EMPLOYMENT TRIBUNALS

Claimant: Mr. David Bartell

Respondent: Rend-Tech North East Limited

Heard at: Newcastle-Upon-Tyne **On: 24 & 25 September 2020**

Before: (1) Employment Judge A.M.S. Green
(2) Mr. D. Morgan
(3) Mr. G. Baines

Representation
Claimant: Mr. H. Menon - Counsel
Respondent: Ms. T. Carling - Solicitor

JUDGMENT

The unanimous decision of the Tribunal is that the claimant's claims for direct age discrimination and unfair dismissal are upheld. The respondent will pay the claimant £17,462.82 in compensation.

REASONS

Introduction

1. For ease of reading we refer to the claimant as Mr. Bartell and the respondent as Rend-Tech.

2. We conducted a remote video link hearing and worked from a digital bundle. We heard evidence from the following witnesses who adopted their witness statements:

    a. Mr. Bartell

    b. Mr. Anthony Lambton, a Supervisor employed by Rend-Tech

    c. Mr. Richard Foley, Rend-Tech's Contracts Manager

    d. Mrs. Susan Fletcher – one of Rend-Tech's directors

e. Mr. Simon Fletcher – Rend-Tech's Managing Director

3. Mr. Menon and Ms. Carling produced skeleton arguments/written submissions and made closing oral submissions. Given time constraints, although we were able to deliberate on 25 September 2020, we agreed with the parties that we would reserve our judgment and issue written reasons.

4. In reaching our decision, we have considered all the oral and documentary evidence, Mr. Menon's skeleton argument and Ms. Carling's written submissions together with their oral submissions. The fact that we have not referred to every document produced should not be taken to mean that we have not considered it.

The claims. and response

5. There was a private preliminary hearing on 29 April 2020 before employment Judge Garnon. In his post hearing case summary, Judge Garnon helpfully set out the claims and responses which we reproduce below.

6. Mr. Bartell has claimed direct age discrimination and ordinary unfair dismissal.

7. Mr. Bartell was born on 29 March 1954 and he claims that on 4 September 2019, he was brought by van without prior notice to a meeting with Mr. Fletcher. During that meeting, he claims that Mr. Fletcher asked him about his future given that he had now reached the previous state retirement age of 65. Mr. Bartell claims that Mr. Fletcher pressurised him to say that he was ready to retire notwithstanding that this was not his real intention. He asked Mr. Fletcher if he could continue working and review his employment monthly. Mr. Bartell alleges that Mr. Fletcher listened but did not ask any further questions or make any comment and ended the meeting.

8. On 4 October 2019 Mr. Bartell received a letter dated 1 October 2019 from Mrs Fletcher which began "I refer to our meeting on Wednesday 4 September in which you advised us that you have decided to retire from your role of Renderer. I am writing to confirm I accept your resignation on behalf of the company". The letter said Mr. Bartell owed Rend-Tech 2.5 days holiday which would be deducted from his October salary and went on to agree an extended notice beyond the two weeks contractual notice he was required to give. Mr. Bartell denies telling Mr. Fletcher that he wanted to resign. He says that on the same day he called Mr. Fletcher saying that he wanted to continue working and insisted that he had never expressed any intention to resign on 4 September 2019. He further alleges that Mr. Fletcher did not accept that and said, "it was all sorted". On 17 October 2019, Mr. Bartell sent a letter which said, "just dropping you a line asking if you are willing to give me my job back or do you still insist I resigned". He did not receive a response.

9. Mr. Bartell believes that he was directly discriminated against under Equality Act 2010, section 13 ("EqA") because of his age by Rend-Tech holding a meeting to discuss his plans upon reaching the age of 65 and by treating him as having resigned and/or dismissing him. He says that a comparator would be a younger renderer who had not reached 65 who would not have been invited to a meeting to discuss retirement plans. In fabricating his resignation and/or terminating his employment Rend-Tech subjected him to less favourable treatment which he considers did not amount to a proportionate means of achieving a legitimate aim. He contends his employment was terminated by Rend-Tech contrary to Employment Rights Act 1996, section 95 (1) (a) ("ERA"). He maintains that the failure to reply to his letter of 17 October 2019 confirmed that Rend-Tech intended to terminate his employment, for which there was no potentially fair reason, but if there was, the dismissal was procedurally unfair.

10. Rend-Tech denies that it dismissed Mr. Bartell. It says that Mr. Bartell's employment ended on 4 October 2019 upon his resignation. He had originally worked as a subcontractor and joined Rend-Tech as an employee on 22 November 2010. He was provided with a contract of employment at his request on 15 July 2019 but refused to sign the version given to him.

11. Rend-Tech has no fixed retirement age and did not initiate any conversation with Mr. Bartell about retiring. It argues that Mr. Bartell indicated to his manager, Mr. Foley, that for the last few years he was finding his role as a renderer "too hard on his body". It is a very physically demanding job. It is further alleged that he indicated to Mr. Foley several times that once he was 65, he would immediately look to retire as he was finding the work too physically demanding. After his birthday in March 2019, he started a discussion with Mr. Foley about his plans to retire. Rend-Tech argues that these discussions are considered good practice by ACAS, especially in a small business. Rend-Tech alleges that Mr. Bartell explained to Mr. Foley that his State Pension age was around 65 ½ years and, while he was keen to retire, he was not going to until he became eligible for pension credit. At no point did Rend-Tech initiate a discussion or push Mr. Bartell to leave. Employees like Mr. Bartell are kept, as qualified and experienced renderers are a scarce resource.

12. Rend-Tech allege that in late August 2019, Mr. Bartell mentioned to Mr. Foley that he needed to agree a date to leave. Mr. Foley arranged for Mr. Bartell to come to Rend-Tech's office to discuss his plans as he was on site. Arrangements were made to ensure that Mrs Fletcher was available as she would deal with any HR matters. It was agreed that Mr. Foley would pick Mr. Bartell up after lunch at around 2 PM on 4 September 2019 from a job in Hutton Rudby in North Yorkshire. Upon arriving at the site, Mr. Bartell was out of his protective overalls and ready to leave. Mr. Lambton was in the pick-up truck at the time. It is alleged that Mr. Bartell chatted normally to both colleagues as he made his way to Rend-Tech's office in Sedgefield. There was no element of surprise as suggested and it was even agreed at the end of the meeting that Mr. Bartell's colleagues still working on site would return

to the Sainsbury's café behind Rend-Tech's office to take him home.

13. Rend-Tech's version of the meeting on 4 September 2019 is different to Mr. Bartell's. It says that it was attended by Mr. Foley, Mr. Fletcher and intermittently by Mrs Fletcher. Mr. Bartell was invited to discuss his retirement plans because he had indicated that he was looking to confirm a final date to leave. There was no pressure put on him as he alleges. Rend-Tech says that Mr. Bartell's suggestion makes little sense given that he had already reached his 65th birthday in March 2019 and the meeting was only held for him to give a date upon which he wanted to leave. At no point did he express any desire to continue working. The meeting was led entirely by Mr. Bartell who suggested the final date of his employment should be 4 October 2019. This date was then agreed. At the end of the meeting hands were shaken and Mr. Bartell commented that he would be calling in for a coffee from time to time as some of Rend-Tech's previous employees had done, whilst their wives were shopping in the nearby Sainsburys. Rend-Tech state that the words used were a clear and unambiguous resignation and the final date came at Mr. Bartell's own request.

14. Rend-Tech alleges that on 1 October 2019 Mr. Bartell told Mr. Foley he had got the dates of his retirement wrong and he wanted to extend his notice period by 2 weeks if possible. Mr. Foley asked Mr. Fletcher whether that would be possible but, by that point, arrangements for the coming weeks and rotas had been agreed with clients taking into account Mr. Bartell's departure date, so there was no work available for him from 4 October 2019. Furthermore, Mr. Bartell was involved in discussions around the renewal of his CSCS card which had expired and was a fundamental requirement of his role to obtain access to sites so, for a brief period, Mr. Foley had to check sites would be agreeable to Mr. Bartell attending with an expired card. Mr. Bartell was aware of this and did not obtain a new card in expectation of his job continuing.

15. Rend-Tech took advice from an external HR provider and prepared a letter dated 1 October 2019 which it sent by recorded delivery and which was signed for on 4 October 2019. The letter was in Mrs Fletcher's name and confirmed Mr. Bartell's resignation and that his notice period was due to expire on 4 October 2019. Mr. Bartell took a call from his wife at about 9:50 AM on 4 October 2019 and stormed off site as his wife had received a letter confirming his resignation. Mr. Foley was preparing to come on site to see Mr. Bartell and shake his hand but was told not to bother by Colin Mitchell who was working at the site. Mr. Foley was also expecting to tell Mr. Bartell to pop in when he could to be given a bottle of whisky and suggest that he attended the Christmas party. However, before he arrived, Mr. Bartell had left the site and did not return. Mr. Foley asked whether he should ring Mr. Bartell but was warned off doing so by his relatives (who are also employed by Rend-Tech) who said they would speak to him instead. At no point did Mr. Bartell return to site or contact Rend-Tech by phone or letter until, on 18 October 2019, Rend-Tech received a brief undated note which contain no address and stated "dear Sir-Mdm, just dropping you a line asking if you are willing to give me my job back. Are you still insisting I resigned? Signed D Bartell".

16. Rend-Tech say that this note came as a complete surprise. They allege that Mr. Bartell made no effort to contact them after he had left and before it was sent. Mr. Bartell had a close relationship with Mr. Foley and always got on very well with other employees. He made no calls and left no messages before the letter was received. When Rend-Tech received the letter, they prepared a detailed response, but their HR adviser advised them not to send it. Rend-Tech suggest that Mr. Bartell's frustration at not being allowed to extend the notice period agreed led him to being angry and walking off site.

17. Rend-Tech say there are no special circumstances arising from Mr. Bartell's resignation and it was entitled to accept an unambiguous resignation made without any pressure. There was no suggestion that Mr. Bartell was not functioning normally when he verbally resigned on 4 September 2019. Mr. Bartell did not retract his resignation within the brief period allowed under the case law. Consequently, Rend-Tech where entitled to hold Mr. Bartell to the date that he gave.

18. Alternatively, Rend-Tech say that if they dismissed Mr. Bartell, there was no fundamental breach of contract entitling him to resign in response. They also assert that if the Tribunal finds that there was a dismissal, it was fair because of Mr. Bartell's gross misconduct by walking off site before completing his work.

The issues

19. The parties agreed the following list of issues:

<u>Direct age discrimination (EqA, section 13)</u>

a. Did the Rend-Tech hold a meeting with Mr. Bartell, on or about 4 September 2019, to discuss his plans for retirement?

b. Did the Mr. Bartell resign from his employment on 4 September 2019 in the meeting on 4 September 2019 or did Rend-Tech dismiss Mr. Bartell by letter dated 1 October, received by Mr. Bartell on 4 October 2019 from its employment?

c. Would a hypothetical comparator have been subjected to the treatment outlined in questions 1 and 2 above?

d. Was the treatment outlined in questions 1 and 2 'less favourable' treatment?

e. Was Mr. Bartell treated less favourably because of a protected characteristic; namely his age?

f. If Mr. Bartell was treated less favourably because of his age, can Rend-Tech show that this treatment was a proportionate means of achieving a legitimate aim?

Unfair dismissal

g. Did Mr. Bartell resign or was he dismissed from his employment (in accordance with ERA section 95(1))?

h. If Rend-Tech dismissed Mr. Bartell, then:

i. For what reason was Mr. Bartell dismissed?

ii. Was the reason for Mr. Bartell's dismissal potentially fair (ERA, section 98(2))?

iii. If so, pursuant to ERA section 98(4), did Rend-Tech act reasonably in treating it as a sufficient reason for dismissing the employee?

iv. If the dismissal was for a potentially fair reason, did Rend-tech follow a fair procedure in dismissing as to Bartell?

Remedy

i. If Rend-Tech unfairly dismissed Mr. Bartell, did it comply with the ACAS Code of Practice in dismissing him?

j. If Rend-Tech unfairly dismissed Mr. Bartell, did he unreasonably fail to follow the ACAS Code of Practice on Disciplinary and Grievance procedures in contesting his dismissal?

k. If Rend-Tech unfairly dismissed Mr. Bartell, did he contribute to his dismissal in such a way that his compensation should be reduced?

l. If Rend-Tech unfairly dismissed Mr. Bartell, should his compensation be reduced pursuant to **Polkey v A E Dayton Services Limited [1987 ICR 142]**?

Burden and standard of proof; assessing the weight of evidence; credibility

20. In relation to his discrimination claim, if Mr. Bartell proves facts from which the Tribunal could conclude in the absence of an adequate explanation that Rend-Tech unlawfully discriminated against him (i.e. a "prima facie case"), the Tribunal must uphold his complaint unless Rend-tech proves that it did not discriminate. In other words, if Mr. Bartell establishes a prima facie case of differential treatment from which the Tribunal could properly draw an inference that the treatment was because of one of the protected characteristics, in this case, his age, then it will be for Rend-Tech to prove that there was some other ground for the treatment.

21. Regarding his unfair dismissal claim, the parties disagree about whether Mr. Bartell resigned or was dismissed, consequently he must establish that he was dismissed.

22. Mr. Bartell must establish his claims on a balance of probabilities. If Mr. Bartell establishes his prima facie case of differential treatment from which the Tribunal could properly draw an inference that the treatment was because of one of the protected characteristics, Rend-tech must prove, on a balance of probabilities, that there was some other ground for the treatment

23. The Tribunal can only decide whether a party has discharged the evidential burden of proving their case once the evidence is complete and thus only after it has come to some conclusion about the quality of the evidence presented. This assessment involves ascribing weight to items of evidence to decide what influence (if any) such items bear on the matters to be decided. The question of the weight to be attached evidence is one for the Tribunal to decide as a fact-finding body or "industrial jury".

24. There was a private preliminary hearing on 29 April 2020 before employment Judge Garnon. He stated that there was no middle ground between the parties because the factual assertions are so different that whoever is believed will win, on both claims. Mr. Menon and Ms. Carling agree with this assessment which makes the question of the weight of evidence and the credibility of witnesses central to our fact-finding exercise.

25. We remind ourselves that if there is a preponderance of evidence on one side, as against a lesser amount of equally good or bad evidence on the other, a Tribunal may well be impressed simply by the volume of evidence in favour of one party. Put simply because, say, five witnesses are called to give evidence on the same point does not necessarily enhance a party's case. Generally, it is quality not quantity that matters most when assessing the weight to be given to the parties' evidence.

26. We had the benefit of hearing oral evidence and we remind ourselves that in determining credibility, factors such as the demeanour of a witness and the coherence of his or her evidence should be considered. We also remind ourselves that there is no requirement for any evidence given to be corroborated. It is simply for the Tribunal to assess, as a matter of common sense and judgment, the extent to which it finds the evidence of the witness satisfactory reliable.

Findings of fact

27. Rend-Tech is a small company which Mr. Fletcher established in 2009. It provides rendering services and specialist cladding mainly to commercial clients. It also provides services to private clients. The company currently has 12 employees and it is based in an industrial estate in Sedgefield. Mr. Fletcher is the Managing Director and, from the evidence we heard, he plays a central role in the running of the business. His wife, Mrs Fletcher, is one of Rend-Tech's directors and she is responsible for HR, payroll, accounts, and general

administration. She freely admitted under cross-examination that she did not have any HR expertise or qualifications and in July 2019, the company decided to retain an external HR consultancy called Harper Adams. They provide ad hoc HR advice to Mrs Fletcher.

28. Mr. Bartell started working for Rend-Tech as a renderer in November 2009. He was with the company right from the start. Rend-Tech initially retained him as a contractor until he became an employee in November 2010. He did not have a written contract of employment when he started working as an employee. He reported to Mr. Foley.

29. There was no dispute that rendering is hard physical and demanding work which involves carrying heavy loads, working outside and at heights. There was also no dispute that it is a skilled job which requires a person to complete a three-year apprenticeship. Finally, the parties agreed that there is a shortage of renderers because it is quite a scarce trade.

30. In November 2018, Mr. Bartell had an accident on a job that he was doing in Billingham. He fell through scaffolding and severely injured his hand which required surgery. He had time off work recuperating. He claimed that prior to the accident, he had a good working relationship with Mr. Fletcher but after the accident, their relationship deteriorated. Ultimately, he instituted a formal personal injury claim against Rend-Tech, and he believes that when it was intimated to the company, this triggered his dismissal in October 2019. He believes this is the operative reason for his dismissal.

31. We were unable to make a finding of fact in this respect because of the lack of evidence to support that allegation. However, the perceived timing of the intimation of the claim is relevant to the question of Mr. Fletcher's credibility. When he was giving his evidence, Mr. Fletcher was clear that the first that he knew about the claim was in early October 2019 when he was contacted by email by Rend-Tech's insurers. He said that the claim was initially intimated to the insurers and not the company. I felt it important to clarify this with Mr. Fletcher. I said that prior to becoming a judge, I had extensive experience in practice as a solicitor acting in personal injury claims and that since the late 1990s, prospective claimants are required by the Civil Procedure Rules to follow a pre-action protocol. I explained that this is mandatory and requires a prospective claimant (or their representative) to write a Letter of Claim to the prospective defendant notifying them of the details of the claim, enclosing a copy to pass to their insurers and to respond within 28 days. I asked Mr. Fletcher if that had happened and he clearly replied that it had not.

32. Mr. Fletcher was clear in his evidence that this had not happened. He said that the claim was first communicated to the insurers. We found this implausible for several reasons.

    a. First, this would not be compliant with the pre-action protocol. The pre-action protocol is widely known amongst

personal injury practitioners and it must be followed. Failure to follow the pre-action protocol can result in premature litigation and the risk of a severe costs penalty for the claimant or their representative. The Letter of Claim must be sent to the prospective defendant with a copy to passed on to their insurers.

b. Secondly, given his position in the company, it seems highly unlikely that Mr. Bartell would have known the identity of Rend-Tech's insurers. These are not matters of common knowledge.

c. Thirdly, from the evidence that we heard, other employees, including Mr. Foley, knew about Mr. Bartell's claim before October 2019. Rend-Tech is a small company and people were talking about the claim. It sees implausible that given Mr. Fletcher's central role within the company, he would not have known about the claim or be ignorant of these rumours. Furthermore, we heard that Mr. Foley, who was Mr. Bartell's line manager, regularly communicated with Mr. Fletcher and as there were rumours circulating amongst the workforce about the claim we believe it is reasonable to infer that Mr. Fletcher would have heard these long before the claim was officially communicated to the company.

Collectively, these factors undermine Mr. Fletcher's general credibility and cast doubt on his powers of recall over key facts in this case. We find it difficult to accept that Mr. Fletcher could be so certain on this matter in circumstances where it is both implausible and highly unlikely that a claim would have been intimated in the way that he described.

33. Mr. Bartell turned 65 on 29 March 2019. He occasionally spoke in general terms to Mr. Foley about retirement. Mr. Foley was in regular contact with Mr. Fletcher and it is reasonable to infer that he would have spoken to Mr. Fletcher about the conversations that he had with Mr. Bartell particularly as he was his line manager. Therefore, given Mr. Fletcher's position within the company, Rend-tech were aware that Mr. Bartell was 65 years old. They had imputed knowledge of this.

34. Mr. Fletcher already had experience as he confirmed to the Tribunal that one other employee had retired on an earlier occasion. Retirement was not a novelty.

35. In July 2019, Mr. Bartell asked Mr. Fletcher for his contract of employment. In his witness statement, it was not clear what triggered this request but when he was giving his evidence, he explained that the solicitors acting in his personal injury claim needed to see his contract of employment. This evidence was not challenged, and we saw no reason not to take it at face value. In her evidence, Mrs Fletcher explained that she contacted Harper Adams to provide a written contract of employment for Mr. Bartell. A contract was produced and given to Mr. Bartell [46-53]. Mr. Bartell did not sign the contract. Indeed, the copy that was produced to the Tribunal shows that neither party signed it. Notwithstanding this, there was nothing to suggest that the parties do not accept that these were the terms applicable to Mr.

Bartell's employment. Consequently, we find that Mr. Bartell's terms and conditions of employment are as set out in the unsigned contract of employment.

36. Clause 15 of Mr. Bartell's contract deals with termination of employment. Clause 15.1 provides that on satisfactory completion of his probationary period he was required to give Rend-Tech two weeks written notice of termination.

37. On 23 August 2019, Mr. Bartell sat and passed the CITB test entitled "HS&E Test for Operatives". The test cost Mr. Bartell £21. Rend-Tech operated a scheme under which employees would take the necessary test and reimburse the employee the cost. Mr. Bartell produced a copy of his score report [79]. The score report has a section entitled "Next Steps". In that section there is a subsection entitled "Apply for a card". This states that once he has passed his test, he should, if he has not done so already, consider applying to join the relevant card scheme. In this case, the relevant card scheme was the Construction Skills Certificate Scheme ("CSCS"). Mr. Bartell had previously been issued with a CSCS Skilled-Blue card which expired at the end of July 2019 [81]. This was proof that he was a skilled worker. He renewed his card. We saw evidence from a document in the additional disclosure bundle entitled "Online Card Checker" that his new card started on 20 November 2019 and will expire on 30 November 2024.

38. From 1 August 2019 and 20 November 2019, Mr. Bartell did not have a valid CSCS Skilled-Blue card. What significance should be placed on the fact that there was a hiatus during which Mr. Bartell did not have a valid CSCS Skilled-Blue card? Rend-Tech's position is that the hiatus was proof that Mr. Bartell did not expect to continue working as a renderer as possession of the card was essential to gain access to commercial sites. It was evidence that he intended to retire but it also accepted that he would be able to work on private sites without a CSCS card. This is what in fact happened. Furthermore, it is also significant from the wording of the score report [79] that it was not mandatory for Mr. Bartell to apply for a card. The wording on the score report is clear. It invited him to consider applying to join the relevant card scheme. This suggests that it is not compulsory to have a CSCS card although we accept that, in most instances, Rend-Tech's commercial clients required possession of a valid card as a condition of working on their sites. What is clear, is that Mr. Bartell was given work by Rend-Tech in the last months of his employment when he did not have a valid CSCS card. The fact that he did not possess the card does not, in our opinion, indicate his imminent intention to retire from working as a renderer. This conclusion is fortified by the fact that Rend-Tech reimbursed the cost. Why would it do that if Mr. Bartell planned to retire? It could at least have questioned Mr. Bartell on the need to take the test. There is no evidence to suggest that it challenged him on that matter.

39. We do not think that there is any dispute that Mr. Bartell is a person of modest means. When he was giving his evidence, he made much of the fact that the way in which payment for obtaining a card and taking

tests for the CSCS scheme had changed over time. Originally, it was the employer who arranged the tests and paid the provider directly. However, this changed so that an employee is responsible for dealing directly with the provider and paying for the test and the card and then seeking reimbursement from the employer. This was significant to Mr. Bartell even though he was paying £21 which, to many would be a modest amount, but not to him. Why would he bother paying for the test if he planned to retire imminently? The reasonable inference to draw is that he paid for the test because he wanted to continue working and did not have a settled intention to retire in the near future.

40. There is no disagreement between the parties that a meeting took place on 4 September 2019. What is disputed is who instigated the meeting, the purpose of the meeting and what, if anything, was agreed at that meeting. The only evidence presented to the Tribunal was oral. No documentary evidence was produced.

41. Mr. Bartell's position is that he was pressurised into offering his resignation to facilitate his retirement. He says he did not ask for the meeting. He says it was Mr. Fletcher who summoned him via Mr. Foley. Rend-Tech's position is that Mr. Bartell had confided with Mr. Foley that he was struggling to do the work because it was physically demanding, and his body was not coping. Mr. Foley understood this to mean that Mr. Bartell wanted to retire, and he facilitated the meeting with Mr. Fletcher that took place on 4 September 2019. Rend-Tech allege that the meeting was amicable, and Mr. Bartell shook hands with Mr. Fletcher at the end of the meeting. Mr. Bartell denies that he shook hands.

42. We prefer Mr. Bartell's version of events regarding the meeting and the events leading up to it on 4 September 2019 for the following reasons:

    a. By general observation, we noted (and we mean no disrespect in saying so) that Mr. Bartell appeared to be an unsophisticated person. Rather his behaviour was occasionally excitable and he sometimes became confused when he was being cross-examined. He explained that he suffered from anxiety. We note that this was not challenged by Rend-Tech. His anxiety can explain his performance when giving evidence. Furthermore, it was abundantly clear that he was unfamiliar with the process of giving evidence and consequently nervous. There were inconsistencies in his evidence, as highlighted by Ms. Carling in her closing submissions, but when one takes a holistic approach at what he claims, the core elements of his narrative withstood trenchant and sustained cross-examination. We believe that the inconsistencies in his evidence can be explained by his anxiety, unfamiliarity with tribunal proceedings and the fact that he is not a particularly sophisticated person rather. His behaviour did not suggest that he fabricated his story. The fact that evidence appears to be unpolished and "frayed at the edges" often gives it a ring of truth in comparison to evidence that is highly polished and entirely consistent. Polished performances can belie the fact that human memory is

fallible and the ability to recall past events becomes increasingly difficult over time. Mr. Bartell was giving evidence of events that took place a year ago.

b. Retirement is a major event in a person's life and not something that is approached casually. Mr. Bartell had periodically spoken to colleagues that he was getting older and finding the work more challenging. This should not be necessarily taken to mean that he was expressing a firm intention in August 2019 to retire imminently, as suggested by Mr. Foley and Mr. Fletcher. It is, instead a generalised expression that the time was coming for Mr. Bartell to consider retiring. His explanation was that he wanted to look at this on a rolling monthly basis which we think is both plausible and credible.

c. Mr. Bartell had only recently asked for and had been given his contract of employment. In her witness statement, Mrs Fletcher states that she physically handed Mr. Bartell a copy of his employment contract and asked him to read it through and return it signed. Whilst he did not sign the contract, no one has suggested that he had not read it. Consequently, if he intended to retire, he would have known that he was required to give two weeks written notice of intention to terminate his employment as set out in clause 15 of his contract. There is no evidence whatsoever that he tendered written notice of his intention to terminate his employment as required by his contract. This supports his version of events that he was thinking of retirement but at that stage he wanted to continue working and to review things on a monthly rolling basis. He had not crystalised a firm intention.

d. We think it is more likely than not that because Mr. Bartell had periodically spoken to Mr. Foley in general terms about his retirement, Mr. Foley passed on that information to Mr. Fletcher who took it upon himself to arrange for Mr. Bartell to come into the office to discuss this. He arranged for Mr. Foley and Mr. Lambton to collect Mr. Bartell and to bring him to the office. It is plausible that Mr. Bartell knew about that meeting as both Mr. Foley and Mr. Lambton state in their evidence that when they collected him from the work site, he had changed out of his overalls and was clearly ready to be collected. This suggests that he knew about the meeting in advance, that he wanted to be presentable and was ready to go to the meeting.

e. Mrs Fletcher was not present throughout the meeting that took place on 4 September 2019. However, the evidence was that she dipped in and out of it. Given that she had only recently taken advice from Harper Adams on the need for the contract of employment, that she had insisted that Mr. Bartell read and sign that contract, it is reasonable to infer that she was also familiar with the terms of his employment including the provisions relating to termination. There is no suggestion that she did not read the terms of employment. Indeed, in her witness statement,

she says that contracts of employment were given out to all the staff and not just Mr. Bartell. This was a project for all the staff that she was working on and it is reasonable to infer that she would have known about the requirement for an employee to give written notice of their intention to terminate their employment.

f. In her witness statement, Mrs Fletcher says that she saw Mr. Bartell and her husband briefly as he came into office and said that they had sorted the arrangements out and that Mr. Bartell wanted to leave on 4 October 2019. If that was the case, it is surprising that Mrs Fletcher did not flag the issue that Mr. Bartell had failed to give two weeks written notice. Even with her limited experience of HR management, this should have raised a red flag. At the very least, one would have expected to see evidence of her querying this with Mr. Bartell and/or Mr. Fletcher. The absence of such evidence is telling and suggests that Mr. Bartell had not formed the firm intention to retire and leave the company on 4 October 2019.

g. Furthermore, under cross-examination, Mrs Fletcher conceded that because she was not present throughout the meeting, she did not hear Mr. Bartell express any desire to retire and that anything she knew came from Mr. Fletcher and Mr. Foley who were present throughout the meeting. That is hearsay evidence and we give it little weight.

h. It is also noteworthy that Mrs Fletcher had never discussed retirement with Mr. Bartell. She did not have direct dealings with him.

i. We accept that Mrs Fletcher is not an HR specialist and it was sensible for her to engage the services of Hunter Adams. Hunter Adams first became involved in July 2019 and provided the contracts of employment for all the staff including Mr. Bartell. Organisations such as Hunter Adams advise their clients on employment law and good industrial practice. However, it was obvious to us that Rend-Tech did not follow good industrial practice as far as the meeting on 4 September was concerned. If, as claimed by Rend-Tech, the purpose of the meeting was to formalise the arrangements for Mr. Bartell's retirement, it would have been good industrial practice for someone to take notes of what was said during that meeting. Indeed, Rend-Tech knew (as set out in their response) that ACAS regards these discussions as good practice, especially in a small business. The relevant guidance from ACAS states in the section "Retiring from Work":

> *Whatever the age of an employee, discussing their future aims and aspirations can help an employer to identify their training or development needs and provide an opportunity to discuss their future work requirements.*
>
> *For all employees these discussions may involve the question of where they see themselves in the next few years*

and how they view their contribution to the organisation. A useful exercise is to ask open questions regarding an employee's aims and plans for the short-, medium- and long-terms. Some employers may find it useful to hold these discussions as part of their formal appraisal process.

The outcome of any workplace discussions should be recorded and held for as long as there is a business need. It would be good practice to give a copy to the employee.

j. When Mrs Fletcher was cross examined on this point she accepted that it was possibly good practice but qualified what she said by suggesting that it was only an informal meeting. It is difficult to comprehend such a meeting being informal given its subject matter. Even with an informal meeting, a note should have been taken and a copy given to Mr. Bartell.

k. There was conflicting evidence on whether any notes were taken at that meeting. In his evidence, Mr. Foley, who was present throughout the meeting said that Mr. Fletcher took a note. Mr. Bartell also said that he saw Mr. Fletcher taking notes. Under cross-examination, Mrs Fletcher said that she had not seen the note. She admitted that she had not asked her husband about notes because she thought that dates had been agreed.

l. In his witness statement, Mr. Fletcher says that the meeting lasted around 20 minutes. He states that not much was said other than that Mr. Bartell had had enough and was getting his pension in October. He goes on to say that he gave him the date and Mr. Fletcher agreed to it. With respect to Mr. Fletcher, 20 minutes is quite a long time for so little to be said. Furthermore, Mr. Fletcher does not refer in his witness statement to taking a note at that meeting. Under cross-examination, he was pressed several times on the question of whether he took a note. In particular, he was asked whether he would take a note if someone was going to terminate their employment. He was asked whether he would show that note to the employee and ask them to agree the contents to which he replied, “I would record key facts”. He was then asked again whether he had taken a note. His answer was equivocal. He eventually said that if he took notes, they would still be on a notepad in his office. We found Mr. Fletcher’s evidence in this respect to be evasive and equivocal which undermines his reliability as a witness.

m. Mr. Fletcher understood that, for the purposes of the Tribunal proceedings, Rend-Tech was obliged to disclose all relevant documents to Mr. Bartell. He eventually conceded that he had at least written down a date on a piece of paper which was the date when Mr. Bartell would retire. This note which he claims he gave to Mrs Fletcher at the end of the meeting. This contradicts what Mrs Fletcher said. If there was a note, it has not been produced in evidence. If such a note exists, it is relevant to the

issues and it should have been disclosed.

n. In his witness statement, Mr. Lambton states that after the meeting, he drove Mr. Bartell home. He goes on to say that during the journey the two men discussed the meeting and Mr. Bartell allegedly told him that it had been agreed that he would work a further two weeks beyond the retirement date. He states that Mr. Bartell was happy with this because his body could not physically take the work anymore. He concludes his statement by saying that Mr. Bartell did not give the impression that he was unhappy at all and seemed to be at peace.

o. We give little weight to Mr. Lambton's evidence. He states in his witness statement that he had known Mr. Bartell for around 28 years but when he was promoted, Mr. Bartell did not speak to him for a couple of years. This suggests that their relationship had broken down or at the least was strained. When he was giving his oral evidence, he was asked to clarify this. He explained that they were not on speaking terms because he had been promoted to the role of Supervisor approximately 2.5 years ago and he would have to tell Mr. Bartell things about his work that he did not like. He admitted that there had only been brief conversations after that and the last time that they had spoken was when there was a job in Manchester in August 2019. If these two men had not spoken to each other for two years and had then only subsequently had cursory conversations, we find it implausible that Mr. Bartell would be so open to Mr. Lambton about his retirement plans in the way that is claimed. The two men were barely on speaking terms.

43. On 1 October 2019, Mrs Fletcher wrote to Mr. Bartell. A copy of her letter has been produced [57]. The following are relevant:

> *I refer to our meeting on Wednesday 4th September in which you advised us that you have decided to retire from your role of Renderer.*
>
> *I am writing to confirm that I accept your resignation on behalf of the company and confirm that I have agreed an extended notice period beyond the 2 week's contractual notice you are required to provide. I can therefore confirm that your final date of employment with us will be Friday, 4 October 2019.*
>
> *We note that by this date, you will owe Rend Tech 2.5 days holiday which will be deducted of your final payment in October.*
>
> *…*

44. In her witness statement, Mrs Fletcher provides context for why she says she wrote the letter on 1 October 2019. She states that towards the end of Mr. Bartell's employment she became aware that he had asked for a two-week extension of his notice and it was at that point

that she realised that she had not formally sent him confirmation of his agreed leaving date. She took advice from Hunter Adams and wrote the letter. She states that it was sent by first class recorded post although she believes that it was not received until 4 October 2019. Mrs Fletcher was cross examined about the timing of the letter. Specifically, she was asked why she had not written to Mr. Bartell earlier and nearer to the meeting on 4 September 2019. She replied that she simply forgot to do that but had contacted Hunter Adams for a standard letter to send out to him "at the beginning". We did not see any evidence of that contact nor of the alleged standard letter. We find it surprising that Mrs Fletcher would have omitted to follow up with Mr. Bartell soon after the meeting confirming the alleged arrangements for his retirement. As we have previously noted above, retirement is a major event in a person's life and good industrial practice dictates that notes of meetings discussing retirement should be taken and prompt follow-up action on the next steps could reasonably have been expected.

45. There is no dispute between the parties that the letter was received on 4 October 2019. It had been sent by recorded delivery. Mr. Bartell had gone to work as usual. His wife contacted him to say that she had collected the letter from the post office, and he asked her to read out what it said. There is conflicting evidence about what happened next. Mr. Bartell claims that at 09:43 hours he telephoned Mr. Fletcher to talk about the letter. In his witness statement he says that the letter told him that he had resigned which he denied. He goes on to say that during the meeting on 4 September he had not resigned but if Mr. Fletcher believed that he had, he wanted his old job back. Mr. Bartell then says that Mr. Fletcher told him that it was "all sorted". Mr. Bartell then states that he tried to plead with Mr. Fletcher, but Mr. Fletcher told him that he should forget it. Mr. Fletcher replied that Mr. Bartell was finished and that he would be deducting two days holiday pay from his final pay and then he hung up.

46. Mr. Fletcher denied speaking to Mr. Bartell on 4 October 2019. In paragraph 11 of his witness statement he claims that Mr. Bartell did not try to contact him.

47. We prefer Mr. Bartell' evidence for the following reasons:

    a. A copy of Mr. Bartell's mobile telephone bill was produced in evidence [58]. It is a poor copy and is difficult to read. However, having heard evidence from Mrs Fletcher she confirmed that Mr. Fletcher's mobile telephone number was (07595) 465174. Under cross examination Mr. Fletcher also confirmed that this was his telephone number. This is the telephone number reproduced on Mr. Bartell's bill [58]. This portion of the bill is legible.

    b. The telephone bill notes that there was a call to Mr. Fletcher's number that lasted for 1 minute 34 seconds. This is also legible. Under cross-examination, Mr. Fletcher denied that there was a conversation which was a departure from what he

said in his witness statement at paragraph 11. It was put to him there was a clear record of a call to Mr. Fletcher's number. In reply, Mr. Fletcher said that Mr. Bartell could have got to the messaging service (i.e. that there was no conversation). Once again, this contradicts his claim in his witness statement that Mr. Bartell did not try to contact him. Mr. Fletcher's behaviour in answering the questions concerning the call was evasive and ultimately amounted to a begrudging acceptance that there was contact with Mr. Bartell.

48. We believe that it is more probable than not that Mr. Bartell telephoned Mr. Fletcher and spoke to him for 1 minute 34 seconds. We also believe that it is more probable than not that the gist of the conversation between the two men is accurately summarised by Mr. Bartell. He did not think that he had resigned. Alternatively, if he had, he wanted his old job back. He was clearly confused by Mrs Fletcher's letter of 1 October 2019 and, understandably, he immediately telephoned Mr. Fletcher for clarification. Mr. Fletcher had quite clearly made up his mind and was not prepared to change it. He told Mr. Bartell that he was finished, and that 2.5 days holiday pay would be deducted from his final pay. These are unambiguous words of dismissal. As far as he was concerned Mr. Bartell's last working day was 4 October 2019. He drew a line under the matter by hanging up on Mr. Bartell.

49. Mr. Bartell was upset by the telephone call and after it ended, he left work, never to return. Mr. Foley's evidence set out in his witness statement is that Mr. Bartell was furious and had walked off site stating that he had been "shafted". We agree with Mr. Menon's submission that this was consistent behaviour for someone who has been set up with a bogus resignation/retirement when they had expressly stated that they wanted to continue working. Both Mr. Foley and Mr. Fletcher interpreted this behaviour differently. They maintained that Mr. Bartell was angry because he had been denied the extra notice period requested. We do not think that this is plausible, and we prefer Mr. Bartell's explanation given the preponderance of evidence pointing to Mr. Bartell's lack of firm intention to resign and the pressure being put on him. He left the site because he was "finished".

50. Mr. Bartell then wrote a short manuscript note which he delivered to Rend-Tech [59]. The note is undated and has no addressee. Mr. Bartell states in his witness statement that he sent the note out on 17 October 2019. This is not disputed. In his oral evidence he explained that he took advice from ACAS before sending the note. There is no dispute between the parties that it was received by Rend-Tech. Mr. Bartell said the following:

> *Just dropping you a line asking if you are willing to give my job back.*
>
> *Are you still insisting I resigned*

51. In her oral evidence, Mrs Fletcher said that once she received the manuscript note, she contacted Harper Adams about it but, perhaps

curiously, she did not send them a copy of it to them. She then drafted a letter in response dated 1 November 2019 [60] but decided against sending it to Mr. Bartell on advice received from Harper Adams.

52. The obvious inference to be drawn from Mr. Bartell's manuscript note was that there was a difference of opinion between himself and Rend-Tech about whether he had resigned. Clearly, he did not think that he had resigned. However, he was asking Rend-Tech to give him his job back which, must mean that he believed he was no longer employed by them. His note is consistent with someone believing that they had been dismissed by their employer. It flows from the letter of 1 October 2019 and telephone call with Mr. Fletcher on 4 October 2019 which ended with him telling Mr. Bartell that he was "finished".

53. Rend-Tech did not reply to Mr. Bartell's note of 17 October 2020.

54. The question concerning scarcity of renderers was raised with Mr. Fletcher in his oral evidence. This is relevant because Mr. Bartell was directly appealing to Rend-Tech for his old job back and the implication is that because there was a scarcity of renderers, this was feasible or indeed desirable. The reality, in Mr. Bartell's case was different.

55. In paragraph 13 of his witness statement, Mr. Fletcher states that Mr. Bartell's skills are in short supply and Rend-Tech would have kept him indefinitely if he had not wanted to go. During his oral evidence, Mr. Fletcher was asked to expand upon this and whether he would have kept Mr. Bartell on if work were available. He admitted that he had not spoken to Mr. Foley about this. We found that strange because Mr. Foley was Mr. Bartell's line manager and would be someone with whom one would expect a conversation about Mr. Bartell's request to have taken place if Mr. Fletcher was genuine about his claim to want to retain Mr. Bartell. It was also put to him that only a short time had elapsed before Mr. Bartell asked for his job back. Mr. Fletcher was asked why he had not acceded to his request. The gist of his reply was vague, in that he referred to the ups and downs in the construction industry. He also stated that there was no work for another renderer. This rather contradicts what he stated in his witness statement about the scarcity of that skill and how he would have kept Mr. Bartell on indefinitely. It does not sit well with the short lapse of time (approximately two weeks) from when Mr. Bartell left the company and when he asked for his old job back. There is no suggestion that in that two-week period, demand for renderers had suddenly collapsed. The obvious inference is that Mr. Fletcher had no intention of having Mr. Bartell back. All of this flowed from the fact that Mr. Bartell had reached his 65th birthday and was starting to slow down and not from there being no work available. If there was a scarcity of renderers, he would have kept him on.

56. What is clear is that Mr. Bartell wanted his job back. If it were indeed the case that Mr. Fletcher would have kept him on indefinitely (as he claims), he would have done that. Mr. Fletcher was unwilling to give him work. As far as he was concerned, Mr. Bartell was "finished" despite having a skill that was in short supply.

57. Mr. Bartell secured alternative employment on 25 November 2019. He states that he was not financially or in a position to retire and that it was important for him to find alternative work as soon as possible. This is not been challenged by Rend-Tech.

Applicable law

Direct discrimination (EqA section13)

58. EqA section 13 (1) provides that

> *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.*

59. Age is a protected characteristic. However, EqA section 13 (2) states that:

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

60. Requiring an employee to retire at a fixed retirement age (e.g. 65) will amount to direct age discrimination unless the employer can justify that requirement. Unsure how to manage older employees whom they hope will retire, some employers may be tempted to "dress up" retirement dismissals as dismissal for misconduct or redundancy, or put pressure on certain employees to retire, thereby prompting the resignation.

Unfair dismissal

61. An employer wishing to fairly dismiss an employee aged 65 or over who has sufficient qualifying service to bring an unfair dismissal claim will need to show that the reason for the dismissal falls within one of the potentially fair reasons for dismissal under ERA, section 98 (e.g. capability, conduct, redundancy or "some other substantial reason"). In most cases, an employer will rely on the "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held") (ERA, section 98 (1) (b). If this argument is successful, the Tribunal will then need to determine whether the employer acted reasonably or unreasonably in treating the retirement as a sufficient reason for dismissal under ERA, section 98 (4). In other words, the dismissal will be treated in the same way as any other dismissal. The justification question is likely to be influential here as it is hard to imagine many circumstances in which a Tribunal would find an employer' as retirement age objectively justified but then go on to hold that dismissing an employee in line with that retirement age fell outside the range of responses of a reasonable employer. However, the two are not synonymous and the Tribunal must consider each claim separately applying the test that applies to each.

Discussion

62. We now turn to the issues and conclude as follows.

Direct age discrimination (EqA, section 13)

a. Did Rend-tech hold a meeting with Mr. Bartell, on or about 4 September 2019, to discuss his plans for retirement? The evidence clearly shows that there was a meeting with Mr. Bartell on 4 September 2019 to discuss his retirement. However, we do not accept that Mr. Bartell had crystalised firm plans for retirement. He was in the process of thinking about gradually winding down.

b. Did Mr. Bartell resign from his employment on 4 September 2019 in the meeting on 4 September 2019 or did Rend-tech dismiss Mr. Bartell by letter dated 1 October, received by Mr. Bartell on 4 October 2019 from its employment? We do not accept that Mr. Bartell resigned from his employment on 4 September 2019 during the meeting although we believe that he was being pressurised to resign. This is also borne out by Mr. Bartell's note of 17 October 2019 where he refers to Rend-Tech still insisting on his resigning. We do not accept that Rend-Tech dismissed Mr. Bartell on 1 October 2019. Mr. Bartell was dismissed during the telephone call that took place between him and Mr. Fletcher on 4 October 2019 when Mr. Fletcher told Mr. Bartell that he was "finished" that it was "all sorted out" and that he owed the company 2.5 days holiday. These are unambiguous words of dismissal.

c. Would a hypothetical comparator have been subjected to the treatment outlined in questions 1 and 2 above? The hypothetical comparator would be a renderer under the age of 65. We do not believe that the hypothetical comparator would have been treated in the same way as Mr. Bartell particularly given the fact that people possessing that skill are scarce and in demand. There would be no question of retirement or dismissal. This is a company that claimed it would retain a renderer indefinitely. A younger renderer would have been retained.

d. Was the treatment outlined in questions 1 and 2 'less favourable' treatment? The treatment was less favourable. Mr. Bartell was initially subjected to pressure to resign and was subsequently dismissed. A younger renderer would not have been dismissed or subjected to the same treatment as Mr. Bartell.

e. Was Mr. Bartell treated less favourably because of a protected characteristic; namely his age? Yes, because Rend-Tech knew that Mr. Bartell was 65 years old and believed that

because of his age he was less able to perform his work as a renderer. The purpose of the meeting and the consequential dismissal were undoubtedly connected to his age and Rend-Tech's perception that he was no longer able to work effectively because of the physical demands of the job. Rend-Tech had no intention of acceding to his request for his old job back. Mr. Fletcher did not entertain the idea and never discussed the possibility with Mr. Foley. Mr. Bartell has established a prima facie case of age discrimination. Rend-tech have not proved, on a balance of probabilities, that there was some other ground for the treatment.

f. If Mr. Bartell was treated less favourably because of his age, can Rend-Tech show that this treatment was a proportionate means of achieving a legitimate aim? Rend-Tech have not offered any evidence or submissions on this matter and, consequently, they have not shown that the treatment was a proportionate means of achieving a legitimate aim.

Unfair dismissal

g. Did Mr. Bartell resign or was he dismissed from his employment (in accordance with ERA section 95(1))? Mr. Bartell was dismissed from his employment.

h. If Rend-tech dismissed Mr. Bartell, then:

i. For what reason was Mr. Bartell dismissed? Although Rand-Tech maintain that the dismissal was for gross misconduct because Mr. Bartell walked off site on 4 October 2019, the operative reason was that Mr. Bartell had challenged Mr. Fletcher during the telephone conversation about the letter of 1 October 2019. Mr. Fletcher dismissed Mr. Bartell during the telephone conversation before Mr. Bartell walked off site.

ii. Was the reason for Mr. Bartell's dismissal potentially fair (ERA, section 98(2))? No, this is not a potentially fair reason for dismissing Mr. Bartell. He was entitled to challenge Mr. Fletcher.

iii. If so, pursuant to ERA section 98(4), did Rend-tech act reasonably in treating it as a sufficient reason for dismissing the employee? No.

iv. If the dismissal was for a potentially fair reason, did Rend-tech follow a fair procedure in dismissing as to Bartell? This not applicable. Rend-Tech have not shown that the dismissal was potentially fair.

Remedy

i. If Rend-Tech unfairly dismissed Mr. Bartell, did it comply with the ACAS Code of Practice in dismissing him? This is not

applicable as this was not a disciplinary dismissal.

j. If Rend-Tech unfairly dismissed Mr. Bartell, did he unreasonably fail to follow the ACAS Code of Practice on Disciplinary and Grievance procedures in contesting his dismissal? No, it was clear that Mr. Fletcher had made his mind up and it was unlikely that pursuing an appeal would have changed it.

k. If Rend-Tech unfairly dismissed Mr. Bartell, did he contribute to his dismissal in such a way that his compensation should be reduced? No. Mr. Bartell was entitled to challenge Mr. Fletcher in respect of the letter of 1 October 2019.

l. If Rend-Tech unfairly dismissed Mr. Bartell, should his compensation be reduced pursuant to **Polkey v A E Dayton Services Limited [1987 ICR 142]**? No. The outcome would have been the same.

Remedy

63. When a Tribunal finds that a complaint of unfair dismissal is well-founded it must decide the appropriate remedy. There are three remedies for unfair dismissal: reinstatement, re-engagement and compensation. Mr. Bartell only seeks compensation.

64. An award for compensation falls under to main heads:

a. The basic award (ERA, section 118 (1) (a), normally calculated in exactly the same way as redundancy payment and intended to compensate the employee for loss of job security.

b. The compensatory award (ERA, section 118 (1) (b), intended to compensate the employee for financial loss suffered as a result of the unfair dismissal. There is a statutory cap or an award of one year's pay whichever is the lower. There is no formula for calculating a compensatory award other than what the Tribunal considers "just and equitable".

65. Mr. Bartell has produced a Schedule of Loss. We note that he secured alternative employment 25 November 2019 and that he has not claimed any state benefits. During the hearing we asked the representatives for their views on the Schedule of Loss and we were informed that the parties were agreed on the quantification of the basic and compensatory awards but that there was disagreement over injury to feelings. Our award for the basic and compensatory loss elements of the claim as set out in the Schedule of Loss. However, we have not made an award for 25% uplift for failure to follow the ACAS code as this was not a disciplinary related dismissal. The basic award is: £5,400. The compensatory award is £2,930.50.

66. Mr. Bartell claims £8,800 plus interest for injury to feelings which

are placed in the lower Vento band. This is justified on the basis that Rend-Tech decision to dismiss Mr. Bartell having reached "retirement age" coupled with the callous manner of the dismissal has caused Mr. Bartell great distress. It is claimed that because of his dismissal, Mr. Bartell has suffered from depressive episodes, increased anxiety and low in confidence. He also claims interest on his injury to feelings award. At the time when the claim was presented to the Tribunal the upper limit to the lower band was £8,400. We have made an adjustment to reflect that.

67. EqA, section 119 (4) provides that the Tribunal may award compensation for injury to feelings. The Tribunal has a broad discretion as to the amount to award for injury to feelings.

68. Turning to his discrimination claim, an award for injury to feelings is not automatic in every case where discrimination is established. The onus remains on the claimant to establish the nature and extent of such injury. However, it is apparent that, as a head of loss, injury to feelings is a crucial element in most cases and that such an award is virtually inevitable to reflect the fact that any act of discrimination is likely to cause hurt to feelings at the very least to some minor degree.

69. A claimant does not need to produce medical evidence of injury to feelings. Translating hurt feelings into hard currency is bound to be an artificial exercise and although they are incapable of objective proof or measurement in monetary terms, hurt feelings are nonetheless real in human terms. The Tribunal has to do the best it can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular some with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss for bodily injury (**Vento v Chief Constable of West Yorkshire Police (No2) 2003 ICR 318, CA**).

70. In **Prison Service and Ors v Johnson 1997 ICR 275** (a race discrimination case) the EAT summarised the general principles that underlie awards for injury to feelings:

    a. Awards for injury to feelings are designed to compensate the injured party fully but not to punish the guilty party.

    b. An award should not be inflated by feelings of indignation at the guilty party's conduct.

    c. Award should not be so low as to diminish respect for the policy of the discrimination legislation. On the other hand, awards should not be so excessive that they might be regarded as untaxed riches.

    d. Awards should be broadly similar to the range of awards in personal injury cases.

    e. The Tribunal should bear in mind the value in everyday life of the sum they are contemplating.

f. The Tribunal should bear in mind the need for public respect for the level of the awards made.

71. We remind ourselves that in **Vento**, the Court of Appeal set down three bands of injury to feelings award, indicating the range of award that is appropriate depending on the seriousness of the discrimination in question. There are three bands which are subject to periodic review for quantum:

a. A top band to be applied only in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. Only in very exceptional cases should an award for compensation for injury to feelings exceed the higher amount in the band.

b. A middle band for serious cases that do not merit an award in the highest band.

c. A lower band appropriate for less serious cases such as where the act of discrimination is an isolated or one-off occurrence. The courts have said that, in general, awards less than the lower figure in the band should be avoided as they risk being regarded as so low is not a proper recognition of injury to feelings.

72. **Vento** also provides that the Tribunal has considerable flexibility within each band, allowing it to fix what it considers to be fair, reasonable, and just compensation in the particular circumstances of each case. Furthermore, common sense requires that regard should be had to the "overall magnitude of the sum total of the awards of compensation for non-pecuniary loss made under the various headings of injury to feelings, psychiatric damage and aggravated damage".

73. Mr. Bartell presented his claims to the Tribunal on 21 February 2020. This is relevant to the applicable bands set out in **Vento.** His claim is slightly over the upper limit of the lower band. At that time, according to the applicable Presidential Guidance, the upper limit of the lower band was £8,400. At paragraph 28 of his witness statement, Mr. Bartell states that he was very upset by what had happened. He was one of the first people to work for Rend-Tech. Indeed, there is no dispute between the parties that he helped to establish that business. He states, "to be shoved out of the door without even so much as a thank you was deeply hurtful and distressing". We have previously noted that Mr. Bartell claims to suffer from anxiety. He also states that he must take medication. We have no reason to disbelieve him. We also observed that when he gave his evidence there were occasions when he was visibly upset about what happened to him. There is no doubt in our minds that Rend-Tech have hurt Mr. Bartell's feelings in the way that they treated him. Consequently, we believe it would be fair, reasonable, and just to award him £8,400 for his injury to feelings.

74. Mr. Bartell has claimed interest on his claim for injury to feelings.

The Employment Tribunals (Interests on Awards in Discrimination Cases) Regulations 1996 gives the Tribunal the power to award interest on awards made in discrimination cases. The Tribunal is required to consider whether to award interest even if the claimant does not specifically apply for it. A figure has not been suggested by Mr. Menon and the parties have not agreed a figure. Consequently, the Tribunal must calculate interest according to rules set out in regulation 3 of the 1996 Regulations. In general terms, interest must be calculated as simple interest accruing from day to day.

75. For an injury to feelings award, regulation 6 (1)(a) provides that the period of the award of interest starts on the date of the act of discrimination complained of and ends on the day on which the Tribunal calculates the amount of interest. In this case, the date on which the act of discrimination complained of was 4 September 2019. The date of the calculation of the amount of interest is 30 September 2020. This is 392 days. 1 day of interest on an award of £8,400 = £1.84. 398 days of interest = £732.32 (1.84 x 398). The total award for injury to feelings plus interest is: **£9,132.32.**

76. The grand total of the claims is: **£17,462.82** (£5,400 + £2,930.50 + 9,121.28)

Employment Judge A.M.S. Green
Date 6 October 2020