clause in his contract. It was, in essence, simply seen by R1 as an efficient vehicle utilised to cut costs and without the need to go through any sort of a time consuming procedure.

5 October – verbal notice of dismissal

33. Robert Gardner asked the claimant to attend a meeting with R1. He was told by R1 that he was to be dismissed with 12 weeks notice in accordance with the retirement clause agreed in April 2012. He was told that during his notice period that Rob Flory would concentrate on the hand printing and that the claimant was instead to focus on his DIY/handyman role. Given that Rob Flory had tended to concentrate on the digital printing, R1 wished to ensure that he was up to speed with his hand printing given the imminent departure of the claimant. The claimant in fact, thereafter, did no further silk screen printing until he left for his holiday in Canada on 9 December.

12 October – written notice of dismissal

34. The claimant was written to by R1 on 12 October.

> *"I write to confirm that under the terms of your contract of employment dated 16th of April 2012 notice of termination of that contract was given*

to you last Wednesday the 5th of October – verbally – and to commence the 12 weeks notice that you are entitled to, last Friday 7th October."

Grievance – 18 October

35. The claimant raised a written grievance by letter of 18 October. *"I am writing to raise a formal grievance about your decision to make me retire on a compulsory basis."* The claimant confirms that he does not agree with the decision because he is still able to do the job, he is rarely sick and has no known health issues, he has a good work aptitude, he has an exemplary time keeping record, is trustworthy, has never asked to be retired and has been told by ACAS that the actions of the respondents are unlawful.

36. After taking legal advice, R1 responded on 25 October confirming that a meeting would be held to consider the grievance. R1 sets out the reasons that the claimant was given notice

- The notice is in accordance with the agreed retirement date
- R2 must plan its future and promote a younger workforce
- R2's need to cut costs
- Preventing any future disputes regarding fitness to work
- Needing a more modern skills set for the future.

37. The tribunal is satisfied that there was only one reason that the claimant was given notice of dismissal and that was a need to cut costs. We are satisfied none of the other reasons put forward were in any sense influential in the decision to dismiss the claimant. Our findings establish that there was no wish to promote a younger work force. The opposite in fact seemed to a degree to be the case on the basis of the evidence of Robert Gardner that he wished younger workers had the same work ethos as the claimant. Further there were no particular concerns regarding the claimant's fitness to work.

38. R1 held a meeting with the claimant on 2 November to discuss his grievance and told him in that meeting that he didn't know why he had mentioned anything about the claimant's fitness to work and that that clause had been put in on the advice of his solicitor.

39. When R1 was being cross examined on the legitimate aims set out at paragraph 23 of the ET3, he confirmed that the statements relating to the need to plan and develop the workforce and the need to ensure a modern skill set in the workforce had been included because that is what he had been advised to say. We were presented with no evidence that there was any substance to the possibility of these being the aim of the respondents or in any sense being causative of or influential upon the decision to dismiss. We find that the other reasons were inserted on the advice of R1's solicitor but in no sense reflected his underlying rationale for dismissal.

40. The claimant was told in that meeting that the Directors had taken a 20% wage reduction to save costs and told that business was down 27% in the last 4 months. There was no discussion with the claimant regarding alternative ways of saving costs. The claimant was told that it had been R1's solicitor's idea to include a retirement clause in the claimant's contract in 2012.

41. The tribunal is satisfied that the decision to trigger the contractual retirement date provisions was simply a reflection of R1s conclusion that that was the quickest route to cutting costs. R1 believed that he could do so without the need to follow any sort of a consultation process. He understood that would be necessary if short time working or redundancies were to be considered.

42. R1 wrote to the claimant on 23 November and confirmed the decision to dismiss. In that letter R1 states

> *"The 2013 letter you signed was an agreement to retire, and establishes a contractual retirement date. It was agreed after negotiations with respect to working hours. It amounts to you giving notice of your intention to retire and the company is under no obligation to let you withdraw your notice".*

This is consistent with R1s evidence to the tribunal that he believed that from 1 November 2016 the claimant's contract in some way ceased to exist without more or without the need to follow a proper process.

43. The letter continues to confirm that in any event R2 may retire the claimant provided a fair procedure is followed and that objectively justified grounds are put forward to achieve a legitimate aim. He sets out again the reasons stated in the letter of 25 October.

44. The claimant wrote a letter of appeal but then withdrew it as, on reflection, he concluded that R1 would not change his mind and that there was therefore no point in an appeal.

45. The claimant's evidence was that had been very hurt by the actions of R1 and we find that he was very hurt. He considered that R1 had taken back control of R2 and that his first action had been to dismiss the claimant. However, he felt that R1 was not taking responsibility for his actions and was instead blaming his solicitor for given the claimant a retirement date in the first place and then blaming the solicitor for what was written in the response to the grievance. This caused him to lose trust in R1 as he had expected more of him after some 36 years of service to R2 and a close working relationship with R1.

46. The tribunal is assisted in being satisfied that it was proper for the claimant to have experienced a significant degree of hurt and loss of trust in R1 due to his

conduct from September 2016 by considering a letter that R1 wrote the claimant on 26 January 2017. This letter is 6 pages long and hand written. It is a letter of apology and confirms the closeness of the working relationship that the two men had had and supports the notion that it was proper for the claimant to have lost his ability to trust R1 in light of his recent actions. R1 writes

> *"On an entirely personal level I owe you my sincere apologies for the hurt that I have caused you over the last few months. You…were the very last person that I would have wanted to offend. What I did was hurtful especially to you….but unfortunately there are some situations in business that if you are not prepared to be ruthless then your business simply does not survive".*

R1 goes on to explain the difficult financial situation that R2 was in and the imperative to cut costs. He closes

> *"We thank you very much for all the excellent work over many years that you have done for Beckford Silk. It has been your life's work as it has been our life's work and it would not have the reputation that it has today if it had not been for the three of us"*

This refers to the claimant, R1 and R1's wife.

47. The claimant worked until the 9 December and then started his period of pre-booked leave to travel to Canada to visit his son. His employment terminated on 29 December 2016. The claimant returned to the UK on 5 January.

Offer to reinstate

48. he claimant took advice in November from a solicitor in light of his notice of dismissal. He was advised that what had happened to him was unlawful. The claimant's solicitor commenced the Early Conciliation procedure with R1 and R2 at the end of November. Now understanding that there was a potential for a claim to be made against R2 and wishing to avoid the possibility of those proceedings, R1 wrote to the claimant on 14 December.

> *"I have reconsidered the decision in my letter of the 23rd of November. I offer to mutually agree with you to withdraw the notice given in October or offer reinstatement of your job on identical terms, except with no retirement date, whichever you prefer"*

49. At that stage R1's intention was that, if the claimant accepted the offer to reinstate, it would be on the basis of negotiating to reduce to 2 days a week to ensure some level of cost cutting.

50. This was sent to the claimant when it was known that he was on leave in Canada visiting his son. He discussed it with his family whilst he was on holiday and responded on 6 January 2017 upon his return to the UK. He rejected the offer of reinstatement. The letter is understood to refer to some without prejudice discussions that have not been made known to the tribunal.

> *"I am afraid I cannot accept your offer because the working relationship between us had broken down to the extent that I do not feel that I can trust your actions in the future:*
>
> - *Your notice to compulsory retire me was given with no prior consultation and it was only when I said that this was unfair that you offered me a one year position*
> - *At our meeting on the 22nd November you stated that my original contract could not be reinstated as this would lead to the same situation the following year*
> - *You demoted me immediately upon giving me notice which was humiliating*
> - *There has been no admission by you that any of your actions were wrong and I think you still believe the way you treated me was right*
> - *It was only after I paid to get legal advice that you changed your mind and I have no confidence that you would not treat me unfairly again if I was reinstated"*

Mitigation of Loss

51. The claimant started looking for a new job in February 2017 and kept a diary of his job search. At the date of his dismissal he was working 3 days a week (24 hours 3 x 8 hours) for R2 and had a commute to work or about 10/15 minutes each way. He wished to find a replacement job that was similar.

52. He had worked in a specialist skilled sector for 36 years and endeavoured to focus his job searches on finding a replacement job in the same sector and at a similar rate of pay. We regard that as compatible with his duty to mitigate loss. From February to September/October 2016 he looked for a replacement job in textile printing. From September/October 2016, and having found no replacement job in that sector, the claimant broadened his job search to include other roles but limited that search to jobs in the Tewkesbury vicinity.

53. The claimant found one opportunity in Cheltenham in April 2017 as a Fabric Technologist which he considered would have been suitable for him in April 2017. He applied for the job only to be told that the applications closed as the vacancy had been filled. The claimant's job search revealed that almost all of the printing jobs which may have been suitable for him were either full time, which he did not want to work, or required qualifications that he could not offer.

54. At the end of January 2017, the claimant was told by his daughter of a job at Cheltenham B&Q as a customer advisor/till operator. The claimant was successful in getting this job and was put on to a standard 12-hour contract on 28 January 2017. There have been no opportunities for the claimant to increase his hours at B&Q. The claimant works variable 12 hour shifts for B&Q.

55. Apart from his job in B&Q and the application in April 2017 as a Fabric Technologist, the claimant has applied for 5 or 6 jobs through agencies and searches in newspapers. Since September 2017 the claimant has applied for jobs similar to that in B&Q but has not yet been successful.

56. The claimant lives in Tewkesbury in Gloucestershire. He drives a car. The distance to Cheltenham is about 9 miles and the drive time varies from 20 to 40 minutes each way depending on time of day and traffic. The distance to Gloucester is about 11 miles with a similar drive time. The distance to Evesham is about 13 miles with a similar drive time.

57. Since September 2017 the claimant has been focusing his job searches in service industry/DIY jobs in the locality in which he lives. He considers that the petrol costs of travelling any further would be too high. He plans to continue with his job at B&Q, is not hopeful that he will be able to increase his hours and will continue looking for something similar within his locality to bring his working hours closer to that which he was doing for the R2.

Submissions

58. Both parties have provided written submissions which have been augmented by oral submissions. The tribunal has been referred to a number of cases and has been provided with *Seldon-v-Clarkson Wright [2012] UKSC 16, Sougrin-v-Haringey health Authority and R-v-Governing Body of JFS [2009] UKSC 15.*

59. The respective submissions are not set out here but are clearly set out in the written submissions. In the final conclusion of this judgment, when we move to determine the issues, the tribunal sets out the respective positions of the parties, where they differ, and explain how we have resolved the issues.

Determination of Issues

<u>Direct Age Discrimination</u>

60. **Because of the claimant's age, did the respondents treat the claimant less favourably in relation to the particular events complained of, than they treated or would have treated other younger employees? S13 Equality Act**

Being given a contractual retirement age in 2012

61. In issue between the parties in relation to this claim is whether this claim is out of time. The events took place some 4.5 years prior to the presenting of the ET1. The discrimination of which the claimant wishes to complain is that he was singled out in 2012 for the insertion of such a clause because of his age. His younger colleagues did not have such a clause inserted in their contracts and they would be appropriate comparators in terms of establishing whether he has suffered any less favourable treatment because of his age at the time that the term was inserted.

62. The claimant submits that the correct characterisation is that having had the contractual clause inserted into his contract, the claimant suffered a continuing act of discrimination thereafter (S123(3) Equality Act, Conduct extending over a period). If that is correct then the claim is not out of time.

63. The respondent submits that it is an act with continuing consequences, a one-off action with continuing consequences in the form of the existence of the contractual term. The respondent refers the tribunal to the case of *Sougrin-v-Haringey Health Authority* to support this submission.

64. We are satisfied that the respondent's submissions in this regard indicate the correct legal analysis of the facts. The tribunal finds that the contractual retirement date agreed between the parties in 2012, is properly characterised as a one off act with continuing consequences. The continuing consequence was that it could be triggered in the future – subject to the requirement, at the time of triggering to it being objectively justified. We can discern nothing that would indicate any continuing discrimination of the claimant in the period 2012 to 2016, there was no conduct relating to the clause and no reference made to the contractual provision during this period.

65. We are therefore satisfied that this claim is out of time as it has not been brought within the 3 month time limit set out in S123 Equality Act. We have considered whether we should exercise our just and equitable discretion under S123(1)(b).

66. We do not exercise that discretion and we are satisfied that, had the claimant wished to complain of age discrimination in 2012 by reference to the insertion of the clause at that time, he could have done so. He took legal advice at the time and was therefore well placed to have given that possibility proper consideration at that time. In all these circumstances we do not consider it just and equitable to extend time.

67. The claim, in this regard, is therefore dismissed.

Being compulsorily retired in 2016 contrary to the claimant's wishes

68. The claimant submits that he was dismissed because he had attained the age of 72 in accordance with his contract of employment and that this therefore amounts to direct age discrimination.

69. Both parties have made submissions on the identification of the correct comparator as a way of establishing whether or not, the claimant's dismissal amounts to less favourable treatment because of the claimant's age.

70. The claimant refers the tribunal to the cases of *Shamoon-v-Chief Constable of RUC 2003 ICR 337 HL* and the guidance given by Lord Scott.

> *"The comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class"*

71. The claimant also refers the tribunal to the EHRC Code *"what matters is that the circumstances which are relevant to the claimant's treatment are the same or nearly the same for the claimant and the comparator".*

72. The claimant reminds the tribunal that it is incumbent on the tribunal to consider how a hypothetical comparator would have been treated where there is no actual comparator *(Balmoody-v-UK Central Council for Nursing, Midwifery and Health Visiting* and *Williams-v-HM Prison Service)* but that there is no obligation to do so when comparison with a real comparator has revealed no discrimination.

73. The claimant submits that the correct comparators are the claimant's two work colleagues who were both in their 30s. In the alternative the claimant argues that the correct comparator is hypothetical – someone who was not about to attain the age of 72 but who had the same contractual term as the claimant. The claimant invites the tribunal to construct an appropriate comparator.

74. The claimant submits that on the basis of the real comparators or the proposed hypothetical comparator it is established that the claimant has been treated less favourable because of his age. Those comparators would not have been dismissed.

75. The respondent submits that the appropriate comparator is someone with a fixed termination date or alternatively a contract for which it is believed that there is a fixed termination date. The respondent cautions against creating a hypothetical comparator who also has a retirement date on the basis that to do so would taint the comparison with age-related circumstances. The respondent submits that such a comparator would have been treated in the same way as the claimant.

76. The respondent submits that the tribunal should be cautious to adopt a 'but for' approach to establish causation and cites the guidance of Lord Phillips in *R-v-Governing Body of JFS 2010 2AC 728 SC.*

> *"This 'but for' test was another way of identifying the factual criterion that was applied by the council as the basis for their discrimination, but it is*

> *not one that I find helpful. It is better simply to ask what were the facts that the discriminator considered to be determinative when making the relevant decision"*

The respondent submits that the claimant's age was not what influenced the decision to dismiss the claimant – instead what was determinative was that he regarded him as someone who was on a contract with a fixed termination date.

77. We deal firstly with the identification of the correct comparator. In this regard we prefer the approach argued for by the respondent. We do not consider that the claimant's two younger colleagues are the appropriate comparators as they are not *"in the same position in all material respects as the victim"*. We do not regard them as being in the same position in all material respects, as they were not subject to a contractual term which allowed the employer, or at least that the employer considered allowed him to, bring the contract to an end, to 'break' it, without more. That feature is critical in this case as it is clear from our findings that it was not the fact of reaching an age that put the claimant in the position that he was in, instead it was the fact of being subject to a contractual term that the employer considered entitled him to terminate or 'break' the contract. Were it not for the financial crises faced by R2 the tribunal is satisfied that no steps would have been taken to trigger the contractual retirement date clause. It was in essence, simply used as a convenient vehicle, to expedite a dismissal to save costs.

78. We turn then next to consider what features a hypothetical comparator would have. We do not adopt the features argued for by the claimant, namely someone who was not about to attain the age of 72 but who was subject to the same contractual term as the claimant. Such a person is not in the same position in all material respects as the claimant because their employer would not be in a position to trigger the contractual term to dismiss.

79. We therefore conclude that the correct comparator is hypothetical and has the features argued for by the respondent. Such an analysis ensures that the correct comparison is made, keeping all other material facts as close as possible to the claimant save for his age. The correct hypothetical comparator is therefore someone younger than the claimant and who was subject to a contractual term that either created a fixed term and the fixed term had passed (or the employer believed it had) or someone who was subject to an ability to break the contract and the conditions for breaking it has been met (or the employer believed they had). When that person is compared to the claimant the tribunal is satisfied that it reveals that the claimant has not been treated less favourably because of his age. The tribunal is satisfied that that hypothetical comparator would have been treated in the same way as the claimant by this employer. R1's impetrative was to move to save costs quickly and such a hypothetical comparator would have been vulnerable to dismissal (subject to notice if applicable) in exactly the same way as the claimant was.

80. We have also considered whether the approach set out in the *JFS* case assists and conclude that it does. The determinative facts relevant to R1 in dismissing the claimant, in no sense included the claimant's age. If one approached this by asking – 'but for the claimant's age would he have been dismissed' – the answer is likely to be no which might suggest that this amounts to direct discrimination as argued for by the claimant. However, we regard that 'but for' approach as too simplistic in a case such as this as it does not assist in establishing the *reason for* dismissal. We are satisfied that the reason was not the claimant's age.

81. The claim in this regard is therefore dismissed.

There being no consultation with the claimant prior to his dismissal

82. This part of the claim is not addressed by the claimant in his closing submissions. The respondent submits that the comparator identified for the dismissal part of the claim would have been treated in the same way. We agree that this is the correct comparison to make.

83. We are satisfied that the comparator, subject to a fixed term or break clause, would have been treated in the same way as the claimant and would have been dismissed without any consultation.

84. The claim in this regard is therefore dismissed.

Being demoted upon being given notice of dismissal

85. This part of the claim refers to the fact that following his notice of dismissal on 5 October 2016, the claimant thereafter did no further silk screen printing and was instead asked to concentrate on DIY/handyman jobs. The claimant submits that this amounts to less favourable treatment because of the claimant's age. The respondent submits that the reason for this request was to ensure an orderly transition and that in any event the undertaking of DIT/handyman jobs formed part of the claimant's job duties.

86. The tribunal is satisfied that this does not amount to direct age discrimination. If one adopts the same comparator as in relation to the dismissal and consultation claim some further features need to be built in to create "*circumstances which are relevant to the claimant's treatment [which] are the same or nearly the same for the claimant and the comparator".* Those features include that the respondent wishes another employee to improve and practice the skills of claimant given the claimant's imminent departure. Using such a hypothetical comparator satisfies the tribunal that this does not amount to age discrimination as we are satisfied that the comparator would also have been asked to concentrate on other contractual duties to enable their colleague to get up to speed with the necessary skill set before the claimant's departure.

87. The claim in this regard is therefore dismissed.

Indirect Age Discrimination

88. S 19 Equality Act. This claim is dismissed upon withdrawal.

Unfair Dismissal

89. **What was the reason, or if more than one, the principal reason for the claimant's dismissal?**

90. In accordance with S98(1)(b) the reason, or principal reason advanced by the respondents for the dismissal was some other substantial reason of a kind such as to justify the dismissal, namely that the claimant was served notice of his contractual retirement date. The tribunal is satisfied that dismissing an employee under such a clause can amount to some other substantial reason.

91. The respondent pleads in the alternative that a promissory estoppel arises in relation to the contractual retirement date and it is inequitable for the claimant to be entitled to the relief claimed. The claimant submits that the claimant should not be estopped from pursuing his statutory rights and that in any event, promissory estoppel operates as a defence to a contractual claim. The tribunal rejects the possibility that agreeing to a contractual retirement date could in some way estop a claimant from being able to pursue a statutory right to bring a claim for unfair dismissal arising from a dismissal consequent upon the use of that contractual clause.

92. The respondent refers the tribunal in its submissions to the case of *Abernethy-v-Mott, Hay and Anderson 1974 ICR 323* to support the importance of identifying the "*set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee"*

93. *Abernethy-v-Mott* is a case that supports the proposition that where an employer uses the wrong label but where the facts that led to dismissal were known to the employee at the time of the dismissal and fully aired in the tribunal proceedings, the tribunal may ignore the wrong label because no unfairness has been done to the claimant. It covers the sort of situation that existed in that case in which the label ascribed to the dismissal was 'redundancy' but the facts underlying the decision to dismiss in fact related to 'incapability' which was fully explored at the time of dismissal.

94. The respondent submits that the motive for dismissing the claimant was to cut costs and then submits thus *"the reason or principal reason for C's dismissal, as defined in Abernethy, is that it was provided for under his contract of employment"*.

95. The tribunal does not adopt the respondent's analysis in this regard and rejects the notion that a need to cut costs was provided for in the claimant's contractual retirement clause in his contract. The use of such retirement clauses may be appropriate where an employer wishes to plan its future work force in terms of skill set, promote a younger workforce for the sake of intergenerational fairness and address concerns about fitness to work for its ageing employees. None of those possibilities were in the mind of R1 when he made the decision to dismiss the claimant.

96. Notwithstanding this, the tribunal is satisfied that the financial concerns of the respondents were real – in that sense they were substantial and were not frivolous or trivial. The tribunal is also satisfied that a need to cut costs can properly form the basis for a decision to dismiss.

97. The reason, and the only reason, for the claimant's dismissal was to cut costs; there was a genuine need to reorganise the small workforce in some way to ensure that R2 remained financially viable.

98. **If the claimant was dismissed because of his age/the retirement age set out in his contract of employment was this a fair reason; namely some other substantial reason (SOSR)?**

99. We have found that the claimant was not dismissed because of his age/retirement age set out in his contract of employment. Notwithstanding this we are nonetheless satisfied by reference to our findings of fact that the respondent has established that there was some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held (S98(1)(b)) and this was the reason for the claimant's dismissal. Accordingly, we are satisfied that the respondent has shown that there is a potentially fair reason for the dismissal.

100. **If yes was the decision to dismiss for SOSR reasonable in all the circumstances? S98(4)**

101. In order for the claimant's dismissal to be fair, there would need to have been some sort of a procedure followed in which a pool was created and in which the claimant, and any others in the pool, were made aware of the true nature of the need for reorganisation/redundancy and to have been given an opportunity to have contributed to the possibilities that existed to address the need to cut costs in that consultation process. The possibilities that R1 had in mind included putting employees onto shorter working hours and/or creating a redundancy pool.

102. These possibilities were never explored with the workforce. The possibility of redundancy was discussed amongst R1 and his children, but they disagreed on the way forward. The possibility of putting employees onto shorter working hours was dismissed by R1 once he became aware that he would need to take time to follow

due process to do so. We recognise the very small-scale nature of R2 and its limited size and administrative resources. However, even taking that into account we conclude that the failure to follow any sort of proper process to dismiss the claimant for SOSR means that it was unreasonable to dismiss the claimant. The dismissal is unfair in all the circumstances.

103. **If the claimant has been unfairly dismissed what compensation is he entitled to?**

Polkey

104. The claimant has submitted that "*the procedural failures of the respondent are so significant that attempting to reconstruct what might have been is so riddled with uncertainly and speculation that no sensible prediction can properly be made*." We don't adopt this approach and remind ourselves that it is our responsibility to make predictions, as best we are able by reference to the evidence submitted and our findings of fact as to what might have happened had a fair procedure been followed. In the alternative the claimant invites the tribunal to consider a Polkey deduction as the lower end of the scale.

105. The respondent has submitted that the likely course of events, had a fair procedure been followed, are that redundancy process would have started in October 2016 and culminated with a dismissal for redundancy some four to six weeks later in early February 2017. We estimate that date to be Friday 10 February 2017. The respondent submits that Rob Flory would not have been selected because he had both digital and hand printing skills. The respondent submits that Victoria Sergeant would not have been selected because of resistance from R1s children to the closing of the design department.

106. In the alternative the respondent submits that, had the claimant remained employed it would have been on the basis of a two-day week or alternatively he would have been dismissed on the grounds of capability.

Redundant?

107. We conclude that there is a fairly high percentage chance that, had the respondent run a redundancy exercise, that the claimant would have been selected for redundancy. We estimate that % chance to be 70%. We do so on the basis that there was no realistic chance that Rob Flory would have been selected for redundancy. However, as identified by R1, there was a chance that Victoria Sergeant may have been dismissed. His children seemed initially to be set against this possibility, but he was in favour of it and we are satisfied that there is a chance that a fair and reasonable process, with proper consultation, may have led to a conclusion that she should be dismissed. To reflect this possibility, we estimate the chance that the claimant would have been selected at 70%.

Put on shorter working hours?

108. Had the claimant not been selected for redundancy we are satisfied that there is a 100% certainty that in the alternative his hours would have been reduced to 2 days a week. This was on R1s mind but was not pursued because he had been advised that he would need to take time to consult on such a possibility before implementing any changes.

Dismissed on grounds of capability?

109. We are satisfied that there is a 0% chance that the claimant would have been dismissed for reasons of his performance or capability. Our findings indicate that we are satisfied that there were no concerns about the claimant's performance at the time of his dismissal.

Mitigation/Contributory Conduct

Offer of reinstatement

110. The respondent has submitted that the claimant's rejection of the offer of reinstatement constitutes a failure to mitigate loss (S123(4) and/or conduct that justifies a reduction in the basic and compensatory award (S123(6)/S122(2)).

111. We do not see any force in this submission and reject it. We can discern nothing that support the proposition that in rejecting that offer the claimant failed to mitigate his loss or that his conduct was blameworthy or that it would be just and equitable to reduce compensation on this ground. Our findings indicate that the claimant was properly in a position to have lost trust in R1 and R2 because of events leading up to his dismissal and therefore properly in a position to reject the offer of reinstatement. There is no indication in the letter of any contrition, regret, remorse or recognition of the damage to trust that was caused by R1's actions. It refers simply to having *'reconsidered'* matters. The offer to reinstate only came after the claimant had consulted a solicitor and the Early Conciliation process had been notified to the respondents. The claimant's ability to trust his employer was severely damaged when he was reassured by Robert Gardner that his job was secure only to be called to a meeting a few months later by R1 and told, with no prior notice, no proper procedure and no warning, that he was to be dismissed. He had had a close and trusting working relationship with R1, having worked with him for 30+ years and was deeply shocked by those turn of events. He was properly in a position to reject the offer of reinstatement for the reasons he set out in his letter *"I am afraid I cannot accept your offer because the working relationship between us had broken down to the extent that I do not feel I can trust your actions in the future".*

Mitigation of Loss – job search

112. We are reminded by the claimant that the burden is on the respondent to prove that the claimant has failed to take reasonable steps to mitigate his loss. The claimant further reminds the tribunal that the respondent has failed to adduce any mitigation evidence of its own.

113. We regard it as eminently reasonable, and compatible with his duty to mitigate loss, for the claimant to have initially endeavoured to find alternative employment in the same specialist sector from which he was dismissed. He had worked in the specialist sector of textile printing for 36 years and properly set about trying to find something similar to replace the job he had been dismissed from. His job searches revealed that most of the jobs that might otherwise have been suitable were not possible for him to consider because they required full time working and/or qualifications that he had never acquired. We don't consider that it was incumbent upon the claimant, now aged 72, to either consider full time working or to consider acquiring further qualifications. Because of the specialist nature of textile printing the opportunities were limited but we are satisfied that in applying for 5 or 6 jobs in an approximate 7 month period is consistent with the duty upon the claimant to mitigate loss. During this period the claimant was looking for jobs in Evesham, Gloucester and Cheltenham. These are all between 20 and 40 minutes drive depending on traffic.

114. We consider it to be to his credit that he applied for a job at the Cheltenham B&Q with some encouragement from his daughter. His job is limited to 12 hours a week and there is no prospect of any increase to those hours. This enabled him, to a degree, to utilise his DIY/handyman skills that were part of his job with R2 but otherwise took him into an entirely different area of work as a customer advisor/till operator. We do not consider that the decision to take this job should have reasonably diverted him from his primary objective of endeavouring to get a replacement job in the print/textile industry. His rate of pay in B&Q was less than the rate he had received from R2 or that he would hope to receive in an alternative job in the textile industry. We are satisfied that he complied with his duty to mitigate loss in endeavouring to find alternative work within the same higher paid sector from which he had been dismissed.

115. We therefore reject the respondent's submission that the claimant unreasonably failed to look for non-printing work before October 2017.

116. In light of his failure to find alternative employment within the textile sector, the claimant adjusted his aspirations in or around October 2017. He has, since then, focused his job seeking on seeking employment only in the Tewkesbury area and in posts more akin to his B&Q job. His reluctance to look further afield is because of his concerns about the cost of petrol to commute elsewhere for lower paid and limited hour contracts in the customer service/retail sector. The respondent submits that this is inconsistent with his duty to mitigate loss.

117. We are not satisfied that this indicates a failure to mitigate loss and is instead a realistic attempt by the claimant to mitigate his loss. We think it likely that the claimant will find further alternative work, similar to his job at B&Q, in his local area within 6 months of October 2017.

ACAS uplift

118. The respondent has submitted that, pursuant to S207A of the Trade Union and Labour Relations (Consolidation) Act 1992 there should be no uplift to compensation to reflect a breach of a relevant code. The respondent submits that the claimant has not identified any relevant Code of Practice that applies and that the ACAS Disciplinary and Grievance Code of Practice does not apply in these circumstances. We agree with the respondent's submissions in this regard. There were no discipline or grievance issues in play and note that the Code refers at para 1 "*This Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace"* It confirms that the Code does not apply to redundancy dismissals or non-renewal of fixed terms contracts. On the facts of this case we have determined that the decision to dismiss related to a need to cut costs which is akin, to a degree, to a redundancy process and we have been satisfied that the respondent had considered running a redundancy process. Accordingly, notwithstanding the failure to follow a fair process, we do not award any uplift in accordance with S207A.

Calculating Compensation

119. As indicted in the judgement section we have not done a calculation to set out the compensation to which the claimant is now entitled. This is because we are without some key pieces of information and it seems likely that the information needed is in the hands of the parties. We have therefore made clear findings which we anticipate will enable the parties to now calculate what is due. In summary

- The claimant is entitled to a basic award based upon his age, earnings and length of service in the normal way. That figure is set out in the draft Schedule of Loss submitted by the claimant.
- In relation to his compensatory award we are satisfied that the claimant is entitled to a payment for loss of statutory rights in the sum of £450 as set out in the claimant's draft Schedule of Loss.
- The claimant's loss from the date of his dismissal should be adjusted to reflect the earnings that he started to receive from B&Q at the end of January 2017.
- There is a 70% chance that the claimant would have been dismissed for redundancy/some other substantial reason relating to the cost cutting exercise by Friday 10 February 2017.
- If the claimant had not been dismissed by reason of redundancy/some other substantial reason, he would have been reduced to a two day week with effect from the week commencing Monday 13 February.

- His ongoing loss therefore should be reduced by 70% for the period after 10 February 2017 and that figure should be further reduced to reflect what would have been an ongoing salary from that date based on a two day week.
- Once that ongoing loss figure is calculated it should be limited to a period of 52 weeks in accordance with S124 (1ZA).
- There is no uplift under S207(A)
- There is no compensation awarded under the Equality Act as those claims have been dismissed.

_____
Employment Judge Christensen

Date:- 28 February 2018

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

7th March 2018
.....

.....
FOR EMPLOYMENT TRIBUNALS