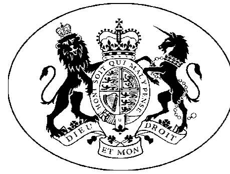

EMPLOYMENT TRIBUNALS

Claimant: Roger Trenoweth

Respondent: David Parrin

Heard at: Norwich (by cvp) **On:** 25 March 2021

Before: Employment Judge Housego
Tribunal Member C Grant
Tribunal Member J Costley

Representation

Claimant: In person

Respondent: Mike Magee, of Counsel, instructed by Neil John, Solicitor, of Fraser Dawbarns LLP

JUDGMENT

1. The claim is dismissed.
2. The Claimant is ordered to pay to the Respondent the sum of £2,000.

REASONS

1. Mr Trenoweth is a qualified mechanic and MoT tester. He was 62 when dismissed. He started work for Dave Parrin on 01 June 2018, principally as the main MoT tester.

2. David Parrin has been in business selling second hand cars, and as a garage, for over 30 years. He had half a dozen employees, including his son, his wife and his cousin. The only members of staff not a family member were Mr Trenoweth, James Cunningham and Tom Chenery, who had been working for him for 14 years. His son is a mechanic, and is also an MoT tester. All his employees had all been with him 10 years and more, apart from Mr Trenoweth and James Cunnningham, who was 18, and who was a car valeter.

3. In early March 2020 Mr Parrin renewed Mr Trenoweth's MoT registration. There was a cost in doing so. At that point he did not intend to dismiss him.

4. On 23 March 2020 the 1st Covid lockdown started. No-one knew how long it would last. Immediately the lockdown started the Government decided to extend everyone's MoT certificates by 6 months. Mr Parrin's garage was not an essential service, and had to shut immediately, and indefinitely.

5. Mr Parrin placed all employees but Mr Trenoweth and Mr Cunningham on furlough. At the time furlough was for a period two months. He dismissed Mr Trenoweth and Mr Cunningham, by reason of redundancy.

6. Mr Trenoweth says that Mr Parrin intended to replace him with his son Andrew Parrin, and that as Andrew Parrin is younger than him this is age discrimination.

7. There has to be a causal connection between the age of the person suffering the detriment, and the detriment itself. In short, the reason for dismissal must be, at least in part, because Mr Trenoweth is older that Andrew Parrin for the claim to succeed. (We were not given Andrew Parrin's date of birth, but he is much younger than Mr Trenoweth).

8. There is no such link here:

    8.1. First, Mr Trenoweth says that Mr Parrin intended to replace him as the MoT tester with his son. Mr Trenoweth's age is irrelevant to that intention. It would be the same whatever age Mr Trenoweth was, and whatever age Mr Parrin's son was. (As Mr Trenoweth was employed for less than two years Mr Parrin was entitled to do so whether it was fair or not, but the Tribunal observes that this would probably be fair for "some other substantial reason" because of the family relationship.)

    8.2. Secondly, it is abundantly clear that there was a reduction in the needs of the business to carry out work that Mr Trenoweth did. There were not going to be any MoTs for 6 months. (There might have been a few, but it is human nature not to incur an expense if it is not necessary, and given the extension of the validity of MoTs for 6 months very few people would have one.) That there might then be more MoT tests as the backlog was addressed is not to the point: Mr Parrin was looking at carrying Mr Trenoweth's wages for the remaining four months after the furlough scheme was due to end. Mr Parrin cannot be criticised for not relying on it being extended, as the cost of the scheme has been so large that it was widely thought to be short term.

    8.3. Thirdly, the garage had to close by law. The furlough scheme was designed to try to help employers keep people on and not make them redundant. There was no compulsion to use it. If Mr Parrin decided to make employees redundant and not furlough them, he was entitled to do so. Since he knew that the MoT work would effectively cease, but the furlough scheme would run for two months, he knew that there would be a four month period when there was nothing for Mr Trenoweth to do.

    8.4. Fourthly, Mr Trenoweth was the only person whose role was primarily that of MoT testing, and it was certain that there was no work for him for 6 months, even if the garage was able to open sooner. There was a genuine

redundancy situation. There were more employees than there would be work for them.

8.5. Fifthly, Mr Parrin dismissed both employees with less than 2 years' service. This is entirely rational, for there would be no large notice payments and no redundancy payments at all. There would be no possibility of an ordinary Employment Tribunal claim as two years' service is a qualifying condition for almost all unfair dismissal claims. That is nothing to do with Mr Trenoweth's age (although it was impossible for Mr Cunningham to have 2 years' service as he was only 18). It was the reason for the dismissal.

8.6. Mr Parrin renewed Mr Trenoweth's MoT registration only weeks before dismissing him. It is beyond doubt that the dismissal was entirely by reason of the pandemic, the lockdown and the 6 month extension of MoT certificates. Since Mr Trenoweth's job was mainly about MoT certificates, if Mr Parrin decided on redundancies, it is obvious that Mr Trenoweth would be selected: if not, then a mechanic would be dismissed. That would have been unfair to the mechanic, almost certainly.

8.7. Mr Parrin decided he needed only one MoT tester, and the other is his son. It is unrealistic to think that he would be obliged to dismiss his son.

8.8. Mr Parrin had taken on Mr Trenoweth only 22 months before, and so had not considered his age an issue then, and there is no reason to think it was now.

8.9. Mr Trenoweth's cross examination focussed on why Mr Parrin had not furloughed him, and hoped things would work out, not that he had dismissed him as older.

9. For all these reasons Mr Trenoweth has not shown any link between his age and the dismissal. It is entirely credible that Mr Parrin was very concerned about the future of his business and took steps to reduce his overheads. While Mr Trenoweth wanted to be furloughed there is no obligation on Mr Parrin to place anyone on furlough. All the other staff members but one were family, and the other had been with him 14 years. There is nothing irrational or suspect about deciding to dismiss both people with less than two years' service. Car sales had stopped, and the valeter was redundant. There were not MoTs for 6 months and the MoT tester was redundant.

10. In legal terms, the claim is one of direct discrimination, and Mr Trenoweth has not shown facts from which the Tribunal might infer that the reason for the dismissal was in any sense whatsoever by reason of age discrimination. The Tribunal does not have to look to the Mr Parrin for an explanation. If one were needed, it has been provided.

11. For these reasons the claim must be dismissed.

12. Mr Magee made a request for a costs order. The total costs were £8,703 exclusive of vat. The letter of 12 February 2021 stated that the costs were £1500 plus vat to that point and be £4,500 plus Counsel's fee if taken to a hearing.

13. He relied on the second limb of Rule 76:

    76.*—(1) A Tribunal may make a costs order…, and shall consider whether to do so, where it considers that—*
    (a) … or
    (b) any claim or response had no reasonable prospect of success.

14. Mr Magee drew attention to a letter to Mr Trenoweth from those instructing him, dated 12 February 2021. It stated that that:

    "Whilst our client is sympathetic towards your current position, it is quite clear that your claim did not at any stage have any reasonable prospect of success. Simply, you were dismissed because of the impact of the pandemic. It was no longer possible for you to conduct your primary role, and the future in terms of the economy was unclear. Your allegations regarding age discrimination are nothing other than a clear attempt to circumvent the two year rule in relation to unfair dismissal, and in pursuing this claim, you have served no purpose other that to waste time, costs and resources. We intend to raise this issue with the Tribunal when it is inevitably found that your allegations are without substance."

15. Mr Trenoweth did not reply to that letter.

16. Mr Magee said that he had no information about Mr Trenoweth's means. He stated that a substantial nuisance offer to settle had been made, but did not give the amount.

17. Mr Magee pointed out that the Tribunal had found for the Respondent without requiring an explanation from them. This was, he submitted, simply a claim made to get round the two year service issue precluding an unfair dismissal claim, borne out, he said, by the focus of the cross examination, in which age did not feature and at the end of which he had accepted that the dismissal was a financial matter.

18. Mr Trenoweth said that he felt that he had a good case. He said that he had sought advice from the CAB and from Acas, and from a friend. He and his wife had covid in January 2021, and been unwell, and his wife had suffered a multiple fracture of an ankle at that time. They had not taken advice on the letter.

19. Mr Trenoweth said that he was now working, but it was zero hours, usually one to three days a week. The sudden dismissal had caused him financial problems, still unresolved.

20. Relevant case law is first Kopel v Safeway Stores Plc [2003] UKEAT 0281_02_1104, particularly paragraph 18 onwards. While *Calderbank* offers do not feature in the Employment Tribunal cases, rejecting a generous offer and including manifestly misconceived claims can lead to a costs order. We were told this was a "nuisance" offer, not a substantive one, even if, as Mr Magee said, a generous one.

21. Vaughan v London Borough Of Lewisham & Ors (Practice and Procedure : Costs) [2013] UKEAT 0533_12_0606, in particular paragraph 26, which the

headnote captures: *"…it was not wrong in principle to make a costs order even though no deposit order had been made and the Respondents had made a substantial offer of settlement (on an avowedly "commercial" basis) – Nor was it wrong in principle to make an award which the Appellant could not in her present financial circumstances afford to pay where the Tribunal had formed the view that she might be able to meet it in due course (**Arrowsmith v Nottingham Trent University** [2012] ICR 159 applied)."*

22. The first issue is whether the claim had no reasonable prospect of success. The Tribunal heard the case in 2 hours and found that the burden of proof had not shifted. The claim form at 8.2 makes no reference to age (other than ticking the age discrimination box) other than (at 9.2) that it would be hard to find a job at his age.

23. The case had no reasonable prospect of success. The Tribunal must therefore consider whether to make an order for costs.

24. This is not a *"costs follow the event"* jurisdiction. The Tribunal does not consider this to be a case of a bad faith claim, rather a misconceived one. Mr Trenoweth has only part time work, and has loans he has to pay.

25. The extra costs from 12 February 2021 are £7,200 (plus vat). The Respondent is assumed to be able to recover the vat as the cost is a business expense.

26. It is not fair to the Respondent that it bear the entirety of defending a claim which has never had any prospect of success. The case was straightforward, and while a Respondent can choose who it wishes to defend it, there is no good reason for the Claimant to have to pay for that choice.

27. The Tribunal considers that the Claimant should pay a contribution to the costs of about half the additional cost to the Respondent defending the case from 12 February 2021. It is reasonable, on the basis of the information provided that, over time, Mr Trenowarth can pay such a costs order.

28. The Claimant is ordered to pay to the Respondent the sum of £2,000.

Employment Judge Housego

Date 25 March 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE