Case Number: 3304163/2020

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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondents**
Mr M Lambert	and	1 Sunsquare Limited
		2 Mr J Seldis

Held by CVP and in person at Bury St Edmunds on 20 to 24 September 2021

Representation	**Claimant:**	Mr H Dhorajiwala, Counsel
	Respondents:	Ms B Omotosho, Consultant
		Mr J Seldis, Director
	Members:	Ms J Buck
Employment Judge Kurrein		Ms S Williams

Statement on behalf of the Senior President of Tribunals

This has been a partly remote hearing. A full face to face hearing was not held because it was not practicable and all issues could be determined in a partly remote hearing. The documents that we were referred to are in a bundle of over 200 pages, which was added to in the course of the hearing, the contents of which I have recorded.

JUDGMENT

1 The Respondents have victimised the Claimant.

2 The First Respondent has unfairly constructively dismissed the Claimant.

3 The Claimant's claims alleging direct and indirect age discrimination are not well founded and must be dismissed.

4 The Claimant's claims alleging unauthorised deductions are not well founded and must be dismissed.

5 The First Respondent's counterclaim is struck out as there is no jurisdiction to hear it.

REASONS

Background

1 At a telephone hearing on 14 January 2021 EJ Kurrein gave comprehensive directions for the further conduct of this case including requirements for disclosure and inspection to take place by 20 February 2021, a bundle to be provided by the Respondent in a defined format by 26 March 2021, and for witness statements to be simultaneously exchanged on 23 April 2021.

2 None of those directions were complied with, and neither party sought leave to vary them.

3 The case was listed for a date to be fixed to be heard at either Bury St Edmunds employment tribunal and/or by CVP.

4 The issues were defined as follows:-

1. Are the Claimant's claims for direct age discrimination against the Second Respondent (concerning the comment allegedly made by the Second Respondent to the Claimant on 3rd January 2020) out of time?

2. Does the claim referred to in the paragraph above relate to conduct extending over a period which is to be treated as done at the end of that period?

Accordingly, is such a claim brought in time?

3. If not, in each case, is it just and equitable to extend time?

Constructive dismissal (sections 94-98 of the Employment Rights Act 1996)

4. Was there a breach of the implied and/or express terms by the First Respondent allegedly doing the following:

a. Advising the Claimant that he would be made redundant without any consultation on 3rd January;

b. Advising the Claimant on 3rd January, that his age was a factor in the decision to make him redundant;

c. Placing the Claimant on gardening leave;

d. Commencing an unfounded disciplinary investigation;

e. Alleging various statements against the Claimant but not providing them;

f. Demanding that company property be returned and on short timescales;

g. Threatening the Claimant with the police;

h. Refusing to accept the Claimant was unable to attend meetings;

i. Refusing to obtain any independent medical advice;

j. Refusing to consider the Claimant's representative's letter of 9th January 2020 as a grievance;

k. The unfounded, fabricated allegations contained in the document entitled: "conclusion to disciplinary investigation regarding Mr Mark Lambert, Sales Director;"

l. The reference to personal and irrelevant information in the above statement;

m. The frequent short deadlines given to the Claimant by the Second Respondent; and

n. The continued and sustained unreasonable behaviour from the Second Respondent in his correspondence with the Claimant.

5. What was the last straw? The Claimant claims that this was the email from the Second Respondent sent to the Claimant on 28th January 2020 at 10.59. The Claimant claims that this email made further false allegations and pushed the Claimant to attend a meeting.

6. Was the First Respondent in serious / repudiatory breach of contract?

7. Did the Claimant resign promptly in response to that repudiatory breach in circumstances whereby he is treated as having been dismissed? Or did the delay in resigning thereby accepting the breach?

8. Was this dismissal unfair?

Direct Age Discrimination (sections 5 and 13 of the Equality Act 2010)

9. The Claimant claims that the alleged discriminatory treatment was:

(i) The Second Respondent's comment on 3rd January 2020 that the Claimant would be able to find an alternative role elsewhere more easily that his counterpart who was older; and

(ii) Selection for redundancy based on his age.

10. Did the First and Second Respondents subject the Claimant to the alleged treatment identified?

11. If so, did this amount to less favourable treatment?

12. If the First and Second Respondent treated the Claimant less favourably, did it do so because of the Claimant's age?

13. The Claimant relies on his former colleague, Mr Howard, as an actual comparator.

Indirect Age Discrimination (section 19 of the Equality Act 2010)

14. The Claimant alleges that the PCP is the Respondents' practice of selecting candidates for redundancy based on their age.

15. Did the Respondents apply the PCP identified by the Claimant?

16. If so, did the PCP place those the protected characteristic of age (in this case, younger age) at a particular disadvantage when compared to those older employees?

17. If so, did the PCP place the Claimant at a particular disadvantage?

18. If so, was there a legitimate aim to the PCP? What is this aim?

19. If so, was the PCP a proportionate means of achieving the legitimate aim identified?

Victimisation (section 27 of the Equality Act 2010)

20. Was the alleged grievance raised by the Claimant representative on 9th January 2020, a protected act done by the Claimant?

21. Was the Respondents decision to move the Claimant from full pay to Statutory Sick Pay a detriment imposed on his because of the protected act?

Unlawful Deduction from Wages (section 13 of the Employment Rights Act 1996)

22. Was the Claimant entitled to carry forward five days untaken annual leave?

23. Was the Claimant owed 7 days annual leave when his employment terminated?

24. Did the First Respondent make deductions of 7 days' pay (in the sum of £……..) from the Claimant's wages?

25. If made out, was this deduction unlawful?

The First Respondent's Claim for Breach of Contract

26. Did the Claimant breach his contract? The First Respondent claims that this happened as follows: [Details to be provided]

27. Did the First Respondent suffer [£amount to be confirmed] of losses?

28. Can these losses be attributed to the Claimant's alleged breach of contract? The First Respondent confirms that they can be because [Details to be provided].

29. Does the Claimant owe the First Respondent [£amount to be confirmed]? The First Respondent claims that it overpaid the Claimant as follows [Details to be provided].

Remedy

30. If the Claimant is successful with his claims, what remedy should be awarded?

31. If the claim for constructive dismissal is successful, what is the Claimant entitled to in respect of a basic award and compensatory award?

32. If the Employment Tribunal decides that the Claimant should receive compensation, what level of compensation would be just and equitable considering all the circumstances, including:

(i) The Claimant's duty to mitigate his losses;

(ii) Any contributory fault on the part of the Claimant and or Polkey:

(iii) Income received from new employment since the termination of employment; and

(iv) Any state benefits received by the Claimant

33. Should the Claimant be entitled to compensation in respect of psychiatric illness, injury to feelings and aggravated damages? If so, how much (in accordance with the Vento guidelines (as amended))?

34. Did the Claimant raise a grievance and was there a failure to deal with this and should there be any uplift for failure to handle the Claimant's grievance appropriately in accordance with section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992? If so, by how much?

35. Should the Claimant be entitled to payment in respect of unlawful deduction from wages?

36. If this is a case where the First Respondent should be ordered to pay a financial penalty and if so, at what level?

37. Is any amount due from the Claimant to the First Respondent in respect of claims for breach of contract? If so, how much?

Matters arising

Exclusion of Respondents' statements

5 The parties had apparently agreed to exchange witness statements simultaneously on 13 September 2021, despite knowing that the case was listed to take place for five days starting on 20 September 2021.

6 That exchange, however, did not take place. As a consequence, on 16 September 2021 the Claimant made an application by email that the Respondents' statements should be excluded. Later that day the Respondents objected to that application.

Postponement of Hearing

7 On 17 September 2021 the parties were sent a notice of hearing varying the nature of the hearing from being in person to being conducted by CVP. The Respondents' representative emailed later that day to request the hearing be postponed on the grounds that the Respondents could not arrange to attend the hearing remotely at such short notice. Later the same day the Claimant objected to that application.

8 Regrettably these were only two of many further matters that arose very largely because the parties had not complied with the clear directions given to them. We deprecate such conduct.

20 September 2021

9 When we convened using CVP on the morning of the 20 September 2021 at 10:00 am no one was present for the Respondents. The Claimant and his representative were present and we asked, in light of the Respondents' application for a postponement, whether the Claimant was aware of any reason why the Respondents might not be present. The Respondents' representative appeared at that point.

10 The Claimant persisted in his application that the Respondents' witness statements be excluded, alleging that it was highly prejudiced by the late exchange, the Respondents having lodged their statements with the Claimant's solicitors at 17:40 on 15 September. It was suggested to Counsel for the Claimant that members of the Bar were quite used to receiving voluminous instructions on a Friday for a hearing on a Monday, to which the Claimant's representative retorted that that was no excuse, the Respondents should not benefit from that: the Claimants representative might have had childcare issues, for instance.

11 The parties were asked why the case management order had not been complied with. Both parties replied that they had no instructions. That showed a lack of preparation.

12 At that point the proceedings were interrupted by the loud noise of a train going past the premises being used by the Respondents' representative, for which she apologised. We expressed out concern a the suitability of the

premises for such a hearing.. We then heard her submissions in response to the Claimant's application.

13 We also asked the Respondents' representative why none of their seven statements complied with the case management order. She told us that two of the statements complied in part.

14 We then asked the Respondents what the difficulty was in their witnesses attending the hearing by CVP. We were told that they had prepared to attend the hearing in person and, she having spoken to the witnesses on Friday, they simply couldn't get access to the necessary equipment. They would have to be in the open plan office, which was inappropriate, and similarly it was not appropriate for them all to be present in a small office usually occupied by the Second Respondent. We were told that all the witnesses were anxious and wanted to be present throughout the hearing in the company of the Respondents' representative.

15 We expressed our concerns at the position of the Respondents and their witnesses and suggested that a hybrid hearing might be appropriate. The Respondents' representative then informed us that she had cancelled her childcare arrangements and the accommodation she had booked when she learned that the hearing was to be by CVP, and that if it was to be a hybrid hearing the Respondents insisted that the Claimant should also attend in person.

16 We heard the Claimant's submissions in response to that application. He objected to having to attend in person.

17 We formed the view that the Respondents were seeking to avoid the hearing taking place, there was no prejudice to either party in holding a hybrid hearing, and directed that the hearing would be of a hybrid nature, commencing the next morning, with those representatives and witnesses who wished to attend the tribunal premises being entitled to do so. We though that to be appropriate for everyone to deal with personal and practical matters.

18 We dismissed the Claimant's application that the Respondents' witness statements be excluded. The late receipt of an entire brief is not unusual. The Claimant did not point to any actual prejudice arising from the late exchange. In any event, we thought both parties to be at serious fault in failing to comply with the direction to exchange several months before the start of the hearing.

19 We dismissed the Respondents' application for the hearing to be postponed save to the extent set out above. In light of the further findings set out below we thought that application to be spurious.

20 Before adjourning the hearing to the next day we raised housekeeping issues.

21 The Claimant informed us that it took the view that the list of issues was in error in recording a counterclaim, because the Claimant's claims did not include a claim for breach of contract. That appeared to us to be correct.

22 We were then informed by the Respondents' representative that she had received additional documents from her clients which she would have to disclose. She did not explain why she had not done so already.

23 Following the conclusion of the full hearing we were unanimously of the view that the Respondents' application for a postponement was wholly unjustified by any practical considerations. Based on what took place and the evidence we heard:-

23.1 The only witness who attended the hearing in person throughout was the Second Respondent.

23.2 Mr Howard attended the proceedings throughout, and gave evidence, using CVP.

23.3 The other witnesses for the Respondent only attended, if at all, for the brief time It took to give their evidence.

23.4 The Respondents' business premises have a number of private offices, all equipped with IT and Internet connections, that could have been used by witnesses without difficulty.

23.5 The Respondent's website boasts of its IT abilities, it having achieved BSI certification for its products entirely by online means.

21 September 2021

24 Unfortunately matters did not improve on the morning of 21 September 2021. The further disclosure provided by the Respondents' representative to the tribunal was not sent until 20:20. The tribunal had not received it when we convened at 10:00, and Counsel for the Claimant took the view that it should be determined whether it was relevant and admissible before the Claimant was cross examined.

25 We adjourned. The documents were not received by us until 10:15. They included a number of email headers, without content, and also included some of the Claimant's wife's bank statements, a mortgage application by her and one of her tax returns. These totalled over 50 pages. There were also six large complex spreadsheets.

26 We reconvened at 10:50 and expressed our concern that many of the documents did not appear to be relevant to the issues in the case. The Respondents' representative indicated that she intended to cross examine the Claimant to show their relevance and would then seek leave to examine her witnesses in chief to the same end. It was pointed out to her that that would be wholly contrary to the terms of the case management order.

27 We heard the submissions of the parties on the relevance and admissibility of these documents, the Claimant reserving his position as to costs. We adjourned to consider the position.

28 We reconvened at 11:15 am and directed that the documents should be admitted into evidence but that the Respondent should not be permitted to adduce evidence in examination in chief concerning them. We took the view the Respondent had had more than ample time to disclose and consider those

documents and to give such evidence as it thought appropriate about them in its witness statements. The Claimant would be seriously prejudiced if the Respondent were permitted to adduce new evidence at such a late stage concerning those documents.

Cross examination of the Claimant

29 It became apparent in the course of this that the Respondents had failed to disclose its records relating to holidays, wages and sick pay. We directed these be disclosed as they were clearly relevant to the Claimant's claims in that regard.

30 Unfortunately we found the Respondents' representatives cross examination of the Claimant to be wanting in a number of respects:-

30.1 Many of her questions simply elicited undisputed facts, such as the Claimant's start date, position, promotion, the holiday year.

30.2 It appeared to us to be unstructured and unhelpful.

30.3 On several occasions she insisted on repeating a question, despite being asked not to do so. This was particularly so when she put that Mr Howard did not corroborate the Claimant's allegation that the Second Respondent had referred to the Claimant's age in the meeting on 3 January 2020. Quite apart from the fact that she had not established whether it was the Claimant's case that Mr Howard was present at the relevant point, and the fact that the Second Respondent accepted he had said the Claimant would be "fine on all fronts" because of his age, the representative' attempt to rephrase the question no less than four times was far from helpful.

30.4 She appeared to be concentrating on minutiae. She spent a lot of time suggesting that matters in the Claimant's witness statement or documents were not referred to in his solicitor's correspondence. We indicated that we did not find this helpful, but it seemed to have no effect.

30.5 We discussed these issues during the short adjournment, and were unanimous in taking the view that much of the Respondents' cross-examination of the Claimant was not helpful or relevant, and should be curtailed in accordance with Zurich Insurance Co. v Gulson [1998] IRLR 118 and Peter Simper & Co Ltd v Cooke [1986] IRLR 19. When we reconvened we informed the Respondents' representative that we would guillotine her cross examination at 16:00.

Nature of Hearing

31 In light of the lost time and the other difficulties arising in this hearing we informed the parties that the hearing would deal solely with liability.

22 September 2021

32 We received new disclosure on this morning showing the Claimant's holiday records from 2017.

33 The Respondents' representative was not present at 10:00, because her taxi had not arrived, and the hearing could not start until 10:37. It then appeared

that she had not asked the First Respondent's staff to provide the documents we had requested be disclosed until that morning, despite the fact we had adjourned shortly after 16 00 the previous day. She also indicated that she wished to examine the Respondents' witnesses in chief concerning the new documents disclosed that morning.

34 We adjourned to consider the position and gave a judgement when we reconvened refusing her leave to examine her witnesses in chief on the new disclosure for the same reason we had refused that leave concerning the new disclosure on the previous day.

35 We then heard the evidence of Mr Seldis. Shortly after his cross examination started he referred to a document in the bundle (122), a budget on which his decision on redundancy had been at least partly made. He was referred to calculations that followed that document and in answer to a question in cross examination said he did not know who had carried out those calculations and that he did not believe them to have been sent with his email. We then adjourned at 11:20 so that a digital copy of the document could be provided.

36 We reconvened at 11:40. Mr Seldis continued being cross examined. Shortly before 15:30 counsel for the Claimant indicated that he had slightly over half an hours further cross examination of Mr Seldis. The Respondents' representative then stated that she believed there was an appearance of bias because the Claimant's cross examination had not been subject to a guillotine. We asked her whether she wished to make an application for recusal and she stated she had no instructions. We indicated that she could not take instructions from the Second Respondent at that point because he was still giving evidence.

37 The Second Respondent then asked for a break and the Tribunal indicated that it would be better to adjourn for the day. The Second Respondent then said that he would continue, but we considered that as he had asked for a break it was better that he took one and we adjourned for the day.

23 September 2021

38 When we convened at 10:00 am the Respondents' representative indicated that she wished to make an application for recusal. The tribunal indicated that she had been told to wait until the Second Respondent had completed his evidence before taking instructions, which recollection was confirmed by counsel for the Claimant.

39 We were concerned at this impropriety, but took the view we should hear the application in any event.

Application for Recusal

40 The Respondents' application was based on the Tribunal allegedly:-

40.1 starting the hearing on the first day and speaking to Counsel for the Claimant before the Respondent's representative arrived.

40.2 refusing to require the Claimant to attend in person at the premises for the hearing

40.3 refusing to allow the Respondent to examine its witnesses in chief concerning the documents disclosed on the morning of 21 September

40.4 refusing to allow the Respondent to examine its witnesses in chief concerning the documents disclosed on the morning of 22 September

40.5 being confrontational and hostile in seeking to direct the Respondents' representatives' cross-examination of the Claimant, at one stage indicating its view that a question was irrelevant and that if the representative believed that to be wrong she knew what she could do. This was said to indicate that the tribunal had already made a decision in the case.

40.6 limiting the time available to the Respondent to cross examine the Claimant

40.7 not limiting the time available to the Claimant to cross examine the Second Respondent

40.8 being hostile toward the Second Respondent by sighing, interrupting and cautioning him for his alleged evasive answers.

40.9 by not continuing the hearing when the Second Respondent requested it.

41 She referred us to Porter v McGill [2002] 2 AC 357 and Locabail (UK) Ltd v Bayfield Properties Limited [2000] IRLR 96. We referred her to Ansar v Lloyds TSB Bank PLC [2006] EWCA Civ 142.

42 The Claimant took the view he had been ambushed as no notice of the application had been given. He made the following points:-

42.1 He had objected to attending in person. The Case Management Order had specifically put the parties on notice of a CVP hearing being possible.

42.2 The Respondents' representative's cross examination had not used the time wisely.

42.3 The Respondent had from 11.00 to 16:00 to cross examine one witness. The Claimant had to deal with seven witnesses, but at the time of the adjournment the previous day had only been cross examining from 11:00 to 15:30.

42.4 The Tribunal's interventions had been entirely proper.

43 We adjourned at 10:32 to consider the application. When we reconvened at 10:55, having had regard to the submissions of the parties, we gave a judgement dismissing the application on the basis that it was not well founded, indicating that full written reasons would be provided in due course.

44 We make the following findings of fact, which should also incorporate our further findings of fact set out below:-

44.1 The reason we started without the Respondents' representative is simple: she was late.

44.2 We have no power to require a party to attend in person, other than by issuing a Witness Order: none was sought. The Respondents' objection to the hearing being by CVP were spurious, and the Claimant objected to attending.

44.3 We have set out our reasons, above, for refusing leave to examine in chief. The terms of the CMO were clear

> "Evidence without a Witness Statement
>
> 13 No evidence-in-chief may be given by a witness, in addition to that contained in the written statement of that witness, without the permission of the Tribunal.
>
> 14 No witness may be called by a party to give evidence at the Tribunal hearing, without the permission of the Tribunal, unless their written witness statement has been prepared and exchanged."

44.3.1 It appeared to us that the Respondents were ill-prepared for this hearing on a number of fronts:-

44.3.1.1 giving full disclosure

44.3.1.2 taking full instructions on disclosure

44.3.1.3 preparing witness statements dealing with all relevant issues

44.3.2 It would be contrary to the interests of justice, and highly prejudicial to the Claimant, to allow a Respondent to give last-minute disclosure of relevant documents and then be permitted to give unknown oral evidence in chief concerning that disclosure.

44.4 We repeat the above reasoning in respect of the new documents disclosed on 22 September 2021.

44.5 The Tribunal intervened because it was concerned that the Respondents' representative's cross examination of the Claimant was not helpful, but was extending over a sustained period. A full day had been lost before it started, and it was important the case did not go part-heard. The Tribunal was not hostile or confrontational: it was direct, but only after more nuanced approaches had failed. That was appropriate.

44.6 This was necessary and appropriate, as set out above.

44.7 This was not necessary. The Claimant's Counsel had not used as much time as the Respondent's representative when the application was made, and his cross examination was detailed, structured and relevant throughout.

44.8 The Second Respondent was not a good witness.

44.8.1 He was, at times, evasive, and at other garrulous.

44.8.2 I twice asked him to "Please, answer the question" and once to not deal in semantics.

44.8.3 At another point, when I asked him why he did not consider terminating Mr Kennedy's contract before he started work (see below for further detail) the Second Respondent replied. "He wasn't costing us." and I retorted, "Don't take me for a fool". This was not hostile, merely pointed. In context his answer had been evasive and impertinent.

44.8.4 He repeatedly failed to answer questions concerning what other options he had considered to redundancy.

44.8.5 On several more occasions I indicated that the answer given did not answer the questions asked. That was appropriate.

45 We took the view that the guidance provided by the Court of Appeal, upholding the decision of the EAT, in Ansar v Lloyds TSB Bank PLC [2006] EWCA Civ 142, being specific to Employment Tribunals, to be appropriate to this case. The relevant passage is as follows:-

> "l. The test to be applied as stated by Lord Hope in Porter v Magill 620021 2 AC 357, at para 103 and recited by Pill LJ in Lodwick v London Borough of Southwark at para 18 in determining bias is: whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased.
>
> "2. If an objection of bias is then made, it will be the duty of the Chairman to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance: Locabail at para 21.
>
> "3. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour: Re JRL ex parte CJL [l9861] 161 CLR 342 at 352, per Mason J, High Court of Australia recited in Locabail at para 22.
>
> "4. It is the duty of a judicial officer to hear and determine the cases allocated to him or her by their head of jurisdiction. Subject to certain limited exceptions, a judge should not accede to an unfounded disqualification application: Clenae Ptv Ud v Australia & New Zealand Banking Group Ltd [l9991] VSCA 35 recited in Locabail at para 24.
>
> "5. The EAT should test the Employment Tribunal's decision as to recusal and also consider the proceedings before the Tribunal as a whole and decide whether a perception of bias had arisen: Pill LJ in Lodwick, at para 18.
>
> "6. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without something more found a sustainable objection: Locabail at para 25.
>
> "7. Parties cannot assume or expect that findings adverse to a party in one case entitle that party to a different judge or tribunal in a later case. Something more must be shown: Pill LJ in Lodwick above, at para 21, recited by Cox J in Breeze Benton Solicitors (A Partnership) v Weddell UKEAT/0873/03 at para 41.
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> "8. Courts and tribunals need to have broad backs, especially in a time when some litigants and their representatives are well aware that to provoke actual or ostensible bias against themselves can achieve what an application for adjournment (or stay) cannot: Sedley LJ in Bennett at para 19.
>
> "9. There should be no underestimation of the value, both in the formal English judicial system as well as in the more informal Employment Tribunal hearings, of

> the dialogue which frequently takes place between the judge or Tribunal and a party or representative. No doubt should be cast on the right of the Tribunal, as master of its own procedure, to seek to control prolixity and irrelevancies: Peter Gibson J in Peter Simpler & CO Ltd v Cooke [l986] IRLR 19 EAT at para 17.
>
> "10. In any case where there is real ground for doubt, that doubt should be resolved in favour of recusal: Locabail at para 25.
>
> "11. Whilst recognising that each case must be carefully considered on its own facts, a real danger of bias might well be thought to arise (Locabail at para 25) if:
>
> "a. there were personal friendship or animosity between the judge and any member of the public involved in the case; or
>
> "b. the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or,
>
> "c. in a case where the credibility of any individual were an issue to be decided by the judge, the judge had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or,
>
> "d. on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on their ability to try the issue with an objective judicial mind; or,
>
> "e. for any other reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues."

46 We are unanimous in concluding that each of the grounds is met by one or more of the matters set out above, for instance, adopting the same numbering:-

46.1 This was a tenuous or frivolous objection

46.2 Ditto

46.3 This was wholly in accordance with the overriding objective and the interests of justice.

46.4 Ditto

46.5 See point 9 of the *Ansar* Judgment regarding control of irrelevancies and prolixity

46.6 Ditto

46.7 Ditto

46.8 Ditto

47 We do not accept that the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased. We therefore declined the application.

Respondents' representative withdraws

48 When we reconvened after the short adjournment the Second Respondent informed us that he and the First Respondent had dispensed with the representative's services.

49 He apologised for the delay and 'some of the shenanigans'. We sought to reassure him that no apology was necessary and gave him guidance on the overriding objective and the procedure we would be following. We explained how we would deal with witnesses, what submissions were and how he might compile his, and the Claimant's Counsel kindly volunteered to disclose his submissions in advance when the time came. We invited him to ask questions to clarify any matter and he declined.

The Evidence

50 We heard the evidence of the Claimant on his own behalf. We heard the evidence of the Second Respondent, the sole shareholder and Managing Director of the First Respondent; Mr Howard, Technical and Operations Director; Mr Prior, Consultant and former Finance Manager; Mr Burrows, Sales Coordinator; Mr. Richards, Internal Sales Consultant; and Miss Sturman, Sales Coordinator; on behalf of the Respondents.

51 We declined to hear the evidence of Mr Dolphin, IT Manager, because no statement by him had been exchanged with the Claimant.

52 We considered the documents that we were referred to which, by the conclusion of the hearing, exceeded 300 pages. We heard and considered the submissions made on behalf of the parties. We make the following findings of fact.

Findings of Fact

53 The Claimant was born on 10 December 1975 and was employed by the Respondent from 31 May 2011 as a Sales Manager. He was provided with comprehensive terms and conditions of employment and clearly performed well. On 1 March 2014 the Claimant was promoted to the position of Sales Director and on 1 October 2014 was appointed a statutory Director and awarded some shares in the business.

54 The Respondent is a specialist manufacturer of roof skylights. It claims to be the sole such business to hold BSI kite marks in respect of the quality of its products. It is based in Bury St Edmunds and employs approximately 35 staff. It uses the services of a specialist HR consultancy who assisted it in drawing up and providing to its staff, including the Claimant,

54.1 A detailed company handbook

54.2 A full disciplinary procedure

54.3 An appropriate grievance procedure

54.4 An equal opportunities policy

54.5 A policy on computer use.

55 In about mid 2019 the Second Respondent was considering options that would allow him to retire and spend more time with his large family. He discussed with

the Claimant the possibility that the Claimant might buy his shareholding in the First Respondent. At this time there was a further the shareholder who was, in effect, a sleeping partner.

56 Those discussions did not progress further at that time, but in October 2019 the Second Respondent acquired the entire shareholding of the First Respondent, and the sleeping partner resigned as a director.

57 In about May 2020 it was found that one of the First Respondent's employees, 'D', had been divulging sensitive financial information concerning the First Respondent to her partner, the former sleeping partner/Director. The Second Respondent took the decision to dismiss her for gross misconduct. The Claimant agreed with that course of action and that the First Respondent should "tighten up on the privacy of sensitive information".

58 One of the methods by which the First Respondent managed sensitive information was to issue each senior member of staff, including the Claimant and the First Respondent, with pass codes for the office printer. This enabled those senior managers to print documents but for the printer not to process them until such time as the manager was at the printer location and entered the code.

59 In the autumn of 2019, we are unable to be more precise because no disclosure of relevant documents was given, the First Respondent agreed to employ a Mr. Kennedy as a Sales Development Manager with an intended start date of 6 January 2020 with a salary of £45,000 plus Commission. The Claimant was centrally involved in that recruitment exercise. We did not accept the First Respondent's evidence that he was wholly unaware and uninvolved. We are confident that a hands-on Managing Director would have had to approve such an addition to the payroll.

60 At this time the Claimant's salary was £70,000 plus bonuses.

61 On about 28 October 2019 the Second Respondent asked the Claimant to sign a non-disclosure agreement. The Claimant did so. This was supposedly in the bundle but was a blank page.

62 On 1 November 2019 the First Respondent informed the Claimant of what he said was his intention to purchase the sleeping partners shares and to offer the Claimant the opportunity to purchase the entirety of his shareholding.

63 On 7 November 2019 the Second Respondent asked the Claimant and Mr Howard to put forward a proposal for a management buyout ("MBO") for his consideration. We did not have sight of that proposal, but understand it to have been presented to the Second Respondent on 24 December 2019.

64 On 2 January 2020, at 12:47, the Second Respondent emailed the Claimant and Mr Howard to decline the proposal. At 14:41 the Claimant forwarded that email and its attachments from his office email account to his private home email account.

65 The contents of that email are lengthy but it is necessary to set it out in full,

“Obviously, having had a little time to think over the Christmas period and discuss the potential deal with my good lady and advlsors, I can give you a definitive answer taking into account present conditions. I would like to say prior to that, that no offense was taken, in any way, by your offer, and I completely understand the method of calculation and reasoning behind your proposal. I also have taken Into account the funds that could be removed from the bank to bolster the figure, but we are not in a position, obviously, to work with that luxury.

In short, the offer Is being declined for a number of reasons, not least that I believe that I would regret letting Sunsquare go for so little. It's not the sort of sum that could sustain us as a family for very long also. I think that the lack of good will as part of the proposed offer is also something that I found quite difficult. Anyway, I am not selling Sunsquare to anyone else as my desire always was, and always will be to create an MBO of one sort or another. I feel it unlikely that someone Is going to randomly pop through the door with a large cheque, so we will work something out eventually. Timing Is everything, and obviously the combination of weird looking accounts and trading conditions would make life tricky. Anyway, onwards and upwards.

I have put £150k of my own money into the company and taken the Libris loan for £60k. Obviously both will need paying back, but I'd rather we started the year clean and give ourselves the best chance of getting the cushion back. The cash flow is a temporary issue and I'm not remotely worried about it. It was going to hit at some point. The libris thing Is ongoing and the rates and amounts get better once an established relationship is found. This could be a way of funding future investments, but let's see how much of a pain it is to deal with.

There are many things that we need to discuss today or tomorrow, not least of which Is budget and cashflow forecasting. I enclose the budget for the coming tax year for your approval. Obviously there will be one or two minor adjustments, but it is something to start the discussion with. I have based it on what we will likely end up on this tax year, so will not really be looking to decrease the sales figures on the budget, but the rest is up for discussion. I have left £10k adrift in the legal/professional services section as I want to have a bit of slack to be able to offer a staff bonus scheme. Obviously I would like It to be a great deal more than that, but the bonus scheme will depend on going over budget, not just hitting It.

On that subject. For us to recover and get back to where we need to be means that there will never be more pressure than now on our sales department. As I am now balls deep into this, I will start to come down hard on anything In that department that Is not pleasing. We have spent wildly on supporting the sales effort and we need them to be proactive and chase everything to death. It is the only way that we will get ahead quickly. That Is imperative for the coming year. We need to discuss site and the Issues there and transport too, both of which are losing us money. We need to look at staffing levels and obviously gear ourselves up for a profitable year. The other vital thing that we need to establish Is regular (weekly) figures that give us all clarity on where we stand sales wise and cash flow wise.

I propose that we sit down tomorrow at 10am and go through some of the above to ensure we are all singing from the same hymn sheet. I will also be asking for your full support for the coming year. If It is that by declining your offer I have upset you In any way, I demand that we get that out in the open and deal with It. We need to work as a team with no bad feelings. I need to trust that we can get this all straight and although I would never run this company autocratically, the risk at

> this stage is entirely mine and I am balls deep in this and can assure you that I will not accept working with any member of staff that doesn't work in the way that we need them to, at any level. I am afraid that I have placed myself in a position where the risk feels very real and you will see a very different MD this coming year. We must ensure that anyone who wants to join us on this Journey understands that they need to think of the company first, at all times, during their working day and I will hope that we can unite and get rid of any clingers on or careless employees. We simply cannot drift anymore.
>
> Anyway, see you in the morning. If there is anything you wish to discuss privately, then you know my door is open."

66 The document attached to that email was a Cashflow forecast for 2020, together with the assumptions on which it was based and a detailed spreadsheet.

67 What took place at the meeting on 3 January 2020, which was in a local pub, is at the heart of the issues in the claim for age discrimination. As it appeared to us, there was little dispute as to what was discussed and said: it is what was meant that is the real issue.

68 The meeting started with a discussion about the proposal put forward by the Claimant and Mr Howard and the Second Respondent's reasons for rejecting it. There was then discussion concerning the business and the future strategy. In the course of this the Second Respondent indicated that he took the view that the business would only need two directors going forward, and it was the Claimant's role that would be made redundant.

69 That was contrary to the figures in the budget, which provided for three directors.

70 We accepted that both the Claimant and Mr Howard were shocked at this announcement. The Second Respondent explained his reasoning. His own background was in sales and marketing, which meant he could cover the Claimant's role. Mr Howard's expertise was more technically focused, and neither the Claimant nor the Second Respondent could cover this effectively.

71 It is common ground that the Claimant was visibly distressed and upset at this turn of events and at that point Mr Howard left the meeting.

72 The discussion between the Claimant and the Second Respondent continued regarding garden leave, the Second Respondent taking over the Claimant's email and like matters, and turned to the Claimant's imminent appointment with a doctor concerning a sensitive medical condition, of which the Second Respondent was already aware.

73 The Second Respondent accepts that he said words to the effect, 'don't worry, at 42 you'll be fine on all fronts', and asserts that the Claimant corrected him to say that he was 44. It is the Second Respondent's case and that it was said by him with sole reference to the Claimant's age being in favour of a positive outcome to his medical condition.

74 The Claimant did not quote the words allegedly used by the Second Respondent. His evidence was,

> "He advised me that I would be the one to be made redundant as I was younger than Mr Howard and therefore more likely to find an alternative role elsewhere. Justin specifically stated that I was 42 and therefore would not struggle to move on."

75 In the absence of an alleged quotation we have concluded that the Claimant's evidence was his interpretation of what the Second Respondent said: it is the gist of what the Claimant understood.

76 On 6 January 2020 Miss Sturman returned to work from her leave. She met the Second Respondent for a "catch up" in the boardroom and was told that the Claimant was absent sick. in the course of the conversation, which was the first 121 that she had held with the First Respondent, she felt that he was paying attention to what she was saying, which gave her confidence to voice her concerns regarding the Claimants conduct in the office. She alleged he was grumpy, didn't talk to members of the team on occasion, swore and made threats concerning their job security if sales didn't materialise. She thought the team was bullied.

77 We accepted the evidence of the Second Respondent, which principally came out in cross examination by the Claimant's counsel, that as a consequence of his discussion with Miss Sturman he spoke to other members of staff, as well as to Mr Howard, in confidence, and was given grave cause for concern.

78 On 6 January 2020 the Second Respondent composed a letter to the Claimant forwarded by email on 7 January, in the following terms,

> "As we discussed in our meeting on 3rd January 2020. As you were made aware, the company is in a very difficult financial position and we have unfortunately had to look at cost savings going forward to help a recovery and attempt to avoid more serious consequences. Although we have looked at a number of options. there Is a requirement to reduce the workforce in order to ensure the continuing viability of the business.
>
> As a consequence, I am obliged to confirm to you that your Job Is proposed as being redundant and the work will be absorbed by myself. I propose, therefore, to hold a formal consultation meeting with you at 10am on Friday 10th January 2020 at Sunsquare offices to discuss this matter. At the meeting I will explain in more detail the reasons why the Company has to make these proposals, and in particular why your job as Sales Director is being made redundant.
>
> We will also be discussing whether there is any other suitable work we can offer in order to protect your employment, and I would ask that you consider any viable alternatives or suggestions you could put forward.
>
> Robyn Pine will accompany me at the meeting to take notes.
>
> It is anticipated that the consultation period will continue for two to three weeks, and the Company will not make a final decision In respect of any redundancies until consultation has been concluded.
>
> As discussed, I do not require you to attend work during the consultation period, unless specifically instructed to do so. Instead I am placing you on garden leave for the consultation period. You should therefore refrain from attending the offices or contacting any of our customers, suppliers, employees, officers or representatives without my explicit consent.

During the consultation period, you should not undertake any other business or profession without our prior written consent, nor should you be or become an employee, officer or agent of any other firm, company or person. You must only carry out work for the Company. which you have been specifically instructed to undertake by a director of the business.

However, may we remind you that, while you are on garden leave, you remain an employee of the Company and continue to owe the Company all the duties of employment. including the duty of fidelity. You must be available during normal working hours to deal with any work-related matters that may arise. You shall continue to receive your normal salary and contractual benefits during the period of garden leave.

For the sake of completeness, could I take this opportunity to remind you that you have still not provided your signed contract as requested some time ago and you agreed ·to provide to Clive Howard. Please, during this period, abide by the covenants contained within your Contract of Employment and shareholder agreement, which will continue during the consultation period.

I am also writing to advise you that you are required to attend an Investigation meeting on the same day at 11am. The meeting is to discuss the following allegations:

1. It is alleged that on several occasions on Thursday 2nd of January 2020 between the times of 15.41 and 15.50 you sent email containing sensitive information to your private email address. This is not the first occasion this has happened, and in light of a very recent disciplinary issue regarding data protection, requires some explaining from a Director and Shareholder,

2. It Is alleged that you threatened a co-Director that you were Intending "poaching" a key member of our technical staff (Wojtek Kobylechl) for your own plans moving forward whilst you ·were still a director and shareholder of Sunsquare.

3. It is alleged that you claimed to a co-Director that you had formed a portfolio of information gleaned from the company to "bring me down", whilst not ever providing a formal grievance or resigning. Again, this was stated whilst you were a director and shareholder.

4. It is alleged that on the 7th December you met with members of staff outside of work and told them of plans within the company that were neither discussed with the Managing Director or concrete. Your discussion created a complaint from Alison Moore to a co-director that she felt unsettled about the level of divulgence. In light of the very recent disciplinary issues Sunsquare has dealt with relating to idle talking outside of work unsettling staff, this would be deemed to be completely unacceptable behaviour from a Director and Shareholder.

I will chair this meeting and Robyn Pine will accompany me to take notes.

You should be aware this investigation meeting Is to consider your explanation for the above concern(s) and you should attend prepared to explain these matters. Please note that this meeting does not constitute disciplinary proceedings, nor does it In any way suggest that you are guilty of any offence. However, should we not be satisfied with your explanation, this may lead to formal disciplinary action."

79 On 9 January 2020 the Claimant saw his GP and was signed off with "stress at work" until 26 January 2020.

80 On the same day solicitors acting on the Claimant's behalf, who had been instructed following the meeting on 3 January 2020, wrote to the Second Respondent. They took the view that the announcement of the Claimant's removal as a director was a breach of the Second Respondent's duties as a director as no board meeting had been held. They asserted the Respondents' letter of 6 January regarding consultation was a sham as the announcement to the Claimant of his redundancy had been in unequivocal terms. The Claimant did not believe his redundancy to be genuine, particularly against the background of a new employee starting work in Sales that week.

81 The letter went on to assert the Claimants belief the decision had been made because of his age and/or health, because both had been raised at the meeting on 3 January 2020, and the allegations made against him were false and made to avoid making appropriate payments to him.

82 The letter concluded,

> "Finally, Mr Lambert wishes to submit a formal grievance to the company about how he has been treated by you, both at the meeting on 3rd January 2020 but also previously as he feels that you have continually undermined his position and created an unhealthy working environment, which has had an adverse effect on his health. The grievance will provide further details about the comments made by you on 3 January 2020, which appear to suggest that Mr Lambert's age and/or Ill health have been taken Into account by you in deciding to remove him from the business, and which are potentially discriminatory. In view of this, it would clearly be inappropriate for you to deal with the grievance, Please therefore provide details of an independent third party, to whom we can send the grievance letter."

83 The Second Respondent replied on 10 January, by email, at great length,

> "I was surprised to read the detail contained in your letter and feel that it would be useful to clarify the situation from my perspective. However, I am not responding fully to all of the points that you have made in your letter as I believe that the internal company process would be the appropriate fora for this.
>
> I was sorry to learn that your client is suffering from stress. I do appreciate that a potential redundancy situation and the allegations that have been made against him would have contributed to this. Your client did make me aware of some of his personal difficulties on the 3rd January but had not raised these previously and I had understood that this was the reason why he was upset. I was not aware of any previous health conditions.
>
> The assertions that the redundancy is a sham are strongly refuted. As you are aware your client had been invited to a consultation meeting to discuss my view that his role of Sales Director was not required due to the financial situation. In the consultation meeting I would have reviewed the financial position with him and explained the reasons for the proposal to him and considered his view that his role is necessary to the business. Whilst I do have a view which has led to the proposal that your client is at risk of redundancy, the meeting would have provided the opportunity for him to provide any alternative suggestions and any other feedback that he felt was relevant. The position of the company is such that savings do need to be made and in my view management costs represent a significant and disproportionate percentage of the salary bill. I am willing to consider alternative proposals during the consultation. However, I believe that your client is very aware of the financial position of the company and the other options that have been

considered to resolve the situation including the MBO. This has been discussed on previous occasions at Director's meetings. ·

It is refuted that the proposed redundancy for your client's role Is driven by age/health of your client.

It is correct that your client was placed on garden leave. In part this recognised his personal situation but also provided him with the opportunity to prepare for the consultation meeting. For the purposes of clarity, your client's employment has not been terminated, he remains an employee of the company.

It is pleasing to note that your client is willing to participate in the investigation into the allegations against him.

In my view it is not appropriate at this stage to involve an external third party in an internal process. Therefore, the consultation meeting and the investigation meeting will be chaired by myself. In addition, I note that your client wishes to raise a formal grievance. Again, this is an internal process and on receipt of the grievance letter I will then review the appropriate person to hear your client's grievances. I have to say that your client has not previously raised any concerns of the nature that you have alluded to in your letter. I do need to stress that the company takes all grievances seriously and I am happy to arrange a grievance heating for your client whilst he is absent. The detail of his grievances will determine who would be an appropriate chair for the hearing.

It your client wishes this hearing can be held at a neutral venue. Of course, it could also be held at the office if he would prefer.

Alternatively, if your client prefers these matters can be. dealt with on his return to work. I will make the required arrangements on receipt of the grievance letter.

I also recognise that your client may not be well enough to participate in a meeting for either the redundancy or the investigation. I believe that your letter confirms that your client is now absent from work due to sickness and as such, if the absence continues for more than 7 days I will require a medical certificate from a GP. If your client is unable to attend meetings, I do need the sick note to state this. In my view, being unfit for work does not necessarily mean that one is unable to attend meetings. In the circumstances I do believe that it would be in the interests of all concerned to resolve these matters as soon as possible. As per the standard contract of employment the statutory sick pay rules will apply to your client. I would remind your client that there is a private health scheme in place which he may find useful to address any health concerns.

I am disappointed that your client has not attended the meeting today as it would have been an opportunity to discuss any concerns with a view to resolving these. I would still prefer to do that and therefore ask your client to consider attendance at face to face meetings.

At present, as your client remains an employee of the company and is absent due to sickness. I do need to progress the internal processes and as such would suggest that your client considers responding to the redundancy proposal in writing via yourselves. I would also suggest that this would be appropriate for the investigation meeting into the allegations against him. In this regard I have enclosed the questions that I would have raised at both meetings and if your client is willing to participate in writing I would ask for a response by no later than 5pm Monday 13th January 2020, Otherwise, I will propose an alternative date for an internal meeting and will progress the internal procedures.

Redundancy Consultation.

Reasoning.

1 Poor trading in 2019

2 Cost cutting required without question

3 Trading insolvently in December

4 £150k had to be put into the company by Justin Seldis (JS) as well as borrowing. Also showing a current loss for the year (with 3 weeks to go) of £300k.,

5 No certainty going forward. Jan 31 could affect things. Uncertainty still looms.

6 Part of the MBO discussions were that 2 directors were enough going forward.

7 Sales team small and no room for additions. i.e. No room for a job there.

8 External sales for Sunsquare and Ikon also covered.

9 Having a sales Director of 4 internal and 1 external is a luxury in the current climate. There is genuinely no need for this position.

10 Marketing done by JS, so small role for very large salary. Simply now unaffordable.

11 No suitable jobs available at the present time as a replacement. Running at lowest staffing level for many years.

12. Income levels for other sales jobs too low to be a serious proposition.

13. Sales Director job will no longer exist. JS will a.dd that role to his and will do so with ease.

14. Directors pay makes up over t/3 of the entire salaries. Told by accountants that this is completely imbalanced.

Questions.

Do you think there are any alternative options based on the business reasons for the proposal? You have been unable to regularly supply the directors with sales figures and forecasts as requested on many occasions, this has contributed to some of the financial issues in my view. If we had had the accurate data we may have been able to take remedial measures earlier. I have also had to pick up some aspects of your role that you haven't fulfilled. As such, I don’t believe that your post is necessary. Do you have anything to say about this?

Disciplinary hearing questions.

All statements and proof will be made available in due course as the investigation is concluded.

1 We have become aware that you have sent emails to your personal account. Is this the case?

2 Do you recall the recent issue with another employee following which we issued a communication stating that this was not acceptable. Do you consider that you have adhered to this? If you haven’t why haven’t you. If he denies the allegation, how can you account for what we have discovered.

4 Why, when we have very recently had such turmoil and a dismissal for data issues would you consider it reasonable as a Director to send emails containing

very sensitive company information to a private email account that does not offer the data security of our own server?

5 Would you agree that of the 12 emails that were sent to a private account, with sensitive information (will provide proof) none relate to recent discussion regarding an MBO. The dates do not co-ordinate.

6 Did anyone at director level approve sending emails to a private account? This does not include the single email between you and I some time ago that we both agreed was appropriate.

7 Would you agree that to send data that is company property and sensitive outside of our protected server is a danger to the company regarding security and GDPR?

8 Would you agree that if we had found any other employee doing such a thing, especially in light of recent disciplinary events with 'D', we would have started disciplinary proceedings against that member of staff.

9 Would you agree that at Director level we should be professional at all times, especially when it comes to privileged or sensitive information.

10 Can you give any good reason why you would select random emails, usually from myself, at dates not related to anything in particular and send them to your private email account?

11 Would you agree that this must have been a deliberate act? Why would you do this? Are you aware this is a criminal offence?

12 Can you see how this looks? Were you using company information to try a build some sort of case against the company?

13 Did you state to Clive Howard on the evening of the 2nd January that you intended to poach Wojtek Kobylechi from Sunsquare for your own project moving forward? Why would Clive say that you had if you hadn't?

14 Do you understand that at this stage: you are a director and shareholder of Sunsquare and that this would be damaging to the stability of the company?

15 Would you consider that if this were stated by another employee or external source it would be considered n serious threat to the company? .

16 Would you agree that we have had previous discussions relating to Wojtek regarding trying to protect Sunsquare against losing him to a competitor or any other company?

17 Can you state for the record what your intentions were with Wojtek?

18 Have you had discussions with Wojtek regarding this matter either in or out of work?

19. Did you report to Clive Howard in recent days that you were building a portfolio (or words to that effect) to somehow "take me down" or cause a situation where you could claim constructive dismissal or something of that nature? Why would Clive say this? Are you suggesting that Clive is lying?

20 Is that why you were sending emails to a private account?

21 Have you ever filed a formal grievance or complaint to me or Sunsquare?

22 Have you ever handed a letter of resignation lo any director at Sunsquare?

23 Would you agree that should you have had a grievance at any stage that should have been reported?

24 Were you planning to do so?

25 If Yes, why, when I had asked only on the 2nd of January whether you were upset with anything relating to recent events did you claim that you weren't?

26 Why, if you had a complaint against Sunsquare had you never mentioned it in a directors' meeting?

27 Please read statement made by Alison Moore.

28 Do· you recall meeting Alison Moore, Robyn and Rob Dolphin as described in the allegations made against you? .

29. Do you recall the recent terrible trouble caused by 'D' discussing company plans or information outside of work? ·

30. Do you understand why as Directors we should be cautious about what we discuss relating to work outside of the office?

3 Do you think that a pub was an appropriate place to discuss future plans that you had not even talked to the MD about?

32. Do you understand how what you stated about 'D' would be offensive to a friend of hers?

33. Do you think it appropriate to state such a thing to n member of staff in and out of work, as a director?

34. Do you think, now these allegations have been made against you that you have acted appropriately as a company Director of Sunsquare with its best interests at heart.

35. Do you agree that the allegations made against you are very serious indeed?

36. Do you think that you have been effective as a Director at Sunsquare and are popular with the sales staff? I wouldn't advise to include anything that would be seen to be personal.

37. Were you aware that two of the team of 4 were actively looking for alternative jobs because of the way you were treating them?

38. Would you agree that to lose 50% of the sales team, including our best sales person would have been devastating to Sunsquare?

39. Can you explain ,why you were unable to regularly supply the directors with sales figures and forecasts as requested on many occasions?

40. Do you understand that by not providing said information, you were not doing your job properly?

Sadly, since the initial discovery of a potential breach of contract, a great deal more has come to light that is of grave concern. I will be collating evidence to supply at our next meeting.

I look forward to hearing from you.

84 Mr Howard, in an unsigned letter dated 10 January 2020, wrote to the Second Respondent confirming the matters attributed to him in the above letter as being accurate.

85 On 13 January 2020 the Claimant's solicitor emailed the Second Respondent, over two closely typed pages with a small font, to dispute the matters he had raised and to assert victimisation contrary to the Equality Act 2010. It is neither necessary nor proportionate to set that letter out in full.

86 The same is true of the Second Respondent's even longer reply sent by email on 16 January 2020, in which he gave further particulars of the allegedly improper use of email by the Claimant. He also set out summaries of the evidence he had received from members of staff.

87 On 21 January the Second Respondent wrote to the Claimant's solicitors asking for confirmation of how his grievances were to be progressed and whether or not he would attend meetings or wished them to be dealt with by alternative means. He took the view that the Claimant was being obstructive of progressing the redundancy consultation and disciplinary proceedings, he also requested that the Claimant should return his company property in his possession by noon the following day.

88 The Claimant's solicitor replied the following day to refute that, to seek disclosure by the First Respondent of all the documentation it was relying on and to indicate that the company property could be collected from the solicitor's office on a date to be agreed.

89 On 23 and 24 January 2020 the following individuals made statements concerning their view of the Claimant's conduct:-

89.1 Mr R Dolphin

89.2 Mr Richards

89.3 Mr Burrows

89.4 Miss Sturman

and the statements of the latter three were 'topped and tailed' to become statements in these proceedings. They were supportive of the disciplinary allegations.

90 The witness statements on behalf of the Respondents failed to provide any detail of the investigation process and how, if at all, it complied with the disciplinary procedure.

91 The investigation was carried out by the Second Respondent, who referred to "the conclusion to my investigations thus far". He asked those staff who were willing to make statements that had spoken to him about the Claimant's conduct to do so, and also obtained statements from his accountants and Mr Howard.

92 We thought the conclusions reached by the Second Respondent to be expressed in trenchant terms. By way of example only:-

92.1 "Ten of these emails contained extremely sensitive company information including management accounts as well as information relating to an MBO that has an NDA attached. This is in breach of ML's contract and especially serious as we have had a recent disciplinary case that ML was involved in relating to internal Information leaking outside of the company.

92.2 The law has also been broken when it comes to GDPR.

92.3 There was obviously bullying happening and a deep unhappiness amongst the people that most need to feel motivated. This is against the ethos of the company and gross misconduct.

92.4 I am now completely convinced that with my records of those conversations and the statements of Sean and Amanda that ML was in serious breach of contract relating to reporting false figures.

92.5 ML had planned prior to our meeting of 3rd January to attempt a case for constructive dismissal.

92.6 This behaviour from a director, in light of the above is not only inappropriate, but a flagrant breach of contract."

93 On 24 January the Second Respondent also wrote to the Claimant's solicitor to respond to her earlier email. He asked for an up to date medical certificate.

94 Later the same day the Claimant's solicitor emailed the Second Respondent to inform him that the supposed documents had not been attached to the earlier email and to tell him that the Claimant had been signed off until 16 February 2020.

95 The Second Respondents penultimate email of the day, which attached a copy of the letter referred to below, contained the following passage,

> "I note that we have still not received company goods held by your client. If they are not In your offices by 9am Monday morning, we will simply report the matter to the police as stolen goods."

96 The Second Respondent's conclusions were sent to the Claimant under cover of a letter dated 24 January 2020, yet later that day, as follows,

> You are instructed to attend a disciplinary hearing on Wednesday 24th January 2020 at 10am at Sunsquare offices to address the allegations as outlined below:
>
> - It is alleged that you have breached the company policy in relation to emails containing confidential company information sent to your personal email address.
> - It is alleged that you had made inappropriate and unprofessional comments to other employees. These comments relating to undermining the management of the company.
> - The above allegations are considered to be serious breaches of confidentiality.
>
> The company alleges that the above matter(s) constitute potential gross misconduct.
>
> I will chair this hearing and [Name, Job Title], will accompany me at the hearing to act as my witness and note taker. You have the right to be accompanied by a fellow employee or an accredited trade union representative and it is up to you to Inform your companion of the date and time of the hearing, etc. If you choose to be accompanied by a fellow employee then please liaise with me in advance of the hearing, in order for the appropriate arrangements to be made to allow your colleague to attend the hearing as your companion.

> I enclose copies of the evidence relating to the allegations gathered during the investigation ….

The letter concluded by informing the Claimant that if the allegations were found proved the outcome might be summary dismissal.

97 It will be clear from the above that the Respondents did not include the statements that had been made by members of the sales team and others in the documents provided to the Claimant. Similarly, copies of the alleged improper emails were not included.

98 In her final email of that day the Claimant's solicitor expressed her disappointment at the stance taken by the Respondents, in particular the short time frame that had been given, to enclose a copy of the Claimant medical certificates and expres concern that the threat to go to the police was an act of harassment.

99 On 25 January the Second Respondent wrote to the Claimant's solicitor concerning his subject access request and to inform her that it would be dealt with according to law.

100 On 28 January 2020 the Claimant emailed the Respondents with his resignation. It was in the following terms,

> "I am writing further to the ongoing redundancy and disciplinary process is which commenced on the 3rd and 7th January respectively and to advise you that I believe that your conduct to date amounts to a fundamental breach of mutual trust and confidence and that I'm resigning, with immediate effect, in response to your conduct
>
> it is clear that you have had no intention of conducting these process fairly or impartially. It is quite evident from the contents of the statement you provided on Friday 24th January and the document entitled "Conclusion to Disciplinary Investigation" that you have already made up your mind that I am guilty of wrongdoing. In these same documents you have accused me of lying. Therefore, I have absolutely no confidence that you will conduct the proposed disciplinary hearing fairly.
>
> After our meeting on Friday 3rd January you informed me that you were making me redundant. You said that at age 42 I would have the best chance of getting another job as you were unemployable and Clive was older (at which point I highlighted that I was in fact 44). When I asked you about next steps, you said you needed to take advice, and as such there was no plan regarding a fair consultation process. Last I accept that there is a need to make cost savings, I do not accept that my role was fairly selected for redundancy. I believe that you selected me because of my age (as reflected in your comments) and/or because you were annoyed at me, following our offer to buy the business and what you perceived (unfairly in my view) to be failings on my part. I now wonder whether Clive had intentionally given you misinformation to try and get me "out of the way" to protect his position and that this was why he had suggested the meeting be held off site. You advised me to go home as I was on gardening leave, despite my employment not being terminated and there being no express condition in my contract entitling the company to place me on garden leave. You also disabled my remote access without any notice or justification.

The decision to make my role redundant (or indeed any redundancies) was taken without any prior discussion at a board meeting, despite the fact that I am a statutory director of the company. When I asked to be treated fairly and with dignity, you also stated that you couldn't "afford" to be fair in this process. You said that you would tell the staff I was off sick. I asked you not to do so as I wanted information about my health to be kept confidential. However, it is now apparent that you did tell staff I was off sick, which I believe is a further breach of my contract of employment. The next correspondence I received from you advised me that I was required to attend a redundancy contact consultation meeting directly followed by a disciplinary hearing on Friday 10th January.

You did not give me the right to be accompanied to either meeting and the wording was such to show that you would not be conducting a disciplinary investigation meeting, but a disciplinary hearing, for which in my view there was no reasonable or proper cause. Your tone throughout this process has been aggressive, including the text message received on Thursday 9th January asking me to bring my laptop and phone to the meeting. Unfortunately, I was unable to attend this meeting, for health reasons (a doctor's note was sent to you to support this which confirm that I am suffering with stress).

Although you subsequently altered your wording to say that an investigation meeting would take place, the wording of the questions were such to suggest that you had already the reached a decision and were very much questions which might be put at a disciplinary hearing, rather than to genuinely establish the facts. You then invited me to a rearranged investigatory meeting on Tuesday 21st January, again while I was signed off from work with stress. You weren't prepared to allow me some time to focus on my health and instead have continued to place pressure on me to respond to your allegations, even though you had not provided me with the evidence you stated you had and on occasion purported to attach despite my solicitor requesting that evidence and making it clear I would respond once I had seen it. You then took the decision to conclude the investigation on Friday 24th January without waiting for any input from myself and are proposing a disciplinary hearing to take place, which you will also conduct. This is in breach of the ACAS code of practise on disciplinary and grievance matters, which recommends that different people deal with the investigation and disciplinary hearing. Furthermore, you have also provided a statement against me and therefore there is a clear conflict in of interest by you also dealing with the disciplinary hearing.

The reason for me not responding to the allegations, beside me being signed off from work with stress, was that I was still waiting to receive the statements you have continually referred to in your correspondence. I wanted to see this so that I could respond, particularly in light of the very serious allegations. To date the only statements that have been provided are from you and Clive together with an email from Knights Lowe, although these were only sent at 5:12 pm on Friday 24th January and therefore you did not provide adequate time for me to respond, having already concluded that you were going to proceed to a disciplinary hearing. I also note from the properties of Clive's statement that although it was it is dated 10th January it was created on Thursday 23rd January. This is further evidence of the unfair process which has been adopted in this matter.

Another example of your aggressive behaviour was the threat late on Friday to report me to the police for stealing company equipment, even though earlier the same day you had indicated that you would be happy to collect this from my

solicitors when they advised you that it was in their possession. your actions here were completely unreasonable and clearly designed to harass me, and compound the stress I am under.

You have a duty to exercise any disciplinary process fairly, which you have failed to do. You continue to insist on conducting the redundancy process, disciplinary process and any grievance process yourself, as you have refused to nominate a third party, and have done so in such an unreasonable and aggressive manner that I'm left in no doubt as to your feelings towards me.

As you know this situation has caused me great deal of stress and anxiety and it's such I've been signed off from work since Thursday 9th January, however you have failed to acknowledge this and have continued to insist that I attend disciplinary hearings and meetings to discuss redundancy while signed unfit for work. You have also asked that my doctor confirms that I am not fit to attend meetings, which he was surprised at, as being signed unfit for work should clarify this point. You have also taken the decision to only pay me SSP while I am signed off from work. This goes against my employment contract and the way in which pay for sickness absence has been treated during my 8 years and 7 months at Sunsquare. It also shows a lack of support, a predetermination of the outcome of the redundancy process, and an intention to yet further increase the pressure on me. In my view you are in breach of your duty of care to me as an employee.

You have also suspended me, even though I am currently off sick. Once again, this was unnecessary, both because I'm innocent of what you have alleged, but also because I was off work anyway, with no access to the company's systems. As such, it is yet another act designed to damage the employment relationship and add to my stress. You have also prevented me from undertaking my duties as a statutory director and have denied me access to information which I am legally entitled to receive. Clearly I cannot continue to be a director and accept the responsibility that comes with that, when I am excluded from the business and information is withheld from me.

I maintain that I have not done anything wrong, however, I have not felt able to respond to the broad allegations until I was well enough to do so and presented with all the information, i.e.the individual statements that have constantly been requested. It is difficult to believe that so many members of staff have come forward, all during my absence from work, but yet their statements are still not being made available to me to enable me to respond to. The suggestion that I view them at the disciplinary hearing is unfair as it gives me no time to prepare. Also, your insistence that the disciplinary hearing proceeds tomorrow once again fails to take into account my ill health. Bearing in mind my livelihood and reputation are on the line, I do not consider the alternative proposed by you to be reasonable.

In response to the allegations regarding emails, whilst some emails were sent to my personal email account this was done to enable me to work from home easier as I can then view them on the large screen in my home office (typically spreadsheets). I have also sent myself emails in order to prepare for meetings and print documents in a confidential setting (as I do not have a private printer at work) and to prepare for the MBO (in respect of which I signed an NDA and therefore committed to keep the information confidential). I have never used any information for anything other than aiding me to carry out my role, or when appropriate for the MBO. I have also always made you aware that this is something I do, particularly after the incident with ‘D’ which I recall you replied it

was different for me as I am a director of the business and the information is not going to go anywhere. I confirm that I have not used the information forwarded for anything other than business purposes.

In response to Clive's assertions that I have said that I intend to poach staff, I have never initiated such conversations, nor have I ever had such conversations with any other members of staff. After the meeting on 3rd January Clive asked me what I planned to do the and if I intended to start up on my own. I said I didn't know. I was upset and hurt by what had just happened. However, I have never taken any steps to poach Wojtek or any other member of staff. Both Clive and I have had shared frustrations with the business but nothing more than that. I have never collected information about you nor has it ever been my intention to "bring you down".

In response to your allegations, I have never "bullied" or "threatened" anyone at Sunsquare, no employee has ever come to me with a grievance against me and I certainly have never threatened anyone from withholding one. Your claims about me not using the computer system are untrue, the fact is that the sales department that I manage are the only department that have successfully started using it, this shows my commitment. The system as you know has not been correctly set up by Medatech and certain departments are resistant mainly due to a lack of managerial support. You have also mentioned in your statements on medical matters and details about my relationship that are personal to me, and have alluded threaten my family life with; this is totally unacceptable under any circumstances.

Given the above, I feel that I've been forced to resign with immediate effect due to a fundamental breach by you of my employment contract, and consider myself to have been constructively dismissed. I would also like to resign as a statutory director and would request that you file the necessary form at Companies House. All company property has been returned, as previously agreed. I will write you separately regarding my shares. I also have some outstanding expenses which I will also send to you separately.

Any future correspondence should be directed to my solicitors Greene and Greene"

101 On the same day the Second Respondent wrote to the Claimant to remind him of the outstanding disciplinary and redundancy issues and to offer him a cooling off period to consider his decision to resign. He said that if he did not hear from the Claimant by 31 January at 3:00 pm he would assume that the Claimant stood by his resignation. He denied that any conduct of the Respondent amounted to a dismissal.

102 Early conciliation in respect of the First Respondent started on 30 January 2020 and ended on 14 February 2020.

103 The Claimant's P45 was issued on 25 February 2020.

104 Early conciliation in respect of the Second Respondent was started on 22 April 2020 and ended on 23 April 2020.

105 The Claimant presented his claim on 23 April 2020. The Respondents response with its purported counterclaim was presented on 26 May 2020.

The Parties Submissions

106 We heard, read and considered the parties submissions. it is neither proportionate nor necessary to set them out here.

The Law

107 We were primarily concerned with the Employments Rights Act Ss 95 and 98. and Equality Act 2010 Ss 13, 18, 123 and 136.

108 We were referred to, or referred ourselves to, the following authorities:-

Western Excavating (ECC) Ltd v Sharp [1978] ICR 221

Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978

Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666

Gebremariam v Ethiopian Airlines Enterprise (t/a Ethiopian Airlines) UKEAT/0439/12/GE

Working Men's Club and Institute Union v Balls UKEAT/0119/11/LA

Iceland Frozen Foods Ltd v Jones [1983] ICR 17

Polkey v A E Dayton Services [1988] AC 344

R v British Coal Corporation ex p Price (No 3) [1994] IRLR 72

Capita Hartshead Ltd v Byard [2012] ICR 1256

British Home Stores v Burchell [1980] ICR 303

Warren James Jewellers Ltd v Christy EAT/1041/02

Amnesty International v Ahmed [2009] ICR 1450

Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15; [2012] ICR 704

Shamoon v Chief Constable of the RUC [2003] ICR 337

Nagarajan v London Regional Transport [1999] ICR 877

Further Findings and Conclusions

109 Our principal findings of fact are set out above. We incorporate them here.

110 We consider it most logical to deal with the Claimant's claims in the following order.

Direct Age Discrimination (sections 5 and 13 of the Equality Act 2010)

9. The Claimant claims that the alleged discriminatory treatment was:
(i} The Second Respondent's comment on 3rd January 2020 that the Claimant would be able to find an alternative role elsewhere more easily that his counterpart who was older; and
(ii) Selection for redundancy based on his age.
10. Did the First and Second Respondents subject the Claimant to the alleged treatment identified?
11. If so, did this amount to less favourable treatment?
12. If the First and Second Respondent treated the Claimant less favourably, did it do so because of the Claimant's age?

13. The Claimant relies on his former colleague, Mr Howard, as an actual comparator.
Indirect Age Discrimination (section 19 of the Equality Act 2010)
14. The Claimant alleges that the PCP is the Respondents' practice of selecting candidates for redundancy based on their age.
15. Did the Respondents apply the PCP identified by the Claimant?
16. If so, did the PCP place those the protected characteristic of age (in this case, younger age) at a particular disadvantage when compared to those older employees?
17. If so, did the PCP place the Claimant at a particular disadvantage? 18. If so, was there a legitimate aim to the PCP? What is this aim?
19. If so, was the PCP a proportionate means of achieving the legitimate aim identified?

111 The relevant provision of the Equality Act 2010 is in the following terms:

13 Direct discrimination
(1) 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.
(2) 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.

112 In considering that provision we have to apply the law relating to the burden of proof,

136 Burden of proof
(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.
(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

113 The Claimant has established to our satisfaction that he was subject to unfavourable treatment by being informed that his role was redundant and/or by not being pooled with other employees.

114 That was less favourable treatment that that accorded to his chosen comparator, Mr Howard, whose suitability was not challenged.

115 The onus therefore lies on the Claimant to establish, on the balance of probabilities, evidence from which we could infer, absent an explanation from the Respondents, that his treatment could have been because of his age.

116 In light of our above findings we have concluded that:-

116.1 The actual words used by the Second Respondent in the meeting on 3 January were more likely to be as stated by him. That also accords with the Claimant's pleaded case. We thought it surprising that the Clamant did not, at any time, even attempt to quote the Second Respondent's actual words.

116.2 Having heard all the evidence and considered it at length we accepted that the reasons set out by the Second Respondent on 10 January 2020 were based on factual realities. None of them were challenged.

116.3 The Second Respondent spoke those words, 'don't worry, at 42 you'll be fine on all fronts' toward the conclusion of a meeting during which the Claimant became tearful and upset at the loss of his job and the discussion of his medical issues.

117 We concluded that we were unable to draw that inference.

118 We accepted that what was said was clearly a reference to the Claimant's age and his future prospects. However, in our view it did not allow us to infer that age could have played a conscious or unconscious part in the decision making process. The decision that the Claimant's role be made redundant had clearly been taken before the meeting. There was no evidence that the Second Respondent had had the Claimant's age in mind when he made the decision, far less of any causal connection between the decision and the Claimant's age.

119 We thought it more likely that the Second Respondent's choice of words was intended to offer some comfort to the Claimant for the future, at or near the conclusion of the meeting, rather than as an indication of the basis for an earlier decision.

120 For the sake of thoroughness we have gone on to consider the position on the basis that the burden of proof has shifted to the Respondents.

121 The reasons given by the Respondents for their decision to make the Claimant's role redundant were set out in the email of 10 January 2020. It was sent the day after the issue of age discrimination were first raised on the Claimant's behalf. We repeat them for convenience,

> 1 Poor trading in 2019
> 2 Cost cutting required without question
> 3 Trading insolvently in December
> 4 £150k had to be put into the company by Justin Seldis (JS) as well as borrowing. Also showing a current loss for the year (with 3 weeks to go) of £300k.,
> 5 No certainty going forward. Jan 31 could affect things. Uncertainty still looms.
> 6 Part of the MBO discussions were that 2 directors were enough going forward.
> 7 Sales team small and no room for additions. i.e. No room for a job there.
> 8 External sales for Sunsquare and Ikon also covered.
> 9 Having a sales Director of 4 internal and 1 external is a luxury in the current climate. There is genuinely no need for this position.
> 10 Marketing done by JS, so small role for very large salary. Simply now unaffordable.
> 11 No suitable jobs available at the present time as a replacement. Running at lowest staffing level for many years.
> 12. Income levels for other sales jobs too low to be a serious proposition.
> 13. Sales Director job will no longer exist. JS will a.dd that role to his and will do so with ease.
> 14. Directors pay makes up over 1/3 of the entire salaries. Told by accountants that this is completely imbalanced.

122 We though those to be a very full and entirely reasonable explanation for the decision to make the Claimant's role redundant. They are not a construct to counter the allegation of discrimination. They were firmly based in reality. Against those reasons, which we deal with further, below, we would have been quite unable to find that the Claimant's age, even if it had been subconsciously in the Second Respondent's mind, had played a part in his reasoning, far less been a significant cause of his decision.

123 This claim is not well founded and must be dismissed.

Time Points

> 1. Are the Claimant's claims for direct age discrimination against the Second Respondent (concerning the comment allegedly made by the Second Respondent to the Claimant on 3rd January 2020) out of time?
> 2. Does the claim referred to in the paragraph above relate to conduct extending over a period which is to be treated as done at the end of that period? Accordingly, is such a claim brought in time?
> 3. If not, in each case, is it just and equitable to extend time?

124 In light of our above Judgment these do not arise for decision.

Indirect Age Discrimination (section 19 of the Equality Act 2010)

> 14. The Claimant alleges that the PCP is the Respondents' practice of selecting candidates for redundancy based on their age.
> 15. Did the Respondents apply the PCP identified by the Claimant?
> 16. If so, did the PCP place those the protected characteristic of age (in this case, younger age) at a particular disadvantage when compared to those older employees?
> 17. If so, did the PCP place the Claimant at a particular disadvantage? 18. If so, was there a legitimate aim to the PCP? What is this aim?
>
> 19. If so, was the PCP a proportionate means of achieving the legitimate aim identified?

125 The relevant provision of the Equality Act 2010 is as follows,

> **19 Indirect discrimination**
> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B´s.
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B´s if–
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> (c) it puts, or would put, B at that disadvantage, and
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

126 We have concluded that the Claimant has failed to establish, on the balance of probabilities, that the PCP he relies on existed or applied. The Respondent did not apply such a PCP to the Claimant.

127 This claim is not well founded and must be dismissed.

Victimisation (section 27 of the Equality Act 2010)

> 20. Was the alleged grievance raised by the Claimant representative on 9th January 2020, a protected act done by the Claimant? ·
> 21. Was the Respondents decision to move the Claimant from full pay to Statutory Sick Pay a detriment imposed on his because of the protected act?

128 The relevant provision is,

> **27 Victimisation**
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because–
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.
> (2) Each of the following is a protected act–
> (a) bringing proceedings under this Act;
> (b) giving evidence or information in connection with proceedings under this Act;
> (c) doing any other thing for the purposes of or in connection with this Act;
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.

129 We have no hesitation in finding that the letter of 9 January 2020 was a protected act.

130 The Claimant's contract clearly did not entitle him to full contractual pay if he was off sick. It only provided for SSP. However, the Handbook provided that contractual sick pay was "at the discretion of the" First Respondent.

131 We accept that, in the past, the Claimant's occasional brief absences were self-certificated, if at all, and he was paid in full for them.

132 The Claimant was placed on Gardening Leave on 3 January 2020 and was entitled to be paid his full salary during that period.

133 However, on 9 January 2020 his solicitor's letter informed the Respondents that he had been signed off sick and was making an allegation of age discrimination.

134 The Respondent's response was sent the next day. We thought that proximity in time to be important. Among other things, it stated that the Claimant had been placed on SSP. We have given careful consideration as to whether this was because he had been signed off or because he had performed a protected act.

135 We thought it noteworthy that the only act complained of as victimisation was one of a series of acts of unfavourable treatment that the Respondents subjected him to in the immediate aftermath of his protected act. These are primarily relied on by the Claimant for his claim alleging unfair constructive dismissal, but in our view are also illustrative of a change of attitude on the part of the Respondents following the protected act.

136 We find that the Second Respondent was upset at what he saw as the Claimant's obstruction of his efforts to progress his own agenda, and frustrated by the delay, However, he produced no documentary evidence to show senior

managers or Directors having been paid SSP. The discretion to pay the Claimant contractual sick pay was clearly exercised in his favour in the past.

137 In light of all our findings we have concluded, on the balance of probabilities, that, this decision was in retaliation for the protected act and amounted to victimisation.

Constructive dismissal (sections 94-98 of the Employment Rights Act 1996)

4. Was there a breach of the implied and/or express terms by the First Respondent allegedly doing the following:

a. Advising the Claimant that he would be made redundant without any consultation on 3rd January;
b. Advising the Claimant on 3rd January, that his age was a factor in the decision to make him redundant;
c. Placing the Claimant on gardening leave;
d. Commencing an unfounded disciplinary investigation;
e. Alleging various statements against the Claimant but not providing them;
f. Demanding that company property be returned and on short timescales;
g. Threatening the Claimant with the police;
h. Refusing to accept the Claimant was unable to attend meetings;
i. Refusing to obtain any independent medical advice;
j. Refusing to consider the Claimant's representative's letter of 9th January 2020 as a grievance;
k. The unfounded, fabricated allegations contained in the document entitled: "conclusion to disciplinary investigation regarding Mr Mark Lambert, Sales Director;"
l. The reference to personal and irrelevant information in the above statement;
m. The frequent short deadlines given to the Claimant by the Second Respondent; and
n. The continued and sustained unreasonable behaviour from the Second Respondent in his correspondence with the Claimant.

5. What was the last straw? The Claimant claims that this was the email from the Second Respondent sent to the Claimant on 28th January 2020 at 10.59. The Claimant claims that this email made further false allegations and pushed the Claimant to attend a meeting.
6. Was the First Respondent in serious / repudiatory breach of contract?
7. Did the Claimant resign promptly in response to that repudiatory breach in circumstances whereby he is treated as having been dismissed? Or did the delay in resigning thereby accepting the breach?
8. Was this dismissal unfair?

138 We found the Claimant had established, on the balance of probabilities, the veracity of the above allegation to the following extent.

138.1 a This was the effect of what was said by the Second Respondent on 3 January 2020. It was not couched in contingent terms. It was not about the Claimant's role.

138.2 b This was not said.

138.3 c This was done, but it was not unreasonable in the context.

138.4 d This investigation was not unfounded. It was justified by the matters that came to light on and after 6 January 2020.

138.5 e This was unreasonable, and contrary to the ACAS Code of Conduct.

138.6 f This was unreasonable.

138.7 g This was unreasonable.

138.8 h This was unreasonable.

138.9 i This was rendered unreasonable by the Respondents refusal to accept the GP's medical certificates.

138.10 j This was unreasonable

138.11 k The content and tone of this document were unreasonable.

138.12 l This was unnecessary and unreasonable.

138.13 m These were unreasonable.

138.14 n This was unreasonable.

139 We are entirely satisfied that the nature and extent of the Respondents' unreasonable conduct was cumulatively such as to seriously undermine the relationship of trust and confidence. There was no just cause for it. It was a fundamental breach of contract.

140 In our view there was not need in this case to establish a "last straw". All of these events took place within a 4 week period. Nothing the Claimant did in that period could be construed as affirming the contract or waiving a preceding breach,

141 The Claimant resigned promptly: that was a dismissal within S.94 ERA 1996.

142 The Respondents did not advance a potentially fair reason for the dismissal that took place. We must inevitably find the dismissal unfair.

Unlawful Deduction from Wages (section 13 of the Employment Rights Act 1996)

22. Was the claimant entitled to carry forward five days untaken annual leave?
23. Was the Claimant owed 7 days annual leave when his employment terminated?
24. Did the First Respondent make deductions of 7 days' pay (in the sum of£.....) from the Claimant's wages?
25. If made out, was this deduction unlawful?

143 We refer to our above findings. We have concluded, on the balance of probabilities, that the Claimant has failed to establish that any deductions were made from his wages, far less that they were "unauthorised'.

Polkey

Redundancy

144 We repeat our above findings and again repeat, for convenience, the factual reasons advanced by the Respondents for the decision to select the Claimant for redundancy.

1 Poor trading in 2019

2 Cost cutting required without question
3 Trading insolvently in December
4 £150k had to be put into the company by Justin Seldis (JS) as well as borrowing. Also showing a current loss for the year (with 3 weeks to go) of £300k.,
5 No certainty going forward. Jan 31 could affect things. Uncertainty still looms.
6 Part of the MBO discussions were that 2 directors were enough going forward.
7 Sales team small and no room for additions. i.e. No room for a job there.
8 External sales for Sunsquare and Ikon also covered.
9 Having a sales Director of 4 internal and 1 external is a luxury in the current climate. There is genuinely no need for this position.
10 Marketing done by JS, so small role for very large salary. Simply now unaffordable.
11 No suitable jobs available at the present time as a replacement. Running at lowest staffing level for many years.
12. Income levels for other sales jobs too low to be a serious proposition.
13. Sales Director job will no longer exist. JS will a.dd that role to his and will do so with ease.
14. Directors pay makes up over 1/3 of the entire salaries. Told by accountants that this is completely imbalanced.

145 We note the Claimant's position: he would have avoided redundancy by persuading the Respondent's to 'bump' Mr Kennedy. He also asserts that they failed to consider pay cuts for themselves.

146 However, we did not accept that the Respondent has to show that its financial position was such that it "necessitated" the Claimant's redundancy. We take the view that the decision on whether to make a redundancy is a matter of management prerogative. In a case such as this, where the duties of a person's role are to be absorbed by present staff that is sufficient to meet the statutory role for a diminution in the needs of the business to be expected to diminish.

147 We were not persuaded by the Claimant's submissions. It was common ground between the then three Directors that cuts needed to be made. The MBO proposal had made it clear that only two Directors were needed. It was not disputed that the Second Respondent had bailed out the First Respondent. Why would the other Directors consider pay cuts for themselves when there was a reasonable alternative option?

148 Mr Kennedy was going to earn considerably less than the Claimant and his costs would have been assumed in the MBO proposal. We thought it extremely unlikely that the Claimant would agree to a salary reduction to the same level as Mr Kennedy, so he would still be expensive by comparison.

149 We thought it highly likely that, had a proper process been followed, the Claimant would have been fairly dismissed for redundancy by the end of February 2020.

Conduct

150 We accepted the Respondents had reasonable cause to investigate the Claimant in light of the matters that came to their attention on and after 6 January 2020.

151 It is equally clear, however, that the manner in which the Respondents went about investigating and progressing that matter was fundamentally flawed. Had it proceeded to a disciplinary hearing based on that process it would inevitably have been unfair.

152 We were concerned at the nature of the allegations that had been raised as potentially offences of gross misconduct.

152.1 We thought the gravity of the Claimants transmission of emails to himself as a Director, and in the process of considering an MBO, to be exaggerated.

152.2 We also thought the dissatisfaction of some of his staff with his attitude to be overstated. The sales environment in any business is known as a hot seat. Performance is everything, and those that do not achieve their targets are frequently placed in uncomfortable positions. That is the nature of such roles.

152.3 A question mark also existed over the veracity of Mr Howard's evidence: it is surprising that the matters he raised only came to light after he learned of the Claimants redundancy. The backdating of his letter of 10 January 2020, not created until 23 January 2020, also calls his evidence into question.

153 In light of these matters we have concluded that the charges faced by the Claimant may not have been proved and, in any event, were most unlikely to be established to be gross misconduct. He would not have been dismissed for them if there had been a fair process and hearing.

ACAS uplift

154 This is governed by the terms of S.207A Trade Union and Labour Relations (Consolidation) Act 1992,

> 207A Effect of failure to comply with Code: adjustment of awards
> (1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.
> (2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
> (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
> (b) the employer has failed to comply with that Code in relation to that matter, and
> (c) that failure was unreasonable,
> the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

<u>Redundancy</u>

155 The Code has no application to proposed redundancy dismissals.

<u>Conduct</u>

156 The Code applies to unfair dismissal claims, but we wish to hear further submissions on whether it applies in a case such as this where there was no dismissal for misconduct.

Discrimination

157 This claim was not successful, so the Code relating to grievances has no application.

Victimisation

158 The Code appears to apply to a grievance alleging victimisation, but we wish to hear further submissions on which grievance is relied on in this regard.

Remedy

159 A remedy hearing will be listed in due course, for a date to be fixed, if the parties cannot resolve the matter.

Employment Judge Kurrein

Date: 25 October 2021

Sent to the parties and

entered in the Register on

16 November 2021

For the Tribunal