



EMPLOYMENT TRIBUNALS

Claimant: Mr A Bowskill

Respondent: Select Support Partnerships Limited

Heard at: Manchester

On: 30 September – 2
October 2019

Before: Employment Judge Slater
Mr R W Harrison
Ms E Cadbury

REPRESENTATION:

Claimant: Mr K Liljenberg, Stepson of claimant

Respondent: Mr M Smith, In House Legal Advisor

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaint of unfair dismissal is well founded.
2. ~~The complaint of harassment related to age in relation to comments made by Mr Dalal on 13 September 2017 is well founded;~~ The Tribunal does not have jurisdiction to consider the complaint of harassment related to age in relation to comments made by Mr Dalal on 13 September 2017, which was presented out of time:
3. The complaint of direct age discrimination in relation to the claimant's dismissal is dismissed on withdrawal by the claimant;
4. The respondent is ordered to pay to the claimant compensation of £25,765.36 for unfair dismissal.
5. The Recoupment Regulations do not apply to this award.

~~6. The respondent is ordered to pay to the claimant £800 plus interest of £131 as compensation for injury to feelings suffered because of the harassment related to age.~~

REASONS

The Hearing

1. This hearing was listed for three days beginning on 30 September 2019. Prior to the Notice of Hearing listing the case for these dates, there had been a prior Notice of Hearing listing the case for three days beginning on 1 October 2019. The dates of the hearing were changed to avoid 3 October when the respondent was not available. A new Notice of Hearing was sent to the parties on 8 February 2019.

2. The claimant and his representative did not attend the Tribunal at the start of the hearing on 30 September 2019. On the instructions of the Judge, the clerk tried telephoning the claimant's representative and left a message. An email was then sent to the claimant's representative on the instructions of the Judge. The claimant's representative replied to say they were under the impression that the hearing began the following day. The claimant's representative said he would attend at 2pm but the claimant was not able to attend until the following day due to work commitments.

3. The Tribunal used the morning of 30 September to begin its reading of witness statements and documents. At 2pm, the Tribunal met with both representatives. Mr Liljenberg explained that he had been unable to find the email giving the change of hearing dates so he did not know what happened and apologised if he had missed the email. His view was that the hearing could be completed in the remaining time. The respondent asked for a postponement, questioning whether there was enough time to go through the witness evidence. However, Mr Smith confirmed that the respondent was ready to go ahead. In these circumstances, the Tribunal decided to proceed with the hearing in the remaining time.

4. We discussed timetabling of the hearing and the issues. The claimant's representative withdrew, on behalf of the claimant, the age discrimination complaint in relation to dismissal. The complaint of harassment was limited to the complaint set out in paragraph 4.1.1 of the notes of the preliminary hearing i.e. about an alleged comment by Mr Dalal on 13 September 2017. The claimant's representative confirmed that the generalised allegation at 4.1.2 that Mr Dalal had made several comments about the claimant's age in the preceding months was not pursued, since the claimant had not given any evidence in support of this allegation in his witness statement.

5. The claimant had started another job and had no continuing loss from the date of start of his new employment. The Tribunal, therefore, decided to hear liability and remedy together so that, if the Tribunal had to reserve its decision, the Tribunal could give judgment on both liability and remedy without the parties having to attend a further hearing. Some issues about documents were raised. The Tribunal discussed these with the parties but asked them to consider this further

overnight and, if matters remained in dispute, the Tribunal would decide on these the following day.

6. At the beginning of the second day, the Tribunal was informed that the parties had resolved matters to do with documents by agreement and various documents were added to the hearing bundle.

7. The Tribunal reserved its decision. We realised, after finding in favour of the claimant, that we had not had the information required from the claimant to determine whether the Recoupment Regulations applied to the award of compensation for unfair dismissal i.e. whether the claimant received or claimed Job Seekers' Allowance, income related ESA, Income Support or Universal Credit. A letter was, therefore, sent to the parties, advising them of the decision which had been reached and requiring the claimant to provide the necessary information to enable the Tribunal to complete the part of its judgment relating to the applicability of the Recoupment Regulations.

Claims and Issues

8. The claims and issues had been set out in notes of the Case Management Preliminary Hearing on 30 May 2018. With the exception of the withdrawal of the direct discrimination complaint and the restriction of the harassment related to age complaint to the alleged comment by Mr Dalal on 13 September 2017, the issues remained as identified at that Preliminary Hearing. The issues to be determined by the Tribunal were, therefore, as follows.

Unfair Dismissal

8.1. Was the claimant dismissed? This was denied by the respondent, contending that the claimant resigned of his own accord. The claimant contended that he was expressly dismissed at the meeting with Mr Dalal on 25 September 2017 or, alternatively, that he was constructively dismissed. In order to decide this issue the Tribunal must decide:-

- (i) Did Mr Dalal terminate the claimant's contract of employment by what he said at the meeting; or alternatively
- (ii) Did the respondent commit a repudiatory breach of the claimant's contract of employment? The claimant's case is that the matters set out in paragraph 13 of the particulars attached to the claim form comprised a breach of the fundamental implied term of trust and confidence;
- (iii) Did the claimant resign in response to that breach?
- (iv) Did the claimant delay in resigning such that it can be held that the breach was waived and the contract affirmed.
- (v) The respondent confirmed that they were not putting forward any case that, if the claimant was dismissed, the dismissal was fair.

Harassment related to age

- 8.2. Did the respondent engage in unwanted conduct by Mr Dalal saying to the claimant on 13 September 2017 that the claimant was “too old to take stress and be driving around the country”.
- 8.3. Was the conduct related to the claimant’s protected characteristic of age?
- 8.4. Did the conduct have the purpose of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- 8.5. If not, did the conduct have the effect of violating the claimant’s dignity or creating such an environment for the claimant, having regard to: the claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.
- 8.6. It was agreed that the complaint in relation to harassment was presented out of time. Was it just and equitable for the Tribunal to consider the complaint out of time?

Remedy

- 8.7. If successful with his complaint of unfair dismissal, the claimant was not seeking re-instatement or re-engagement. What compensation should be awarded?
- 8.8. Compensation for injury to feelings was sought for the complaint of harassment related to age.
- 8.9. The respondent confirmed that they were not pursuing “Polkey” or contribution arguments in relation to the unfair dismissal compensation.

Evidence and Cast List

9. The Tribunal heard evidence for the claimant from the claimant and Ms Brindle, former Human Resources Manager with the respondent. We heard evidence for the respondent from Mrs Ujvari, Head of Operations from September 2017 and Managing Director from April 2019, and from Mr Shokat Dalal, the “controlling mind” of the respondent.

Summary of Case

10. The claimant was Managing Director of the respondent company. He took his directions from Mr Dalal, who was agreed to be the “controlling mind” of the respondent. The claimant claimed that he had been actually dismissed by Mr Dalal, acting on behalf of the respondent, or, alternatively, that he had been constructively dismissed by reason of Mr Dalal doing and saying various things, including that the claimant was going to be removed from his role as Managing Director and given an alternative role.

Facts

11. The respondent is a provider of care services to individuals with learning difficulties and other disabilities. They contracted with local authorities to provide services.

12. We were told by Mr Dalal that shares in the respondent are owned by Vision Healthcare Group UK Limited which is a subsidiary of ASD Holdings, a company now registered in Belize and at one time a Hong Kong registered foundation. Mr Dalal told us that Mrs Dalal is the ultimate beneficial owner. Mention is made in various documents of "ASC". We are unclear whether this is a reference to ASD Holdings or whether this is to another company, the full name of which we have not been given.

13. It is agreed that all directions for the claimant from the respondent business came from Mr Dalal, although, at most relevant times, Mr Dalal was not a company director of the respondent and was not a shareholder of the respondent company. Mr Dalal agreed he was the controlling mind of the respondent although he was not notified to Companies House as a person with significant influence or control. Mr Dalal controlled the finances of the respondent. The claimant had understood that Mr Dalal was the ultimate owner of the respondent, via holding companies, although Mr Dalal, as noted above, informed us that Mrs Dalal is the ultimate beneficial owner. The claimant got his instructions from Mr Dalal. Mr Dalal told us that Mrs Dalal had given him responsibilities over the respondent.

14. The claimant's employment with the respondent began on 4 November 2013. He was employed as the respondent's Managing Director. The terms of his contract of employment included at clause 5.2 the following:-

"Notwithstanding your specific job title, you may be required by the company to perform any function within the range of your skill and capability which the company considers necessary to promote and maintain the business of the company".

15. When the claimant joined the company, neither he nor Mr Dalal were company directors. Peter Marshall was then the sole company director and secretary but played no active part in the running of the respondent.

16. On 9 November 2015, Peter Marshall resigned as a director and company secretary. The claimant became a company director. The respondent has not had a company secretary since that date.

17. For a brief period between 10 April 2016 and 8 June 2016, Mr Dalal was a company director of the respondent.

18. It appears that, at some point, Mrs Dalal was put on the payroll of the respondent with a salary of £50,000 per annum. However, it is agreed that Mrs Dalal did not work full time in the role for which the contract was issued. We find that the claimant was not aware of Mrs Dalal being on the payroll until after 25 September 2017.

19. In spring 2017, issues with a service the respondent ran in Peterborough came to the respondent's attention. The respondent voluntarily suspended its contract with Peterborough Council on 12 April 2017. On 9 June 2017, Mr Dalal sent the claimant an email in which he wrote as follows:-

“As the Managing Director of the business it is your responsibility to ensure services are delivered to an appropriate standard by line managing the Area Manager. It seems as this has not been the case in Peterborough, the repercussions of which you are experiencing now. You still have an opportunity of resolving and saving all the investment in the form of both financial and sweat equity that has gone into the Peterborough service.

“I really don't want to know whilst I am away how you are going to sort it. We have discussed it many times at length what needs doing, and have been down to interview a suitable candidate with you. For some reason after us deciding and getting a reference you choose not to go with that option?? The consequences of the error of judgment is plain to see now !!!.

“I am extremely disappointed how things are playing out I hope before I am back in two weeks you have stabilised the decline and put a robust structure in place”.

20. The claimant replied on 12 June 2017 that he was addressing this matter. He was seeking Peterborough City Council that day and reinstating S from the next day. They were interviewing for an Area Manager Wednesday.

21. On 16 June 2017, Mr Dalal directed the claimant to leave S in place and minimise her role as Training. He wrote “it doesn't matter what safeguarding say. They cannot dictate who we employ”. “I have been thinking about this quite a lot today, the business will fold if you suspend her again. If you keep her it will give you short term stability until we find a permanent solution. What is the worst that Safeguarding can do?”. He continued later to direct that he wanted the claimant to visit Peterborough weekly to mentor the managers until they sorted this out.

22. On 26 June 2017, the claimant emailed Mr Dalal to notify him that Peterborough City Council had terminated the contract.

23. Mr Dalal asserts that the claimant offered his resignation due to the Peterborough situation. The claimant denies this but says he asked whether Mr Dalal wanted him to resign. On either version of events, the possibility of resignation was raised. We prefer the claimant's version of how this was raised but consider that this could have been recalled by Mr Dalal as an offer of resignation. However the possibility of resignation was raised, Mr Dalal did not want the claimant to resign at the time. Although Mr Dalal had some criticisms of the claimant, he did not think the claimant was performing so badly in relation to dealing with the Peterborough service that he dismissed or took disciplinary action against the claimant at that time.

24. Once the issues came to light at Peterborough, we find that the claimant did address matters, including suspending the manager of the service.

25. On 3 August 2017, the claimant sent an email to staff saying that he needed to consider a deputy to support him in his role and attaching a job description for an Operations Manager.

26. We find no evidence in the documents that there was an investigation into Peterborough planned to report in October as has been asserted by Mr Dalal. We consider that this would have been mentioned in emails if this had been planned.

27. On 6 September 2017, Denise Ujvari was offered a joint development post across the respondent and ASC by Mr Dalal at a salary of £50,000. The claimant sent an email to Christine Brindle, HR, saying that they would continue to interview on Monday but had two choices:

- (i) Denise had a joint post across ASC and SSP and
- (ii) Denise is employed via ASC and they had the Operational Manager's post independently.

28. We prefer the evidence of the claimant to that of Mr Dalal in finding that the claimant did not interview Ms Ujvari for the post. Her introduction by Mr Dalal was separate to the interviews which the claimant and Ms Brindle had been carrying out for the post of Operations Manager.

29. There was a phone call between the claimant and Mr Dalal on 6 September 2017. The claimant says that Mr Dalal indicated that he had in mind a review of the structure of the company. However, we find that nothing was discussed which would affect the claimant's role. The intention was that someone should take part of the operational load from the claimant.

30. On 11 September 2017, Mrs Dalal came to the office. She presented herself as being there in the capacity of a shareholder. An email complaint of 27 September 2017 confirms the claimant's evidence that, shortly after attending the office, Mrs Dalal visited services without having had the required DBS checks.

31. We accept the evidence of the claimant that staff were wondering why Mrs Dalal was in the office so, on the instructions of Mr Dalal, the claimant sent an email to staff on 11 September around midday, advising them that Mrs Dalal, one of their shareholders, would be taking a greater interest in the respondent. He wrote that she was Mr Dalal's wife and brought a considerable amount of experience into the company which he was sure would be invaluable. He wrote that he had invited her to the next OMT meeting to allow senior staff to meet her.

32. On 13 September 2017, there was a meeting between the claimant and Mr Dalal. We prefer the claimant's evidence to that of Mr Dalal in relation to the discussion at this meeting. The claimant's account is more consistent with subsequent contemporaneous documents. In particular, the claimant's account is more consistent with the claimant's email of 22 September 2017 asking for a meeting to discuss his new role and Mr Dalal's failure to question in his emailed response, if there had been no intention to put the claimant into a new role, what "new role" the claimant was talking about,. We find that Mr Dalal told the claimant that there would be a restructure involving Mr Dalal taking on the role of Managing

Director and the claimant being allocated another, at that time, unspecified, role. The claimant was not given a date in this meeting as to when he would cease being Managing Director. The claimant said in oral evidence that he considered he was dismissed at that meeting. However, after a break, the claimant adjusted his position, saying that he thought he was going to be dismissed rather than that he had been dismissed.

33. The claimant's account of the meeting is also supported by the exchange of emails on 24 and 25 September. The claimant wrote in the email of 24 September that he understood that, as part of Mr Dalal's proposed restructure, Mr Dalal wanted him to take a different role and he would take over as Managing Director. Mr Dalal, in his response, responded to other parts in the email but did not say anything about the new role. If the claimant had written something that Mr Dalal had not intended or had misunderstood Mr Dalal, we consider it more likely than not that Mr Dalal would have set this right in his email in response as he did about the remark of calling the claimant "too old".

34. Also on 13 September 2017, the claimant alleges that Mr Dalal told him that he was too old to take stress and be driving around the country. This is the subject of the complaint of harassment related to age. Mr Dalal has denied that he said this. We prefer the claimant's version of events and find that Mr Dalal did make the alleged comment. The claimant referred in his email of 24 September to Mr Dalal having on several occasions said that he was too old. Mr Dalal replied on 25 September as follows:-

"I was pretty upset about the reference to me calling you "too old", in the context of the workplace, and as you used it in the email.

"I know you now confirmed it as a "LOL" remark.

"Meant in jest, thought it may have been, and friends as we are, please do not attribute those kinds of views to me as an employer!!".

35. We find that the claimant was sufficiently annoyed about the remarks made to refer to it in the email of 24 September, some eleven days later.

36. On 15 September 2017, Denise Ujvari was appointed as Head of Operations. We accept the claimant's evidence that Mrs Dalal and Mrs Ujvari began to have meetings without the claimant being present. The claimant was not challenged on this evidence.

37. We also accept that Mr Dalal informed the claimant that he was not to provide an induction to Mrs Ujvari as the claimant was no longer involved in operations matters. The claimant was not challenged on this evidence.

38. On 21 September 2017, Mr Dalal wrote to the claimant forwarding an email about a tenancy of a property. He asked to meet to discuss this and commented "it is a damning assessment on how you have run SSP. This ??? after the catastrophe in Peterborough and the huge loss we have sustained there. Please revert back to me with your defence". This email is consistent with Mr Dalal no longer wishing the claimant to be Managing Director.

39. Sometime before 22 September 2017, we find that Mr Dalal had a meeting with Christine Brindle, HR, in which he told Ms Brindle that he did not wish the claimant to be Managing Director any more, he wanted to do the job himself, and the claimant was not right for the job. He raised the possibility of the claimant doing business development. We prefer the evidence of Ms Brindle to that of Mr Dalal about this meeting, the evidence of Ms Brindle being more consistent with contemporaneous documents.

40. On 22 September 2017, Ms Brindle showed the claimant some rough notes outlining what his proposed “new job” was to be.

41. On 22 September 2017, the claimant wrote to Mr Dalal asking to have a meeting the next week to review the points raised with Ms Brindle over his new role. He received a reply suggesting a meeting at 10 am on the Monday. As noted above, Mr Dalal did not, in his reply, question what the claimant was talking about by referring to a new role.

42. We find that on, 22 September 2017, as evidenced by the claimant, the claimant’s desk was removed from his office. It is common ground that there were texts between the claimant and Mr Dalal on this day but these texts have not been disclosed by the respondent. The claimant did not have copies because these had been on a company phone which had been returned to the respondent. There was a late suggestion by Mr Dalal in oral evidence, which was not in his witness statement, that the claimant’s desk was never, in fact, moved. We reject this. Had this been the case, we consider this would have been made clear in the response to the claim and Mr Dalal’s witness statement. The claimant was not challenged, in cross examination, on his evidence that his desk was moved on this day. Mr Dalal suggested reasons as to why the move was planned, including protection of personal information. We did not find the reasons for suggesting the move to be credible since the claimant’s successor, Ms Ujvari, who took the role of Managing Director after the claimant left, is working in the office in which the claimant formerly worked.

43. As noted above, on 24 September 2017, the claimant sent an email to Mr Dalal saying that he understood Mr Dalal wanted him to take a different role and that Mr Dalal would take over as Managing Director. The claimant wrote that he was not in favour of changing his job or title. He referred to Mr Dalal making comments about him being too old. He wrote that, with Denise on board, he would have more time to look at the strategic direction of the company which they could review on 25 September.

44. Mr Dalal’s evidence was that, by this stage, he was anticipating a claim by the claimant. He gave evidence that the claimant’s email of 24 September 2017 made him feel that the claimant was engineering a scenario or situation to engineer a constructive dismissal.

45. On 25 September 2017, the claimant and Mr Dalal had a meeting. We find that their mobile phones were left outside the meeting room at Mr Dalal’s instigation. Mr Dalal’s explanation was that they did not wish to be disturbed. We do not find this explanation credible; they could have just turned their phones off. We consider it

more likely that Mr Dalal wanted the phones out of the room to avoid any possibility of a meeting being recorded, since, as he has given evidence, by this stage he was anticipating a claim from Mr Bowskill. We find that there was discussion about the claimant taking on an alternative role. The claimant was not given a date on which he would cease being Managing Director. There was some discussion about Mr Dalal calling the claimant too old. We find that Mr Dalal came away from this discussion thinking that the claimant had agreed that Mr Dalal was joking when he said that the claimant was too old. We consider this to be supported by Mr Dalal's email of 25 September. We find that a natural reading of this email was that Mr Dalal's comments about the claimant being too old were meant in jest and not, as Mr Dalal asserted, that the claimant's email of 24 September had been meant in jest.

46. Ms Brindle joined a meeting with the claimant and Mr Dalal, either at the end of the meeting referred to above or shortly afterwards. We accept Ms Brindle's evidence that there was an uncomfortable discussion about what the claimant's role would be.

47. Mr Dalal's email reply to the claimant's email of 24 September dealt with the matter of Mr Dalal referring to the claimant as too old. It did not, however, seek to correct the claimant when the claimant had written that he was no longer to be Managing Director or that Mr Dalal was to take over as Managing Director. Had this not been Mr Dalal's intention at the time, we consider that Mr Dalal would have made sure that he corrected this glaring inaccuracy.

48. The claimant continued to attend pre-booked meetings after the meeting on 25 September. It is not clear to us from the evidence when Mr Bowskill last attended the respondent's premises for work. What happened in terms of the claimant's attendance at work on 26 to 27 September is unclear to us. We have seen no evidence, however, that Mr Bowskill presented himself as no longer working for the respondent until his letter of 28 September 2017.

49. On 27 September 2017, Ms Brindle sent an email to the claimant and Mr Dalal with a proposed job description for a Strategic and New Developments Manager. Mr Dalal confirmed by email of the same day that it reflected their discussions the previous day. The job description states, under the job title, that the post holder will be responsible to the Managing Director. Mr Dalal gave evidence that the role described in the job description was reflective of the claimant's original role as Managing Director and the only difference was that Mrs Ujvari had been employed and was taking over Operations. Mr Dalal could not explain why the job description said that the holder would report to the Managing Director, if the claimant was, as he asserted, to continue as Managing Director. Mr Dalal said he was extremely busy and did not give this much attention at the time. We do not find Mr Dalal's evidence that he did not notice that the role was described as responsible to the Managing Director to be credible. We find, on a balance of probabilities, that Mr Dalal saw that the post holder was to be responsible to the Managing Director and did not seek to correct this because it reflected Mr Dalal's intention at the time i.e. that the claimant would cease to be Managing Director.

50. On 28 September 2017, the claimant wrote to Mr Dalal. He raised a number of matters in this letter. It included Mr Dalal instructing him to email staff to quell any possible resistance to Mrs Dalal from the staff on 11 September. He referred to Mr

Dalal, in a meeting on 13 September, informing him that there would be a restructure involving Mr Dalal taking the role of Managing Director for himself and the claimant being reallocated another role. He wrote that at that meeting, Mr Dalal told him that he believed he was too old to take stress and intimated that he was a poor manager. He wrote that Mr Dalal had appointed Denise Ujvari as Head of Operations without involving the claimant in the recruitment process. He wrote that Mrs Dalal visited two services unannounced and uninvited and without the necessary DBS checks. He wrote that Mrs Dalal had invaded the privacy of a service user's room without being invited in and this had resulted in a formal complaint to the respondent from the service user. The claimant wrote that he, when he spoke to Mr Dalal about this, Mr Dalal failed to accept that this was unacceptable conduct. He wrote about Mrs Dalal and the new Head of Operations having meetings not involving the claimant. He wrote that Mr Dalal specifically told the claimant not to provide induction to Mrs Ujvari as he was no longer involved in operations matters.

51. The claimant wrote that, on 22 September, Ms Brindle showed him rough notes outlining what his new job was to be and that he understood these notes arose from a meeting that Mr Dalal had with Ms Brindle off site in which he discussed the claimant's removal from his role as MD. The claimant wrote that on the same day, staff instructed by Mr Dalal removed his desk into Mr Dalal's office. He wrote that he had had to text Mr Dalal to ask where he was supposed to sit and Mr Dalal had told him that his office was to be the meeting room. He wrote that it was clear to the staff that the claimant had no idea, as Managing Director, where he was to sit and that these actions were carried out without his knowledge or consent which was embarrassing and undermining.

52. The claimant wrote that on 24 September the claimant informed Mr Dalal by email that he did not wish to relinquish his role as Managing Director. He wrote that, at a meeting the following day, Mr Dalal started by removing both of their telephones from the room, which the claimant assumed was out of fear that he was recording the meeting. He wrote that Mr Dalal told him that he was offended by his email the night before and that he could see a claim coming. Mr Dalal informed him that he was within his rights to sack him, if he wanted, for performance issues. Mr Dalal encouraged him to consider a new role, whether on a self-employed or employed basis. The claimant wrote that he had agreed to look at any proposal given that Mr Dalal had, by this time, made it abundantly clear that the claimant's position as Managing Director was at an end, having unilaterally given away many of his responsibilities to new staff appointed without his involvement and had given away his office. The claimant wrote "essentially, you have dismissed me and offered me a new, much reduced role".

53. The claimant wrote that, since the meeting, he had discovered that Mrs Dalal had been taking a salary of £50,000 from the business since February 2016 despite undertaking no duties for that period. He alleged that Mr Dalal had been using business capital as a personal "slush fund" and that the claimant did not have any access to the bank accounts to which Mr Dalal was sole signatory.

54. The claimant wrote:

"As set out above, in recent weeks you have:

- Demonstrated a blasé attitude towards the safeguarding procedures in causing/allowing/justifying Samiya's visits to service users and their properties.
- Indicated to me that your desired atmosphere within the company is one of fear.
- Expressed ageist and derogatory remarks towards me.
- Criticised my performance of my role without following due procedure.
- Appointed senior staff without my consent or input.
- Removed my authority and responsibility and unilaterally demoted me to the role of Business Manager.
- Removed me from my office with no prior arrangement of where to sit causing acute embarrassment."

55. The claimant wrote that he had been dismissed from his employment as Managing Director and, for the reasons he had set out, he would not be accepting any demoted role with Mr Dalal or any of his companies.

56. The claimant wrote: "I have to say that even if you had not expressly dismissed me and offered me alternative employment, your poor handling of matters over the last couple of weeks and your derogatory comments towards me would have led to my departure from the business in any event as this situation was entirely toxic. Due to your actions I have no trust and confidence in you as a controlling mind of SSP and given your paranoid behaviour on Monday it seems you do not trust me".

57. Mr Dalal replied on 2 October 2017. We do not consider that what he wrote in this email can be relied on as evidence of the truth unless supported by other evidence. Mr Dalal anticipated a claim by this stage and was seeking to set out a defence. The letter included the allegation that the claimant was seeking to resign before accounting to an investigation into the service failure at Peterborough. As noted previously, we find no evidence in the documents that there was an investigation into Peterborough planned to report in October as has been asserted by Mr Dalal. We consider that this would have been mentioned in emails if this had been planned.

58. The letter concluded with a request for clarity as to the claimant's position. He wrote that, if they did not hear from the claimant by 6 October, they would assume his resignation as Managing Director and resignation from his employment with the respondent which would then take effect from the date of his non-attendance at work.

59. The claimant replied to Mr Dalal on 4 October, responding, in particular, to the suggestion in Mr Dalal's letter of 2 October that the Peterborough matter was to be the subject of a full internal investigation. The claimant wrote that he had no prior knowledge of any such investigation and so could not be said to be seeking to avoid accounting to it.

60. Mr Turner, the respondent's then in-house solicitor, then took over the correspondence on behalf of the respondent. On 9 October 2017 he wrote asserting that the claimant had absented himself from the office just as informal discussions had commenced with regards to the forthcoming investigation into Peterborough.

61. 25 September 2017 was agreed by the parties, on the claim form and response form, to be the claimant's effective date of termination.

62. The claimant resigned as a company director of the respondent on 25 September 2017 and Mr Turner became a company director in his place.

63. It was agreed that the CQC had made serious findings about the Peterborough service but CQC inspections of all other services during the claimant's employment had been rated good.

64. The claimant started new employment on 1 April 2018. He does not claim any continuing loss. The claimant, in his CV, described himself as a Management Consultant from November 2017. The respondent did not challenge in cross examination whether reasonable steps had been taken to mitigate loss and, in particular, did not ask whether the claimant did any paid work as a management consultant in the period 1 November 2017 to 31 March 2018.

65. The claimant, when asked why he did not present his harassment complaint in time, said that he always questioned himself and, at the time, he was trying to engage with his employment. He said that "sometimes, when I reflect on things, I consider whether that is right".

Submissions

66. The representatives made oral submissions. We summarise the principal arguments. Mr Smith, for the respondent, submitted that the claimant was not actually or constructively dismissed. The claimant's role was changing because they had appointed an Operations Manager. Mr Smith referred to clause 5.2 of the claimant's contract. In relation to constructive dismissal, Mr Smith submitted that the claimant left the organisation because of ongoing issues about Peterborough and because a report was due shortly, which the claimant had not taken steps to produce. In relation to harassment, Mr Smith submitted that there was no act of harassment and the claim was presented out of time and it was not just and equitable to consider it out of time.

67. In relation to remedy, Mr Smith submitted that the claimant should only be awarded loss to 1 November 2017 because the claimant, in his CV, described himself as a Management Consultant from November 2017. Mr Smith argued that the claimant was not entitled to an uplift on compensation for failure to comply with the ACAS Code because, following dismissal, his correspondence was dealt with in a fair and just manner.

68. Mr Liljenberg submitted, on behalf of the claimant, that Mr Dalal dismissed the claimant at the meeting on 25 September 2017 by making it clear that the claimant was not, in any circumstances, to continue in his role as Managing Director. In the alternative, he submitted that the claimant was constructively dismissed. He relied on two broad limbs for arguing that the respondent committed a repudiatory breach of contract: 1) stating that the claimant was not going to continue as Managing Director and making it clear the claimant was to be demoted; and 2) general conduct around the end of the claimant's tenure at the company. In relation to harassment, Mr

Liljenberg submitted that Mr Dalal had been evasive in evidence and the claimant's account should be preferred. In relation to remedy, Mr Liljenberg stated that the claimant started work in April 2018; putting management consultant on a CV did not mean that the person got any work. Mr Liljenberg recognised that £10,000 for injury to feelings (as had been included in the schedule of loss when the claimant was also claiming his dismissal was an act of age discrimination) was north of what an award would be for harassment and left it in the hands of the Tribunal to determine an appropriate award. Mr Liljenberg argued that an uplift for failure to comply with the ACAS code should be applied.

The Law

69. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996 (ERA). Section 94(1) of this Act provides that an employee has the right not to be unfairly dismissed by his employer. A dismissal may be express (which we refer to as an actual dismissal) or constructive.

70. Where there is a dispute as to whether there was a dismissal, the burden of proof lies on the claimant to show, on a balance of probabilities, that there was a dismissal.

71. A warning that an employee is to be dismissed will not be an actual dismissal if the date of termination is not given or the notice does not contain material from which the date can be positively ascertained: *Morton Fabrics Ltd v Shaw 1966 2KIR 1, Div Ct*. If an employee leaves in response to such a warning, he will have resigned.

72. A resignation, in some circumstances, will constitute a constructive dismissal.

73. Section 95(1)(c) ERA provides that an employee is to be regarded as dismissed if "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

74. An employee will be entitled to terminate a contract of employment without notice if the respondent is in fundamental breach of that contract and the employee has not waived the breach or affirmed the contract by their conduct.

75. An implied term of an employment contract is the term of mutual trust and confidence. This is to the effect that an employer will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Limited* 1981 ICR 666, said that the Tribunal must "look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."

76. Section 26 Equality Act 2010 defines harassment. The relevant parts of that section for this claim are as follows:

"(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.

77. Subsection (5) lists relevant protected characteristics which include age.

78. Section 40 Equality Act 2010 prohibits harassment by an employer of an employee.

Conclusions

Unfair dismissal

79. The claimant asserted that he was dismissed by Mr Shokat at a meeting on 25 September 2018. At one stage, in oral evidence, he stated that he had believed he had been dismissed at the meeting on 13 September 2018. We conclude that the claimant was not dismissed at either meeting. We have found that Mr Shokat told the claimant at both meetings that he was to cease being Managing Director and that Mr Shokat would take over the role and the claimant would be given an alternative role, still to be decided. However, Mr Shokat did not give the claimant a date on which he would cease to be Managing Director. Because no date was given when the claimant’s employment as Managing Director would cease and the date could not be ascertained from anything else, this did not constitute an express or actual dismissal. It was, instead, a warning that the claimant was to be dismissed from his role as Managing Director at a date to be determined and offered an alternative role.

80. We conclude that the claimant’s employment did not terminate on 13 or 25 September, but continued until the claimant’s letter of 28 September 2018, which we conclude was a letter of resignation. We conclude that the claimant was leaving because of various matters listed in his letter but principally because he was to be removed as Managing Director. We have found that Mr Dalal, acting on behalf of the respondent, told the claimant in meetings on 13 and 25 September that the claimant was to cease to be Managing Director. We conclude that, by Mr Dalal telling the claimant he was to be removed as Managing Director, the respondent was in fundamental breach of the claimant’s contract of employment. The claimant was

employed specifically as Managing Director. Although clause 5.2 gave flexibility to the respondent in terms of allowing the respondent to amend the claimant's duties, we conclude that this must be subject to the duties being consistent with the role of a Managing Director and did not allow the respondent to remove the claimant from that role and demote him to an alternative, lower status, role. We conclude that the respondent breached the implied duty of mutual trust and confidence by telling the claimant he was to be removed as Managing Director and demoted to an alternative role. The claimant resigned in response to that breach. He acted promptly in resigning and did not, by any of his actions, affirm the contract. He made it clear to Mr Dalal that he did not agree to cease being Managing Director and to taking an alternative role.

81. We conclude that the claimant was constructively dismissed with effect from receipt of his letter of 28 September 2017. Since the respondent has not sought to put forward a case that, if the claimant was dismissed, the dismissal was unfair, the respondent has not shown a potentially fair reason for dismissal and we conclude that the complaint of unfair dismissal is well founded.

Remedy for unfair dismissal

82. The claimant was not challenged, during cross examination, on his evidence that he started new work on 1 April 2018 and on whether he had taken reasonable steps to mitigate his loss during the period from the ending of his employment with the respondent until that date. The claimant did not claim any continuing loss after the start of his new employment. However, in closing submissions, the respondent's representative submitted that loss of earnings should only be awarded up to 1 November 2017 because the claimant had put in his CV that he was a management consultant from November 2017. The respondent's representative had not questioned the claimant about his CV. Putting in a counter schedule referring to the CV does not provide the Tribunal with any evidence that the claimant had any earnings from consultancy services from 1 November 2017 until 31 March 2018.

83. In the absence of any evidence that the claimant had any earnings in the period from 28 September 2019 until the start of his new employment on 1 April 2018, we are not satisfied, on a balance of probabilities, that there is any amount of earnings for this period to be deducted in calculating compensation.

84. The onus is on the respondent to prove that the claimant has not taken reasonable steps to mitigate his loss. The respondent did not challenge the claimant on steps taken to mitigate his loss.

85. We conclude that the claimant should be awarded compensation for loss of earnings and pension contributions in the period 29 September 2017 to 31 March 2018 inclusive, being the period the claimant was out of work. In addition, we award £500 for loss of statutory rights.

86. The claimant's net weekly pay was agreed to be £874.61 and pension contributions from the respondent agreed to be £12.50 per week.

87. We conclude that the ACAS Code of Practice on Discipline and Grievance had no application in this case since it was not a disciplinary or grievance situation. We cannot, therefore, award any uplift for failure to comply with the ACAS Code.

88. The calculation of the basic and compensatory awards for unfair dismissal are as follows:

Basic award

3 completed years of service

Age at effective date of termination: 55

Week's pay – statutory maximum at the time of £489

3 x 1.5 x 489 = **£2,200.50**

Compensatory award

Loss of earning 29 September 2017 to
31 March 2018 inclusive (26 weeks)

26 x £874.61 = £22,739.86

Loss of pension contributions for 26 weeks

26 x £12.50 = £325.00

Loss of statutory rights £500.00

Total compensatory award £23, 564.86

Total award for unfair dismissal £25,765.36

89. The claimant did not claim or receive benefit so the Recoupment Regulations do not apply.

Harassment related to age

90. The complaint of age-related harassment was about a comment made on 13 September 2017. The claimant notified ACAS of a potential claim under the early conciliation procedure on 19 December 2017 and the early conciliation certificate was issued on 19 January 2018. The claim was presented on 16 February 2018.

91. The claimant did not notify ACAS within the primary 3 months' time limit applying to the complaint of harassment. No extension of time because of early conciliation, therefore, applies. The time limit for presenting the complaint of harassment expired on 12 December 2017. It was not suggested, and we do not find, that the act of harassment formed part of a continuing act of discrimination ending with an act in relation to which the complaint was presented in time. The complaint of harassment was, therefore, presented out of time and this was accepted by the claimant.

92. We only have jurisdiction to consider the complaint out of time if we consider it just and equitable to do so in all the circumstances: section 123(1)(b) Equality Act 2010.

93. The claimant gave no evidence in his witness statement as to the reason for presenting this complaint out of time. When asked about it in oral evidence, the claimant said, as recorded in paragraph 65 above, that he always questioned himself and, at the time, he was trying to engage with his employment. He said that “sometimes, when I reflect on things, I consider whether that is right.”

94. In submissions, as noted in paragraph 66 above, Mr Smith, for the respondent, submitted that the complaint of harassment was presented out of time and it was not just and equitable to consider it out of time. Mr Liljenberg, for the claimant, made no submissions relating to the time limit issue.

95. The claimant’s explanation that he was trying to engage with his employment at the time, does not explain why, after his employment ended on 28 September 2017, he did not present his claim within the remaining part of the time limit, which expired on 12 December 2017. We also consider the claimant had sufficient time after his employment ended to reflect on things and submit a claim in relation to the age-related harassment in time if he wished to do so. The claimant’s explanation for not presenting this complaint in time has not persuaded us that it would be just and equitable to consider this complaint out of time. We, therefore, conclude that we do not have jurisdiction to consider the complaint of age-related harassment.

96. Had we concluded that it was just and equitable to consider the complaint out of time, we would have concluded that the complaint was well founded for the following reasons.

97. We found that Mr Dalal did say to the claimant, on 13 September 2017, that the claimant was too old to take stress and be driving around the country.

98. We conclude that this conduct was unwanted; the claimant was sufficiently aggrieved by it to raise it in his email of 24 September 2017.

99. There is no evidence which persuades us that it was Mr Dalal’s intention or purpose in making the remark to violate the claimant’s dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. However, we are satisfied, on the evidence, that the remark had the effect of violating his dignity or creating such an environment for him. We accepted the claimant’s evidence that he was annoyed by the remark; he was sufficiently aggrieved to raise it in his email of 24 September 2017, some 11 days after the incident.

Remedy for harassment

~~100. We accepted the claimant’s evidence that he was annoyed by the remark. The claimant did not make more of the effect of the comment on him than this. We conclude that the claimant did suffer some injury to feelings but this was very much at the lower end of the lowest Vento band. We conclude that an appropriate award in the circumstances is £800.~~

~~101. There having been no suggestion that interest should not be awarded in the normal way on the award, we calculate interest at 8% on the £800 from the date of the act of discrimination, 13 September 2017, until the calculation date, 2 October 2019 (106.5 weeks). The interest payable is: $8/100 \times 106.5/52 \times £800 = £131.$~~

Employment Judge Slater

Date of original judgment: 15 November 2019

Date of variation on reconsideration: 19 May 2020

RESERVED JUDGMENT AND REASONS AMENDED ON
RECONSIDERATION SENT TO THE PARTIES ON

29 May 2020

FOR THE TRIBUNAL OFFICE



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2404183/2018**

Name of case: **Mr A Bowskill** v **Select Support Partnerships Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **19 November 2019**

"the calculation day" is: **20 November 2019**

"the stipulated rate of interest" is: **8%**

For the Employment Tribunal Office