EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4121035/2018

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Hearing Held at Dundee on 18, 19 and 20 March 2019

Employment Judge: Mr A Kemp
Members: Mr K Culloch
10 **Mr J R Terry**

Mr A Bowie — **Claimant**
In person

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20 **Alltec Construction Ltd** — **Respondents**
Represented by:
Mr D Hay
Advocate

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 **The Claims for unfair dismissal and discrimination on grounds of age do not succeed and are dismissed.**

REASONS

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Introduction

1. The Claimant made a claim for unfair dismissal, and for age discrimination. That was identified at the commencement of the hearing as direct

discrimination under section 13 of the Equality Act 2010, but latterly also as potentially one of harassment under section 26. The claims were denied by the Respondents.

5 2. The Claimant represented himself. The Respondents were represented by Mr Hay.

Issues

10 3. The Tribunal identified the following issues:

(i) What was the reason for that dismissal?

(ii) If the reason was potentially fair under section 98(1) and (2) of the Employment Rights Act 1996, was that dismissal unfair under section 98(4) of the Act?

15 (iii) Was there direct discrimination on grounds of age under section 13 of the Equality Act 2010?

(iv) Had there been harassment on grounds of age under section 26 of that Act?

(v) Did the Tribunal have jurisdiction to hear the claims under the 2010 Act?

20 (vi) If there was an unfair dismissal, or discrimination what was the extent of the Claimant's losses and what remedy should be given?

(vii) If there was an unfair dismissal had there been any contribution by the Claimant to that dismissal?

25 **Evidence**

4. A bundle of documents had been prepared, and was added to by the provision of information as to earnings of the Claimant and some invoices for periods after dismissal. The Respondents led evidence from Mr Graham
30 Wallace, Mr Graeme Macintosh and Mr Greg Robins. The Claimant gave evidence himself.

5. At the commencement of the hearing the Claimant referred to his application for witness orders. It was not directly made in a communication to the tribunal, in the sense that an application for a witness order was not made in those terms, but did make mention of two witnesses and the Tribunal had indicated that it would be dealt with separately. It had not been addressed specifically by the time of the Hearing. After discussion, it was agreed that the evidence of the Respondents and the Claimant himself be heard, and that the issue of those witnesses would be addressed thereafter. That duly occurred on the third day of evidence after the Claimant's own evidence had been completed, when it was explained to him that he could seek a witness order, which if granted would mean the adjournment of the hearing, or not do so in which event matters would move to submissions. He decided not to seek the order. In that situation the Tribunal moved to hearing submissions.

Facts

6. The Tribunal found the following facts to have been established:

7. The Claimant is Mr Allan Bowie.

8. He was employed by the Respondents, Alltec Construction Limited, as a joiner.

9. The Respondent is a relatively small business with about 40 employees. It was established by the managing director Mr Graeme Mackintosh about 16 years ago. It carries out construction works for commercial and residential clients. It has its principal place of business at Whitehill Industrial Estate, Glenrothes, Fife. It does not have any in-house Human Resources function.

10. The Claimant's employment commenced on 29 August 2014.

11. The Claimant had no disciplinary record.

12. The Respondents had a bullying procedure which included that employees should “avoid behaving in such a way as to cause offence or create an unpleasant working environment.” It stated that if there was bullying that could lead to dismissal for gross misconduct.

13. The Respondents’ disciplinary procedure stated that the company would generally try to give two days’ notice of any hearing, and contained the following provision as to gross misconduct – “A wide range of behaviours can amount to gross misconduct but the most common involve dishonesty, violent or aggressive behaviour…. or a deliberate refusal to obey a reasonable instruction”.

14. The Respondents’ grievance procedure included that that should be “by making a written complaint, stating that it is being made under this procedure. You should give as much information about your grievance, including any relevant dates and times, as you can…..”

15. On 7 February 2018 a meeting was held at the Respondents’ office premises in Glenrothes to discuss a job for a client, Bosch. About nine persons were present, including the Claimant and Mr Mackintosh. Mr Mackintosh asked whether the remainder of the job could be completed within two weeks, and the Claimant replied that it could not, swearing when he did so. Mr Mackintosh responded by asking why not, also swearing. Swearing is common in the construction industry, and the Claimant did not take offence as a result of it at the time. No reference was made to the Claimant’s age at that meeting.

16. The works at Bosch were completed within two weeks of that meeting.

17. On 4 May 2018 the Claimant was working at a site of the client Bosch. It was situated about two minutes by motor vehicle from the Respondents’ principal place of business. The Claimant had been working on the installation of a kitchen. A carcass for that kitchen had been delivered but was the wrong size, which caused delay. At about 3pm-3.30pm the Claimant was informed that

Mr Greg Robins and Mr Gavin Riddell both Project Managers were at the site. They did not work there continuously but did visit it from time to time. The Claimant spoke to them outside the premises. Some members of staff of Bosch were working within the building at the time. Mr Robins asked the Claimant something to the effect of why the kitchen was taking so long. The Claimant was annoyed by that, and when Mr Robins said that he had not spoken to Mr Mackintosh, who had arranged for a finishing joiner Mr Mathieson to complete the kitchen, the Claimant called Mr Robins a liar twice and a bully.

18. Mr Robins and Mr Riddell considered that the Claimant had been shouting when he did so, was red in the face, and had acted in a threatening manner. Mr Robins and Mr Riddell claimed that the Claimant had said that Mr Robins was a bully, and that he (the Claimant) dealt with bullies by punching them, or words to that effect. Both Mr Robins and Mr Riddell felt threatened and did not wish to be on site with the Claimant in light of that, and they went to the principal office to report their concerns.

19. At about 4pm that day the Claimant was called by Mr John Watson the site manager, and by Mr Riddell separately very shortly afterwards, stating that he was required to attend at the principal office to see Mr Mackintosh. The Claimant indicated that he would not do so, and that if Mr Mackintosh wished to see him he could come to site.

20. The Claimant was due to finish work at 4.30pm that day. He had a van at the site. It would have taken about five minutes to tidy away his tools and come to the office. He could have attended by 4.15pm at the latest and discussed matters for fifteen minutes. He did not do so.

21. The Claimant met Mr Mackintosh when he attended on site at about 4.20pm that day, and the latter said that he would see him on Monday morning.

22. On 6 May 2018 the Claimant sent an email addressed to a member of staff who had left the Respondents' employment. It stated:

> "To whom it may concern,
> I'm writing to you today to raise my concerns of pressure at work. I feel that there is unnecessary pressure from line managers. I don't want to suffer in silence but we're constantly under pressure about times to get jobs completed and I feel that some are unrealistic which leaves me with stress & anxiety. I also get regular comments about my age which gets me down at time.
> Thanks".

23. That email was forwarded to a management email account at 08:50 on the morning of 7 May 2018.

24. An investigation into the alleged incident was commenced. Robert Wallace, (not related to Mr Graham Wallace referred to below) conducted it. He met the Claimant at 7.58am. The Claimant had not been informed in advance of the meeting. He did not wish to answer questions as to what had happened, stating "No comment". He was given an opportunity to make a statement but did not take it.

25. The Claimant was informed at that meeting that he was suspended on full pay pending an investigation.

26. Mr Robert Wallace interviewed Mr Robins, Mr Riddell, Mr Watson and Mr Purvis a tradesman employed by the Respondents. Minutes of those meetings were taken which were a reasonably accurate record of the discussions.

27. The Claimant was informed that he required to attend a disciplinary meeting by letter dated 9 May 2018. It contained the following allegations:

"1. On Friday 4th May 2018 you made threatening and intimidating comments to a colleague in front of other colleagues at a client's site;

2. On Friday 4th May 2018 you behaved in an inappropriate and unacceptable manner at a client site in front of our client's employees which caused or was likely to cause damage to this company's reputation; and

3. On Friday 4th May 2018 you refused a reasonable instruction to attend at the company's head office to meet with Graeme Mackintosh."

28. Attached with that letter were the disciplinary procedure, and the minutes of the meetings referred to. The letter referred to the right to be accompanied by a work colleague or trade union representative, that dismissal was a potential outcome, and that if he failed to attend it might be dealt with in his absence. He was encouraged to attend.

29. The disciplinary hearing took place before Mr Graham Wallace, Senior Projects Manager. The Claimant did not appear with any companion. He asked initially about his email he had sent on Sunday, meaning that of 6 May 2018. It was stated that it had been referred to "the relevant people". By that was meant the Respondents' external HR advisers, Ellis Whittam.

30. Whilst that email had been forwarded to them for advice, the Respondents had not been advised further about it, and they took no action on it.

31. The meeting addressed the issue of representation. The Claimant had brought his daughter with him, but she was not a work colleague or trade union representative and was not permitted to attend. That issue was discussed.

32. The Claimant was then asked about the allegations against him, and for each of the three he responded, "No comment". When asked if he wished to make

a statement he said, “I feel that the charges are…I was totally oblivious to them and that’s it”.

33. Following the meeting Mr Graham Wallace took advice from Ellis Whittam and after doing so decided to adjourn the hearing. He wrote the Claimant to that effect by letter dated 17 May 2018 sent on that date by email which explained that he had done so to ensure that he could fully exercise his right to be accompanied. The letter sent repeated the same information as previously as to representation, potential for dismissal and the consequence of not attending, with a new date of 21 May 2018.

34. The Claimant saw that email on 20 May 2018, a Sunday. He intended to attend the meeting. He was travelling to it, and was about one minute from the Respondents’ office, when he had a call which required, he considered, that he attend at his home for his daughter. He did not call the Respondents to explain that, nor send an email, either before the time for the meeting, or later that day.

35. Mr Graham Wallace considered the allegations, and the evidence before him. He believed that the Claimant had acted as alleged. He considered that his doing so amounted to gross misconduct. He decided that the appropriate penalty for doing so was dismissal. He wrote to the Claimant to inform him of that decision by letter dated 22 May 2018. The dismissal was with immediate effect, and resulted in the termination of the Claimant’s employment on that date.

36. The Claimant appealed that decision by letter dated 24 May 2018. He referred to the lack of representation and his desire “to put forward the details of the day concerned”. He did not allege that there had been any age discrimination.

37. The meeting to consider his appeal was arranged for 4 June 2018 by letter dated 29 May 2018. It took place on that date before Graeme Mackintosh.

38. The minute of that meeting is a reasonably accurate record of it. During the course of the meeting the Claimant was asked on two occasions if he had anything to add. He did not at that stage, or otherwise during the meeting, make any allegations of age discrimination, nor did he refer to his email dated 6 May 2018.

39. Before taking his decision, Mr Mackintosh spoke to all of the witnesses again with regard to the incident on 4 May 2018, and they confirmed their positions. Derek Donnelly of the client Bosch had also enquired of Mr Mackintosh in relation to the incident on 4 May 2018, which confirmed to Mr Mackintosh that the client had been aware of there having been an incident. He resolved to reject the appeal. The decision to do so was confirmed by letter dated 8 June 2018.

40. The pay rates for staff at the Respondents were set by reference to their abilities.

41. The Claimant's earnings are accurately set out in payslips provided by the Respondents, and were approximately £400 per week net.

42. The Claimant sought to obtain other paid work after termination. He advertised his services in a local newspaper. He carried out some work for a contractor and earned a gross sum of £2,445.99. He did not claim benefits.

Submissions for Respondents

43. Mr Hay made a detailed submission and the following is a basic summary of it. He argued firstly that the Respondents' witnesses should be preferred where there was any conflict on fact with the Claimant. He argued that the Claimant had not always answered questions, or had done so by filtering his answers. Allegations had been made which had not been pled. He made submissions as to the law on unfair dismissal, under reference to section 98 of the 1996 Act, and the cases of ***Burchell, Iceland, Shrestha v Genesis***

Housing Association Ltd [2015] IRLR 399, and ***Taylor***. He argued that the appeal had been sufficiently comprehensive to address any issues in the earlier process. The procedure was to be looked at as a whole, and was fair. Dismissal fell within the band of reasonable responses. He noted that the behaviour could amount to gross misconduct, and was exacerbated by being at a client site, and with an absence of apology. He then addressed the age discrimination claim and argued that there was insufficient evidence to make findings as to detriment or dismissal being unlawful. He confirmed that the same argument was made in respect of any potential claim of harassment as for direct discrimination. He finally made submissions as to remedy, arguing a lack of mitigation, and referring to comments Mr Mackintosh had said were made before and after the appeal hearing. In conclusion he sought the dismissal of the Claim.

Submissions for Claimant

44. The Claimant argued that he had not had a fair trial. There had been a few issues on 4 May 2018. The statements had not been signed, and did not include timings. Ross Middleton and Robert McRae had not been asked for statements. Others should also have been suspended. He preferred post for letters being sent, and email was not 100% safe. He had suffered constant remarks by Mr Robins about his age. He had not received a pay rise. He had worked for four years and had not been in trouble. It could have been sorted out, and there had been no violence, but the Respondents had made up its mind to get rid of him.

Law

Statute

(a) Unfair dismissal

45. Section 98 of the Employment Rights Act 1996 provides, so far as material for this case, as follows:

"**98 General**

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

…….

(b) relates to the conduct of the employee,

……………

(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"

(b) Discrimination

46. Section 4 of the Equality Act 2010 ("the Act") provides that age is a protected characteristic.

47. Section13(1) of the Act provides that:

"**13 Direct Discrimination**

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."

5 48. Section 26 of the Act provides that:

"**26 Harassment**

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

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

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

(i) violating B's dignity, or

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

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

(a) the perception of B;

(b) the other circumstances of the case;

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

49. Section 136 of the Act provides:

"**Burden of proof**

(2) If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

Case law

(a) Unfair dismissal

50. Section 98 of the 1996 Act was examined by the Supreme Court in ***Reilly v Sandwell Metropolitan Borough Council [2018] UKSC 16.*** In particular the Supreme Court considered whether the test laid down in ***BHS v Burchell [1978] ICR 303*** remained applicable. Lord Wilson considered that no harm had been done to the application of the test in section 98(4) by the principles in that case, although it had not concerned that provision. He concluded that the test was consistent with the statutory provision. Whilst Lady Hale appeared to raise an issue over that, there had been no full argument and she concluded that that was not the case to review that line of authority.

51. The ***Burchell*** test remains authoritative guidance for cases of dismissal on the ground of conduct in circumstances such as the present. It has three elements –
    (i) Did the Respondent have in fact a belief as to conduct?
    (ii) Was that belief reasonable?
    (iii) Was it based on a reasonable investigation?

52. It is supplemented by ***Iceland Frozen Foods Ltd v Jones [1982] ICR 432*** which included the following summary:

> "in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;
>
> in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
> the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

53. The band of reasonable responses has also been held in ***Sainsburys plc v Hitt [2003] IRLR 223*** to apply to all aspects of the disciplinary procedure.

54. If an appeal hearing is sufficiently comprehensive it is capable of remedying earlier defects in the disciplinary process. Whether or not the appeal process is sufficiently comprehensive to redress any earlier procedural defects will be a question of fact for the employment tribunal (***Taylor v OCS Group Ltd [2006] IRLR 613***, following ***Whitbread & Co plc v Mills [1988] IRLR 501.*** What is necessary is for the employment tribunal to consider the disciplinary process as a whole when assessing the fairness of the dismissal. In ***Khan v Stripestar Ltd UKEATS/0022/15*** the EAT stated that there was no limitation on the nature and extent of the deficiencies in a disciplinary hearing that could be cured by a thorough and effective internal appeal.

55. Although there is an onus on the employer to prove the reason for dismissal, there is no onus on either party to prove fairness or unfairness.

56. The Tribunal is required to take into account the terms of the ACAS Code of Practice on Disciplinary and Grievance Procedures.

(b) Discrimination

Direct discrimination

57. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? In ***Amnesty International v Ahmed [2009] IRLR 884*** the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council [1990] IRLR 288*** and (ii) in ***Nagaragan v London Regional Transport [1999] IRLR 572,*** In some cases, such as ***James,*** the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan***, the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious

or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15.***

58. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions) – as explained in the Court of Appeal case of ***Anya v University of Oxford [2001] IRLR 377.***

Less Favourable Treatment

59. In ***Glasgow City Council v Zafar [1998] IRLR 36***, also a House of Lords case, it was held that it is not enough for the Claimant to point to unreasonable behaviour. She must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.

Comparator

60. In ***Shamoon v Chief Constable of the RUC [2003] IRLR 285,*** a House of Lords authority, Lord Nichols said that a tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

Harassment

61. The terms of the statute are reasonably clear, but guidance was given by the Court of Appeal in ***Pemberton v Inwood [2018] IRLR 542*** in which the following was stated by Lord Justice Underhill:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))."

62. Account is taken in all of such discrimination issues of the Code of Practice of the Equality and Human Rights Commission.

Discussion

63. In general terms the Tribunal concluded that it accepted the evidence from the Respondents and their witnesses as credible and reliable. They all gave evidence clearly and in a straightforward manner. The Claimant gave evidence in a generally similar manner, but there were some occasions where there were questions that were not directly answered, and rather evaded, an issue where he read into the disciplinary procedure a word "working" that did not exist, and his failure to provide any detailed explanation of the incident on 4 May 2018 when given opportunities to do so was of concern. Those opportunities were at an investigatory hearing, hearings on 16 and 21 May 2018 and finally at the appeal hearing on 4 June 2018.

64. In relation to the allegations of age discrimination it was notable that no issue had been raised in any formal sense until after the incident on 4 May 2018.

When he did so no details of who had done or said what, when were provided. He did not refer to the issue in his letter of appeal, nor did he do so at the appeal hearing. That was not consistent with the issue being considered by him at the time to be an important one. The Claimant also accepted that he had sent that email as a consequence of the incident on 4 May 2018.

65. Against that background the Tribunal first considered the issue of the fairness of the dismissal. It was clear that the trigger for procedures being commenced was the incident on 4 May 2018. The Tribunal was satisfied that the reason for dismissal was conduct, and that that was not in any sense a cover for another reason, including age as shall be addressed later.

66. On the issue of fairness, the Tribunal considered that generally the procedure was a reasonable one. Statements in the form of minutes of meetings were taken. They might have been more full, including more particular issues such as times of events, and they might have been signed, but they were adequate. There were two issues that the Tribunal considered in some detail. The first was sending the letter for the second hearing on 21 May 2018 by email dated 17 May 2018, and the second was the response to the email from the Claimant on 6 May 2018.

67. The letter calling the claimant to the first disciplinary hearing had been sent by post. The Claimant was then in email correspondence with the Respondents. Not all of that was before the tribunal but it was accepted that it had taken place. At the meeting on 16 May 2018 the Claimant had not properly engaged with the questions put to him, and afterwards Mr Wallace decided to offer him another opportunity. That was confirmed by letter sent by email on 17 May 2018. The Claimant stated that he saw that on 20 May 2018. Whilst it had been sent with the two days' notice provided for in the disciplinary procedure, and the Claimant did in fact both see it and intend to be present, the notice was quite short. Mr Macintosh in his evidence indicated that he would have preferred the letter to have been sent by post. It would then have been received either on 18 or 19 May 2018. But that did not really

make any difference as the Claimant would have attended, but for the intervening issue of a requirement to be with his daughter.

68. What the Claimant did not do however was either call the Respondents, or email them, to say that he could not attend, or had not been able to attend. From their perspective he had not attended, and had given no reason for that. It did not appear to the Tribunal in that context that the sending of the letter on 17 May 2018 by email was material to the issue of fairness.

69. The second matter was of greater concern. On 6 May 2018 the Claimant had emailed with complaints, that included ones of stress and age discriminatory comments. He did not in terms reference that he was doing so under the grievance procedure, nor did he give much by way of specification. No names, or dates, or other details, were provided. But the email did in substance amount to a grievance.

70. The ACAS Code of Practice states the following:

> "**Overlapping grievance and disciplinary cases**
>
> 46. Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently."

71. What happened in practice is that the email was sent to the Respondents' HR advisers Elis Whittam. But the Respondents stated in evidence that they had not had further advice about it. They therefore in effect did nothing to address it. That was potentially a failure to follow the ACAS Code, which does not of itself make the dismissal unfair but is an important factor to consider.

72. On the other hand, the Claimant had not followed the grievance procedure by providing details, and had not referred to that procedure. He had had the opportunity to comment at the meeting on 16 May 2018. He had made a very

basic comment, but no more. He then had an opportunity to attend the meeting on 21 May 2018 but did not do so, and did not contact the Respondents to ask for a further date at or about that time. He simply did nothing at that point. That was not a reasonable act by him in the circumstances. More fundamentally he did have a full appeal hearing, at which on two occasions one about half way through and the other at the very end, to add anything else he wished. He did not do so. He could have referred to any matter at all including his comments that there had been inappropriate remarks made to him, issues as to pay, and for his CSCS card. He did not do so.

73. Taking all of those issues into consideration, the Tribunal did not conclude that the failure to address the email of 6 May 2018 by either conducting a grievance investigation or discussing it directly at any of the formal hearings at the disciplinary and appeal stages amounted to unfairness in the statutory sense.

74. The Tribunal concluded that the investigation had been adequate, such that it was reasonable. That is not to say that it was without fault. It is good practice to note the times of incidents, and to have statements or notes of meetings signed by the witness but those issues did not render the process unfair.

75. The submission for the Claimant was that there were discrepancies in the statements, with them not stating the same details. To an extent that is true. The statements do not say exactly the same thing. But the test is not that of a criminal trial, nor of a civil proof where in any event the law does not require the evidence to be exactly the same. The test in tribunal is whether the belief in guilt was reasonable, based on a reasonable investigation.

76. In light of the evidence before both Mr Wallace and Mr Mackintosh the Tribunal concluded that the belief that the Claimant had been aggressive on 4 May 2018 as alleged, and had refused a reasonable instruction to attend with Mr Mackintosh that day, was a reasonable one. The statements were

sufficiently supportive of each other to lead a reasonable employer to conclude that the Claimant had behaved as had been alleged. He had been believed to have made threats in effect to punch Mr Robins as a "bully". He had been shouting, it was believed. There was also the possibility of damage to reputation given that the incident had occurred on a client site, indeed had been raised by the client. The instruction to attend the head office was a reasonable one, and the Claimant had disobeyed it. His reason for doing so, that he assumed he would have to be there after 4.30 when he had to attend to his grandchildren, was unwarranted.

77. In each case the Tribunal does not seek to establish what is likely to have happened on 4 May 2018 which is the civil standard. It does not consider what it would have done were it the employer. It decides whether the decision was one a reasonable employer could have come to. The Tribunal was satisfied that the Respondents met that test.

78. The next issue was that of penalty. The question is whether dismissal was within the band or range of responses open to a reasonable employer. The Tribunal concluded that it did. The behaviour referred to in the statements was aggressive. There was what amounted to a threat of violence. There was no actual violence, but such a threat was sufficiently concerning for two managers to leave the site, and say that they would not wish to be there when the Claimant was. The Claimant was said to be angry, shouting and red in the face. The impression formed was that he had rather lost his temper. That may explain why his own recollection of what happened was a different one. He said that he had responded to a comment from Mr Robins by calling him a liar twice, and a bully. But the description of events he gave was at odds with all of the other evidence. It was reasonable for Mr Graham Wallace (who had very little from him to go on) and particularly for Mr Mackintosh who had the Claimant's description of events to an extent, to disbelieve him.

79. There are other factors worthy of comment. What matters is not what evidence was before us, but what was before the employer. The Claimant did

not give the employer a full and candid description of events on 4 May 2018. He had the opportunity to do so, but did not fully engage with that. Separately, he failed to engage appropriately with the attempts to find out what had happened. He avoided Mr Mackintosh on 4 May 2018. He could have been at the office by 4.10pm, or 4.15pm at the very latest. He could have had a discussion for 15 minutes over the incident, and left at 4.30. His decision to refuse to do so was unreasonable and his explanation that he would certainly had have to stay beyond 4.30 because he had to care for his grandchildren the Tribunal did not accept. Secondly, he was asked if he wished to make a statement at the meeting on 7 May 2018 before Mr Robert Wallace. That was no sort of trap. It was his own opportunity to say what happened in his own words. He was unreasonable in not taking that opportunity.

80. At no stage did the Claimant make any attempt to apologise, even on a conditional basis to the effect that he had not been aggressive or intended to be but if that was how it was perceived then he apologised. Had he done so at any of the opportunities given to him, the evidence from Mr Mackintosh in particular was that he may have been treated differently from a dismissal. But he did not.

81. Whilst therefore the penalty was a harsh one given the circumstances and the context of work at a construction site, it was not outside the band of reasonable responses. It was not therefore unfair.

82. For completeness the Tribunal did not consider that the limited evidence in relation to a former employee Stewart McRae was potentially relevant. Questions had been put by the Claimant to Mr Wallace and Mr Mackintosh about him, seemingly in relation to an argument as to inconsistency of treatment, but his employment had been terminated by the Respondent and no such argument could arise as to inconsistency.

83. The Tribunal then considered the claim of age discrimination. There were two potential elements to that, either direct discrimination or harassment. For the

former the Tribunal did not consider that the Claimant had established a prima facie case such that the onus of proof shifted to the Respondent. There had been no complaints made by the Claimant until after the events of 4 May 2018. The incidents that were provided in the further and better particulars were separate ones. That on 10 October 2017 included an allegation that Mr Robins had said that the Claimant would not get a pay rise in answer to a question to Mr Graham Wallace who was present, but that was not put to Mr Wallace when he gave evidence and was not apparent from the terms of the document submitted to the Tribunal (pages 35 and 36 of the bundle). Mr Robins denied making the comments alleged of him. On the same date it was alleged that Mr Robins had said, in answer to a question to Mr Graham Wallace, that the Claimant would not be getting a pay rise. That was denied by Mr Robins, who said that it was not his area of responsibility. The matter had not been put to Mr Graham Wallace in cross examination however, even although Mr Wallace had been present.

84. The incident alleged to have taken place on 7 February 2018 did not refer to the Claimant's age at all. Whilst he claimed that he was singled out, Mr Mackintosh denied that. He had asked about whether the job could be completed in two weeks, as the client was demanding that, and the Claimant had replied that it could not be, swearing as he did so. Mr Mackintosh swore when replying. The Tribunal considered that the evidence of Mr Mackintosh was more likely to be correct.

85. The Tribunal did not consider that the incident on 4 May 2018 had involved any comment as to age by Mr Robins. He explained that he had asked about the time the job was taking. That was a part of his role. There was a question about the work being completed by Ross Mathieson the finishing joiner. Mr Robins said that he had not spoken to Mr Mackintosh about that, and was called a liar and a bully by the Claimant, who accepted that he had done so in his evidence.

86. There was no adequate evidence that either Mr Wallace who decided to dismiss, or Mr Mackintosh who rejected the appeal, were aware of what, if anything, had been said by Mr Robins. There appeared to the Tribunal to be no connection between those matters, even if they had occurred, and the dismissal. In any event, the Tribunal preferred the evidence of Mr Robins.

87. The email of 6 May 2018 did not provide any details of what had happened, when, what had been said, and by whom. That absence of detail was, the Tribunal considered, indicative of the allegations by the Claimant not being reliable.

88. As indicated above, the Claimant did not refer to those issues when he had the opportunity to do so on 7 May, 16 May and at the appeal.

89. Mr Mackintosh further gave evidence of the benefits of a workforce with a balanced age profile, of other employees including himself in their 50s, and that two employees had been taken on or retained after what had been normal retirement age. He also stated that the Respondents did not operate a retirement age. The Tribunal accepted that evidence, and considered that it was not consistent with either the reason for the dismissal being in any way related to age, or that earlier decisions had been tainted by age discrimination.

90. The Tribunal did not consider that there was evidence of any failure to award a pay rise being tainted by age discrimination. Mr Mackintosh's evidence, which was accepted, was that pay was based on factors such as ability, and not to any extent on the basis of age.

91. The Tribunal was also satisfied that the reason the Claimant did not have his CSCS card paid for by the Respondents was that the Claimant did not need it for the job he was on, but others did for a proposal to carry out work for a client, although in fact that work was not successfully won.

92. The Claimant had alleged in evidence that he had been asked to move bags of asbestos with a comment to the effect that he would not be alive in 20 years' time anyway. The Tribunal did not accept that such an incident had occurred in the manner he had alleged. It had not been referred to in the Claim Form or his provision of further and better particulars, although if true would have been the most serious of the allegations made. It had also not been referred to in any of the meetings with regard to the disciplinary process, and particularly the appeal. No grievance was taken in respect of it at the time. It had not been referred to in any document before the Tribunal. The evidence given in relation to it was not, the Tribunal concluded, sufficiently reliable to be accepted.

93. Having regard to the evidence as a whole, the Tribunal was satisfied that there was no sufficient evidence of direct age discrimination. The Claimant had not established the level of prima facie case that led to the onus of proof shifting to the Respondent.

94. In relation to the allegations that could have amounted to harassment, the Tribunal was not satisfied that the statutory test had been met. There was very little direct evidence of what had been said, and the same issues as to lack of specification, lack of complaint at the time, and lack of detail during the disciplinary process and appeal apply. Even if the Claimant held a perception that there had been harassment, which the Tribunal did not consider had been the case, the Tribunal would not have held that to have been reasonable. The Tribunal considered that it was possible that some remark in relation to age could have been stated at some point, but not in a manner that met the statutory test. That test, under the former statutory formulation, was considered in ***Richmond Pharmacology v Dhaliwal [2009] IRLR 336,*** and in ***Pemberton v Right Reverend Inwood [2018] IRLR 54,*** the Court of Appeal stated that the same test applied under the 2010 Act. It indicated that there was a need to avoid "hypersensitivity", such that not all comments which referred to a protected characteristic in some way were necessarily to be treated as harassment.

95. In light of that finding, it was not necessary to consider the arguments raised by the Respondent that the claim was time-barred. It was also not necessary to consider whether there had been sufficient attempts at mitigation, or the alleged comments made by the Claimant before and after the appeal hearing (which had not been pled by the Respondent and for which the Claimant had not therefore received fair notice).

Conclusion

96. The Tribunal was unanimous in the following conclusions it reached on the list of issues:

(i) What was the reason for that dismissal? Conduct

(ii) If the reason was potentially fair under section 98(1) and (2) of the Employment Rights Act 1996, was that dismissal unfair under section 98(4) of the Act? No

(iii) Was there direct discrimination on grounds of age under section 13 of the Equality Act 2010? No

(iv) Had there been harassment on grounds of age under section 26 of that Act? No

(v) Did the Tribunal have jurisdiction to hear the claims under the 2010 Act? Yes

(vi) If there was an unfair dismissal, or discrimination what was the extent of the Claimant's losses and what remedy should be given? Not applicable

(vii) If there was an unfair dismissal had there been any contribution by the Claimant to that dismissal? Not applicable

97. The Claim must therefore be dismissed. The Tribunal would however like to record its appreciation of the manner in which both the Claimant and Mr Hay conducted the proceedings before it.

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Employment Judge: **Alexander Kemp**
Date of Judgment: **03 April 2019**
25 **Entered in register:** **04 April 2019**
and copied to parties

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