EMPLOYMENT TRIBUNALS

Claimant **David Robson**
Respondent **Clarke's Mechanical Ltd**

Heard at: Bristol (by VHS)
On: 15, 16, 17 and 18 November 2021

Employment Judge: M Street
Members Mrs M Metcalfe
Mr M Cronin

Representation

Claimant: Mr Sanghera, counsel
Respondent: Mr S Clarke, company director

JUDGMENT having been sent to the parties on 10 December 2020 and written reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. **Evidence**

1.1. The Tribunal heard from the claimant, and, for the Respondent, from Mr Mr Clarke, company director, Mr Liam Greenham, plumber, Mr Paul Bewick, contracts manager and line manager for the schools team, Mr Tom Fox, plumbing and heating engineer and supervisor, Mr Lee Pitman, supervisor/contracts manager on the commercial side, and Mr Paul Taylor, contracts manager on the domestic side.

1.2. The Tribunal read the documents referred to in the bundle provided.

2. **Issues**

2.1. The Claimant claims unfair dismissal and discrimination on the grounds of age. The issues were defined in the Case Management Order of Employment Judge Salter of 27 October 2020.

2.2. In brief summary, they are,

- Whether the claims other than unfair dismissal were made in time
- Whether there was an unfair dismissal – the Claimant contests the reason for his dismissal; he contests whether there was a fair selection for redundancy and a fair process leading to a fair decision to dismiss, one within the range of reasonable responses open to a reasonable employer
- Whether there was direct discrimination on the grounds of age in respect of the following:
  The dismissal
  Calling him "Half-dead Dave"
- If the Claimant was successful, as to remedy.

2.3. As set out in Employment Judge Salter's Order, and using the internal numbering there, the issues are:

1. Time/ Limitation issues

1.1 Given the date the claim form was presented (16 March 2020) and the dates of early conciliation (Date A 29 January 2020, Date B 14 March 2020) , any complaint about something that happened before 30 October 2019 is potentially out of time so that the tribunal may not have jurisdiction to deal with it.

1.2 The Respondent is to indicate if it accepts that the Claimant's claims relating to his dismissal have been presented within the primary limitation period contained within s111(2)(a) or the Employment Rights Act 1996 ("ERA") and s123 Equality Act 2020.

1.3 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?
1.3.2 If not, was there conduct extending over a period?
1.3.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.3.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.3.4.1 Why were the complaints not made to the Tribunal in time?
1.3.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Claims

2.1 Unfair dismissal claim

The Law

(a) In relation to unfair dismissal, section 98(1) of the ERA 1996 states that it is for the employer to show the reason for the dismissal and that that reason falls within subsection 2 or is some other substantial reason of a kind so as to justify the dismissal. In relation to the fairness of the dismissal, section 98(4) states:

> "where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer –
> (a) Depends on whether in the circumstances (including the size of the administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) Shall be determined in accordance with equity and the substantial merits of the case"

(b) As is well known, it is not for the Tribunal to substitute its judgment for that of a reasonable employer in deciding whether or not the employer acted reasonably for the purpose of section 98(4). Rather, the Tribunal should ask itself whether or not the decision to dismiss fell within the range of reasonable responses of a reasonable employer.

Qualification

(c) The Respondent accepts that the Claimant was an employee, that he was dismissed and that at the time of their dismissal he had sufficient continuity of employment to present a claim of unfair dismissal.

The Reason for the Dismissal

(d) What was the reason for the dismissal. The Respondent asserts that it was redundancy which is a potentially fair reason for section 98(2) ERA 1996.

(e) The Claimant does not accept that this is the real reason for his dismissal as the Respondent advertised his role immediately upon his dismissal.

Reasonableness of Process

(f) Did the Respondent hold that belief on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances. The burden of proof is neutral here, but it helps to know the Claimant's challenges to the fairness of the dismissal in advance and they are identified as follows:

(i) Did the Respondent adopt the process of a reasonable employer in the circumstances of the case? The Tribunal will consider whether:

(a) The Respondent warned and consulted with the Claimant (or their representative) about the proposed redundancy/ies;
(b) The Respondent adopted a fair redundancy basis on which to select for redundancy; and
(c) The Respondent considered suitable alternative employment.

Dismissal in Band of Reasonable Responses

(g) Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses open to a reasonable employer when faced with these facts?

2.2 Equality Act Claims

Protected Characteristic

(a) The Claimant relies on the Protected Characteristic of age. The Claimant was 69 years old at the time of his dismissal.

2.3 *Section 13 Direct Discrimination*

(a) It is not in dispute that the Respondent subjected the Claimant to the following treatment falling within section 39 Equality Act 2010, namely;

(i) dismissing the Claimant,
(ii) comments to the Claimant being "Half-dead Dave"

(b) Did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators who are not in materially different circumstances? The Tribunal will have to decide whether the Claimant was treated worse than someone else was

treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who he says was treated better than he was and therefore relies upon a hypothetical comparator, the characteristics of whom are a younger person carrying out the same role as the claimant but younger, in the region of 20 to 40 years old.

(c) If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic (ie, it was a material factor in the decision)?

(d) If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

(e) The Respondent does not contend that dismissal was a proportionate means of achieving a legitimate aim

2.4 *Employer's Defence*

The Respondent is not relying on the employer's defence within section 109 of the Equality Act 2010.

3. Remedy

(a) If the Claimant succeeds, in whole or in part, the Tribunal will be concerned with issues of remedy

Remedies for Unfair dismissal

(b) The Claimant confirmed that he is not seeking re-instatement or re-engagement by the Respondent.

(c) If the Claimant was unfairly dismissed and the remedy is compensation:

Basic Award

(i) The Claimant accepts he received a properly calculated redundancy payment. Accordingly no Basic Award is payable if there was a genuine redundancy situation. If there was no redundancy situation, then a Basic Award is payable. What basic award is payable to the Claimant if any?

(ii) The Respondent is not advancing any argument of contributory fault.

Compensatory Award

(iii) What financial losses has the dismissal caused the Claimant?
(iv) Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
(v) If not, for what period of loss should the Claimant be compensated?
(vi) If the dismissal was procedurally unfair, what adjustment, if any, should be made to any Compensatory Award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed/ have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Credit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604;
(vii) The Respondent is not arguing the Claimant's Compensatory Award should be reduced on grounds of contributory fault.

Discrimination

a. Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend? What financial losses has the discrimination caused the Claimant?

b. Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

c. If not, for what period of loss should the Claimant be compensated?

d. What injury to feelings has the detrimental treatment caused the Claimant and how much compensation should be awarded for that?

e. Has the detrimental treatment caused the Claimant personal injury and how much compensation should be awarded for that?

f. Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

g. Should interest be awarded? How much?

3. **Findings of Fact**

References are to the bundle, the first number being the indexed page number, the second the digital page number. Witness statements are referred to as "ws".

3.1. The Claimant was born on 23 June 1950.
3.2. He is qualified to work with gas, heating and plumbing. He is a qualified pipe fitter. He is gas-safe registered, City and Guilds qualified and a CSCS card holder. He has worked in the field since 1965. He describes himself as dual qualified, in that he was qualified both as a plumber and a gas fitter.
3.3. The Respondent is a company that provides services including plumbing, heating and ventilation with design, installation, maintenance, service and repairs to commercial, industrial and domestic customers. The sole director is Mr Clarke.
3.4. Mr Robson was employed by the Respondent as a plumber/pipefitter. His employment with the Respondent began on 16 January 2012.
3.5. He was dismissed with notice on 24 January 2020.
3.6. At the time of his dismissal, he was the oldest skilled worker in the business, at the age of 69.
3.7. It is agreed that there were no absence or conduct issues during his employment. There is no record of concern in relation to his performance.
3.8. There were at that time some 17 gas engineers/plumbers in the business, including 4 supervisors and around 10 office staff, with 4 apprentices.
3.9. Engineers and plumbers worked in teams.
3.10. At that time, Mr Robson was assigned to the school team, a team on the commercial side with some 7 engineers, but he had worked on different teams during his employment.
3.11. Christmas bonuses were paid to the staff in December 2019. Bonuses were not contractual.
3.12. A management meeting took place in the course of January 2020 (92/95) Those present included the accounts manager, Anita, Mr Clarke, Mr Bewick, Mr Taylor, Mr Pitman. The notes (which do not appear to be a contemporary record of the discussion) record that redundancies are necessary due to a downturn in workload specifically in the commercial market. The most valuable employees were those that had skills enabling them to work in both commercial and domestic work. The proposal was to focus more on the domestic market. The employees in the large contract team were those most at risk of redundancy, the area that had experienced the biggest downturn and a difficult area in which to secure contracts, given a competitive environment.
3.13. There had been a failure to secure expected contracts worth some £650,000, due to competition from mainland companies.
3.14. On 22 January 2020, Mr Robson was invited by Mr Clarke to a meeting on 24 January.

3.15. He had been working on a job which was coming to an end. He thought the meeting would be to tell him about his next job.

3.16. At the meeting on 24 January, he was told he was to be made redundant.

3.17. There had been no warning to Mr Robson before this meeting that he was at risk of redundancy, and no consultation with him. That is agreed.

3.18. Mr Robson was the first to be told that he was being dismissed for redundancy. That is agreed.

3.19. It is agreed that the meeting lasted 13 minutes. Mr Robson was given 8 weeks notice of dismissal on the grounds of redundancy at that meeting. It is agreed that he was not given any information about the redundancy process or any appeal procedure. No notes of the meeting have been produced.

3.20. He received an email on 28 January from Anita, the accounts manager (20/22). It said he had been given notice with effect from 27 January to 20 March 2020. He was awarded £6,300 by way of redundancy pay (103/106).

3.21. He appealed on 29 January (21/23). He asked a number of questions, including about the roles identified as at risk, the consultation process, selection and scoring and steps to mitigate the risk of redundancy. He pointed out his superior level of skill and experience, expressed surprise at having been selected and referred to the lack of any consultation or warning.

> "I am not aware of any other colleagues employed in the same role that had been identified and put at risk of redundancy. As you know there is a larger pool of 'Plumber/Pipe Fitters than just myself. This has led me to try and understand how and why I have been solely selected from the group of fully qualified 'Plumber/Pipe Fitters/ Gas Engineers' and served notice for dismissal.
>
> I believe that due to my current skill set and multi-disciplinary work history across gas, plumbing and pipefitting within domestic, commercial and industrial settings there is still a need for my role to exist and there is no basis to fairly dismiss me on the grounds of redundancy." (22/24).

3.22. He says he was the oldest plumber/pipe fitter on the staff and asks whether his age has been a factor (22/24).

3.23. He had had no information about the process or any associated selection criteria.

3.24. On 29 January, Mr Clarke responded, offering a meeting, copying in Mr Robson's union representative,

> "If you would like me to sit with both of you to discuss your Redundancy, please let me know"

3.25. On 31 January 2020, Clarke's Mechanical website showed an advertisement for a qualified plumber/pipefitter on the Isle of Wight, offering short term employed contract and sub-contract positions for immediate start in the installation and service team (appendix 2c to ET1, 30/32). That was a job for which Mr Robson was qualified. That ad must have gone in a day or so earlier at the latest.

3.26. There was also an advertisement in the County Press for a fully qualified gas engineer, inviting online applications to www.clarkesmechanical.com also on 31 January 2020 (17, appendix 2b to ET1, 29/31). That was a job for which it is agreed that Mr Robson was qualified.

3.27. On the same date, there was an advertisement in the County Press online jobs section for a gas engineer, a permanent full-time post on the Isle of Wight, with the employer named as Clarke's Construction Ltd (appendix 2a, 25/27)

3.28. There was also an advertisement for a fully qualified gas engineer, full-time, permanent, for Clarke's Construction Ltd on the se1jobs.com site (26/28).

3.29. The wording on the se1jobs.com advertisement is as follows:

> "Applicants must be qualified and have experience of servicing, maintaining and diagnosing faults on a wide variety of gas appliances.
> The successful applicant will have a current CGNI Certificate plus additional elements. Commercial / Catering qualifications an advantage but not essential.
> Our busy maintenance department deals with boiler breakdowns, servicing, gas safety reports for landlords and letting agencies as well as plumbing maintenance, commercial and catering servicing and maintenance.
> Salary negotiable dependent on experience/qualifications, company vehicle, uniform and mobile phone will be provided."

3.30. That wording is identical to the wording on the advertisement in the County Press inviting applications to www.clarkesmechanical.com (29/31).

3.31. It is agreed that positions within the company were advertised soon after Mr Robson was informed that he was made redundant and that there was a need for a gas engineer in the small works department which is why the job was advertised.

3.32. Others were invited to apply for voluntary redundancy on 11 February (110/114).

3.33. There was a meeting between Mr Robson, Mr Clarke and Mr Cumming, GMB Union, on Wednesday 12 February. Explanation was requested, but no explanation of the redundancy process or basis for Mr Robson's selection was given at that meeting.

3.34. On 17 February, the Claimant received from Mr Clarke details of scoring criteria said to have been applied in selecting him for redundancy

(98). The scores applied are not explained in any way. This was his first knowledge that a scoring procedure had been applied or how he had been assessed.

3.35. In an email to Mr Clarke, he complained that the scores had been fabricated. In the two previous meetings, 25 January and 12 February, there had been no mention of a scoring exercise having been carried out in spite of a direct question being asked each time (34/36). Of the meeting of 12 February, he writes,

> "You were unable to provide any clarification on the scoring criteria that was used, failed to provide any evidence that a scoring matrix existed and that subsequent scoring criteria had been identified, despite being asked directly."

No other qualified worker had been made aware of any scoring criteria or of any scoring exercise being carried out in relation to them, and no other qualified worker had been dismissed for redundancy.

3.36. The criteria identified were length of service, qualifications, domestic experience, commercial experience, performance, skills, flexibility and attendance. Scoring was out of 5, five being the best. Mr Robson was scored 28, 2 for domestic experience and performance, 3 for skills and flexibility, 4 for length of service and qualifications, 5 for commercial experience and attendance. The score for performance was the lowest, save for that of the junior trainee. The score for domestic experience equated to those of the level 2 plumbers (trainees) and the welder/pipefitter (93/96).

3.37. The scores for the seven men, including the two trainees and two chargehands were 13, 18, 27, 27, 28, 37 and 38.

3.38. On 27 February, Mr Robson received a letter confirming that he would be paid for the remaining three weeks of his notice period and was not required to work them. His last day of work was 28 February.

3.39. Two other people were made redundant in February or March. Andre and Ian (Andre was one of those invited to apply for voluntary redundancy). The dates and procedure have not been put in evidence.

Half-Dead Dave

3.40. Mr Pitman admitted using the name "Half-dead" or "Half-dead Dave" to refer to Mr Robson, on an occasion in around 2015. He heard the name used on site (ws para 4). He was giving an instruction to Mr Fox to take plumbing fittings to Mr Robson. It was in the office, in the hearing of others.

3.41. His oral account was,

> "Dave was working a particular job. I think I give Tom something to give to him and I said give that to Dave and I think Tom hadn't worked with

Dave and he said “Who’s Dave?”, and I said Half-dead Dave because that is what I thought that was what they all called him on site.”

3.42. Mr Fox that he handed Mr Robson the fittings saying “Here you are, Half-dead”. Mr Robson asked him who called him that, and Mr Fox said it was Mr Pitman. Mr Fox then apologised, having assumed that it was Mr Robson’s nickname. He was uncomfortable with having used it.

3.43. Mr Pitman had used the words because he thought Mr Fox would know who he meant. There was no malice involved, it was just banter, he told us.

3.44. Those are the agreed facts. The Tribunal’s findings in relation to whether the term went on being used are given below.

Law

Unfair Dismissal

1. Section 98(1) of the Employment Rights Act 1996 (“ERA 1996”) sets out:

> “In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.”

2. It is for the employer to satisfy the Tribunal as to the reason for the dismissal.
3. The reasons that are potentially fair under section 98(2) are capability, misconduct, redundancy or some other substantial reason.
4. If the employer fails to establish that the reason for the dismissal was an acceptable one, the tribunal must find the dismissal unfair.
5. Where the employer establishes that the reason for the dismissal was within section 98(2), then the next question is whether it was fair and equitable including as to the procedure adopted.
6. By section 98(4),

> “Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
> a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

b) shall be determined in accordance with equity and the substantial merits of the case."

7. First, therefore the employer must establish the reason or principal reason for the dismissal and that it is a potentially fair reason.
8. Then the Tribunal must be satisfied that the employer has acted reasonably in treating the ground as a sufficient reason for dismissal.
9. By section 139(1)(b),

"For the purposes of this Act, an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to - ….

(b) the fact that the requirements of that business –

(i) for employees to carry out work of a particular kind
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

10. Where the allegation is of dismissal for redundancy, the employer must show that the facts supporting that ground in fact exist *(Elliott v University Computing Co. (Great Britain) Ltd 1977 ICR 147)*

Reason in the mind of the employer

11. Applying *Abernethy v Mott Hay & Anderson (1974 IRLR 213),*

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

12. "The essential point is that the "reason" for a dismissal connotes the factor or factors operating on the mind of the decision-maker which causes them to take the decision – or, as it is sometimes put, what "motivates" them to do what they do." *Beatt v Croydon Health Services NHS Trust 2017 EWCA Civ 401 2017 IRLR 748*

Fair Redundancy

13. Redundancy is a potentially fair reason for dismissal, but it may be unfair in all the circumstances. The position was summarised by Lord Bridge in *Polkey v A E Dayton Services Ltd [1988] ICR 142 at 162 – 163*

> "in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimize redundancy by redeployment within his own organisation. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with."

14. In carrying out a redundancy exercise, an employer should begin by identifying the group of employees from which those who are to be made redundant. If an employer simply dismisses an employee without first considering the question of a pool, the dismissal is likely to be unfair *(Taymech Ltd v Ryan EAT 663/94))*.
15. The question for the Tribunal is not what the Tribunal thinks is the right pool. It is whether the employer's choice of pool is within the range of reasonable responses available to the employer.

> "Different people can quite legitimately have different views about what is or is not a fair response to a particular situation… in most situations there will be a band of potential responses to the particular problem and it may be that both of solutions X and Y will be well within that band."

16. Relevant factors in determining whether the employer has acted reasonably in identifying the pool will include,

    - Whether other groups of employees are doing similar work to the group from which selections are made
    - Whether employee's jobs or skills are interchangeable
    - Whether the employee's inclusion in the unit is consistent with his or her previous position
    - Whether the selection unit was agreed with any union.

17. Usually the pool is composed of employees doing the same or similar work.
18. Job losses confined to one team can result in the dismissal of skilled and experienced staff who are of greater long-term value to the organisation than other individuals whose posts are not directly affected. If therefore the pool is drawn more widely to include different teams, someone not obviously affected by the reduction of work may be fairly dismissed for redundancy, whether their post goes instead to someone whose role has been lost. That is known as "bumping", when an employee is redeployed, with the dismissal of the person previously doing that job.
19. It can therefore be unfair not to consider offering alternative employment to a potentially redundant employee, even in the absence of a vacancy *(Lionel*

Leventhal Ltd v North EAT 0265/04). Whether such a failure is unfair is a question of fact for the Tribunal which should consider factors such as,

- Whether there is a vacancy
- How different the two jobs are
- The difference in remuneration between them
- The relative length of service of the two employees
- The qualifications of the employee at risk of redundancy.

20. Again, it is a matter of the Tribunal considering the range of reasonable responses in assessing whether failure to consider or the reasons for rejecting bumping is fair.
21. When selecting for redundancy, the criteria applied must be objective and applied with transparency and must not be unduly vague of ambiguous. There should be reference to data such as records of attendance, efficiency and length of service that would support or explain the scorings given, although an element of judgment is necessarily part of the assessment. The Tribunal again must not substitute its own judgment but be satisfied that the method of selection was not inherently unfair and that it was applied in the particular case in a reasonable fashion.
22. It is reasonable for an employer to try to retain a workforce that is balanced in terms of skills and abilities. So it is reasonable to assess skill and knowledge, but there should be some objective assessment. An organisation that appraises and keeps records will be better placed than the employer that relies only on a subjective opinion.

Direct Discrimination - section 13

3.45. Direct discrimination is provided for under the Equality Act 2010 ("EA 2010") by section 13(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.'

3.46. By section 39(2) of the EA 2010,

> 'An employer (A) must not discriminate against an employee of A's (B)
> (a) as to B's terms of employment;
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
> (c) by dismissing B;
> (d) by subjecting B to any other detriment.'

3.47. The words “because of” mean that the protected characteristic must be a cause of the less favourable treatment, but it does not need to be the only or even the main cause. For it to be a significant influence or an effective cause is enough.

3.48. Motive or intention is not required.

3.49. Treatment is “because of a protected characteristic” if either

- it is inherently discriminatory (James v. Eastleigh Borough Council [1990] ICR 554) or
- if the characteristic in question influenced the "mental processes" of the alleged discriminator whether consciously or unconsciously, to any significant extent *(Nagarajan v London Regional Transport [2000] 1 AC 501).*

3.50. It is where a decision is alleged to fall into the second category that it will be necessary to identify the person who made the decision. Detriment does not require a physical or economic consequence; it is sufficient that a reasonable person might take the view that they have been disadvantaged:

> “Detriment exists if a reasonable worker would, or might, take the view that the treatment accorded to her had in all the circumstances been to her detriment. It is not necessary to demonstrate some physical or economic consequence.” *(Shamoon v Chief Constable of RUC [2003] IRLR 285 HL)*

3.51. As the Equality Act Statutory Code of Practice on Employment (the “Code of Practice”), explains, at paragraph 3.5:

> ‘It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated – or would have treated – another person.’

3.52. In general, direct discrimination cannot be justified. Direct discrimination on the grounds of age can be justified as a proportionate means of achieving a legitimate aim.

The comparator

3.53. Essential to the consideration of less favourable treatment is the question of comparison.

3.54. By section 23 of the EA 2010,

> "On a comparison of cases for the purposes of sections 13, 14 and 19, there must be no material difference between the circumstances relating to each case."

3.55. This is dealt with by the Code of Practice at paragraphs 3.22 onwards.

3.56. The other approach is to say but for the relevant protected characteristic, would the claimant have been treated in this way? That may be helpful in identifying a hypothetical comparator (Code of Practice, 3.27).

Burden of proof

3.57. By section 136(2) and (3) of the EA 2010, the test in respect of the burden of proof is set out:

> "(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.'

3.58. The switching of the burden of proof is simply set out in the Code at para 15.34:

> "If a claimant has proved facts from which a tribunal could conclude that there has been an unlawful act, then the burden of proof shifts to the respondent. To successfully defend a claim, the respondent will have to prove, on balance of probability, that they did not act unlawfully. If the respondent's explanation is inadequate or unsatisfactory, the tribunal must find that the act was unlawful."

3.59. For the burden of proof to shift, the claimant must show facts sufficient – without the explanation referred to – to enable the tribunal to find discrimination. The Barton guidelines as amended in the Igen case *(Igen v Wong, 2005 IRLR 258 CA),* remain the basis for applying the law notwithstanding the re-enactment of discrimination legislation in the 2010 Act. It is those guidelines that establish the two-stage test,

> "The first stage requires the complainant to prove facts from which the Employment Tribunal could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld *(Peter Gibson LJ, para 17, Igen)*

3.60. The Tribunal is required to make an assumption at the first stage which may be contrary to reality.

3.61. In *Hewage v Grampian Health Board [2012] UKSC 37,* the application of the Barton/Igen guidelines to cases under the EA 2010 is approved at the highest level. At paragraph 33, Lord Hope, on the burden of proof provisions, says,

> "They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence…"

3.62. In *Laing and Manchester City Council and others, 2006 IRLR 748,* the correct approach in relation to the two-stage test is discussed,

> "No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case…. (para 73)
> The focus of the tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race (*or other)* discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a tribunal to say, in effect, 'there is a nice question as to whether the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race'.

3.63. The nub of the question remains why the claimant was treated as he or she was:

> "The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination." *(Madarassy v Nomura International plc) 2007 IRLR 246).*

3.64. In that case, in a judgment later approved by the Supreme Court in Hewage, above, Mummery LJ pointed out that the employer should be able to adduce at stage one evidence to show "that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant."

3.65. The "something more" that may lead a Tribunal to move beyond the difference in status and treatment need not be substantial – it may be derived from the factual context including inconsistent or dishonest explanations *(see Base Childrenswear Ltd v Otshudi 2019 EWCA Civ 1648 CA; Veolia Environmental Services UK v Gumbs EAT 0487/12.*

3.66. The presence of discrimination is almost always a matter of inference rather than direct proof – even after the change in the burden of proof, it is still for a claimant to establish matters from which the presence of discrimination could be inferred, before any burden passes to his or her employer.

3.67. In drawing inferences, an uncritical belief in credibility is insufficient' as Sedley LJ pointed out in *Anya v University of Oxford 2001 IRLR 377 CA (paragraph 25)* it may be very difficult to say whether a witness is telling the truth or not. Where there is a conflict of evidence, reference to the objective facts and documents, to the likely motives of a witness and the overall probabilities can give a court very great assistance in ascertaining the truth.

3.68. In *Talbot v Costain Oil, Gas and Process Ltd and ors 2017 ICR D11, EAT*, His Honour Judge Shanks — having looked at the relevant authorities — summarised the following principles for employment tribunals to consider when deciding what inferences of discrimination may be drawn:

- it is very unusual to find direct evidence of discrimination
- normally an employment tribunal's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before and after the unfavourable treatment in question
- it is essential that the tribunal makes findings about any 'primary facts' that are in issue so that it can take them into account as part of the relevant circumstances
- the tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference
- assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also of reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities
- where there are a number of allegations of discrimination involving one person, conclusions about that person are obviously going to be relevant in relation to all the allegations

- the tribunal must have regard to the totality of the relevant circumstances and give proper consideration to factors that point towards discrimination in deciding what inference to draw in relation to any particular unfavourable treatment

- if it is necessary to resort to the burden of proof in this context, S.136 EA 2010 provides, in effect, that where it would be proper to draw an inference of discrimination in the absence of 'any other explanation', the burden lies on the alleged discriminator to prove there was no discrimination.

3.69. Unreasonable conduct or poor management does not of itself point to discrimination. There must be indications from the evidence that point to the unreasonable conduct relating to the prohibited ground *(Laing v Manchester City Council and anor 2006 ICR 1519, EAT).*

3.70. In *Glasgow City Council v Zafar 1998 ICR 120, HL*, Lord Browne-Wilkinson considered that,

> "The conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant "less favourably".' His Lordship also approved the words of Lord Morison, who delivered the judgment of the Court of Session, that 'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances".

3.71. Equally, it cannot be simply inferred that the fact that an employer has acted unreasonably towards one employee means it would have acted the same way towards others. A failure to explain unreasonable conduct by the employer can support an inference of discrimination. If an employer acts in a wholly unreasonable way, it may be inferred that the explanation offered is not the true or full explanation *(Rice v McEvoy 2011 NICA 9 NICA).* In all cases, the drawing of inferences involves careful consideration of the surrounding facts:.

> "Facts will frequently explain, at least in part, why someone has acted as they have" (Elias P in Laing (above).

3.72. However,

> 'Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic.' Simler P, *Chief Constable of Kent Constabulary v Bowler EAT 0214/16*

3.73. As stated by the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL*, an unjustified sense of grievance does not point to less favourable treatment.

3.74. Where a case consists of several allegations, the Tribunal must consider each separately to determine whether less favourable treatment occurred by comparison with others, so as to shift the burden of proof, rather than taking a broad-brush approach in respect of all the allegations *(Essex County Council v Jarrett EAT 0045/15).*

Time Limits – Equality Act

3.75. Section 123 of the EA 2010 sets out the period within which proceedings are to be brought.

3.76. Proceedings on a complaint within section 120 may not be brought after the end of:

> (a) the period of 3 months starting with the date of the act to which the complaint relates or
> b) such other period as the employment tribunal thinks just and equitable.

3.77. That means that a claim must be presented before the end of the three-month period beginning when the act complained of was done. The date of the act is included in the calculation of the time allowed. That means the period of three months beginning with 10 March ends on 9 June.

3.78. By section 123(3),

> " For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.

3.79. By section 123(4)

> "In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

3.80. In *Hendricks v Metropolitan Police Commissioner [2002) EWCA Civ 1686,* in particular paragraphs 51 and 52, continuing acts are explored, concluding simply,

> "The question is whether there is an act extending over a period as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed."

3.81. The question is whether the employer is responsible for "an ongoing situation or continuing state of affairs" in which the members of the defined group are treated less favourably. It is wrong to pay close attention to words such as 'policy', 'rule', 'practice', 'scheme' or 'regime', as these are but examples of when an act extends over a period.

3.82. In *Hale v Brighton and Sussex University Hospitals NHS Trust (EAT 0342/16),* it was held that a decision to commence a disciplinary investigation was not to be treated as a one off act where it led to disciplinary procedures and ultimately dismissal. A relevant but not conclusive factor is whether the same or different individuals were involved in the incidents.

3.83. However, citing Hendricks, Choudhary P in *South Western Ambulance NHS Foundation Trust v King [2020] IRLR 168* warned '… that reliance cannot be placed on some floating or overarching discriminatory state of affairs without that state of affairs being anchored by specific acts of discrimination occurring over time. The claimant must still establish constituent acts of discrimination or instances of less favourable treatment that evidence that discriminatory state of affairs.' (at [36])

3.84. The time limits for bringing claims are extended by section 140B of the Equality Act to facilitate conciliation before the institution of proceedings.

Unfair Dismissal Remedy

3.85. The first consideration for a Tribunal in unfair dismissal is of reinstatement or reengagement.

3.86. Where that is not sought by the Claimant, a financial award can be made, comprising the basic and compensatory elements.

3.87. By s123(1) of the ERA1996, the amount of the compensatory award shall be, "such amount as Tribunal considers just and equitable in all the circumstances, having regard to the loss in consequence of the dismissal in so far as attributable to action taken by the employer."

3.88. The award is to fully compensate the claimant, as if they had not been dismissed, but not to award a bonus or to punish an employer.

3.89. The Tribunal must factor in the chance that the employment would have occurred in any event after a specific period of time, perhaps because of the redundancies or the closing down of the business, then that will set a limit to the compensation payable. If there is a chance as opposed to a certainty of that occurring, that should be assessed and factored into the calculation of future loss.

3.90. A reduction can be made to reflect the chance that the individual would have been dismissed fairly ("Polkey", from *Polkey v AE Dayton Services Ltd [1987] IRLR 50 (HL))* in any event or for contributory conduct.

3.91. Ability to pay is not a consideration.

3.92. Compensation may be awarded beyond retirement age if the evidence shows that the employee would have stayed on past that age *(Barrel Plating and Phosphating Co Ltd v Danks 1976 ICR 503 EAT)*

3.93. By section 124 of the ERA 1996, compensation is capped, including at the level of one year's gross salary, if lower than the current statutory cap.

3.94. There can be no award for the manner of the dismissal. The award does not attract interest. No award can be made for injury to feelings or personal injury.

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Discrimination Remedy

3.95. Section 124 of the EA 2010 provides by way of remedy for discrimination, a declaration, as given in making the initial judgment, financial compensation and scope to make recommendations.

3.96. An order for monetary compensation is only made where it is just and equitable to do so. The measure of damages is the same as it would be in a civil court in tort. There is no upper limit on what can be awarded.

3.97. Where compensation is awarded, it is on the basis that "as best as money can do it, the claimant must be put into the position she would have been in but for the unlawful conduct of [her employer"]' *(Ministry of Defence v Cannock [1994] IRLR 509, EAT, per Morison J at 517, [1994] ICR 918, EAT).*

3.98. Losses must be attributable to the specific acts of discrimination found by the Tribunal based on the pleaded claim.

3.99. Heads of damages include pecuniary losses, that is, personal financial losses, and non-pecuniary losses, such as injury to feelings and in some cases personal injury. Financial losses include loss of earnings and benefits derived from the employment. Where failure to mitigate is demonstrated, a deduction can be made in respect of earnings that were not but should have been achieved.

Injury to Feelings

3.100. Injury to feelings awards are compensatory and should be just to both parties. The matters compensated encompass subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression (*Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102 ("Vento"))*. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award.

3.101. The Vento case is the source of guidance on the level of compensation for injury to feelings which have since been updated by *Da Bell v NSPCC and Simmons v Castle ([2013] 1 All ER 334),* but are still referred to as the "Vento" Guidelines. They identify three broad bands of compensation for injury to feelings as distinct from psychiatric or personal injury.

3.102. The Tribunal had regard to the Presidential Guidance issued by the Presidents of the Employment Tribunals in respect of claims issued after 6 April 2019. The lower band is for less serious acts of discrimination. Awards in this band are currently between £900 - £8,800. The middle band is for cases which are more serious but do not come into the top band. These awards tend to be from £8,800 to £26,300. The top band is for the most serious cases such as where there has been a lengthy campaign of harassment. These awards are between £26,300 and £44,000 but are relatively rare.

3.103. A case would have to be highly exceptional for any sum higher than this to be awarded.

Interest

3.104. Interest is calculated as simple interest. The current statutory rate is 8%. (1/365 or 0.00273973 per day). The period of accrual of interest in injury to feelings runs from the act of discrimination to the hearing. For other sums it is from the mid-point of the period since the act of discrimination. Awards for injury to feelings unrelated to termination of employment are tax-free but compensation for injury to feelings in a termination payment will be taxable to the extent that the £30,000 tax free allowance is exceeded, except where the compensation is for psychiatric injury.

4. **Reasons**

4.1. The hearing was converted to a video hearing, with the consent of the parties. It was consistent with the overriding objective to do so, given the impact of Covid-19 on the availability of in-person hearings and the risk of serious delay had it been necessary to wait for an in-person hearing to be practicable.

Unfair Dismissal

4.2. Mr Robson was the oldest skilled worker in the business at the age of 69 and the first to be dismissed. That is agreed

The Reason for the Dismissal

4.3. The first question is what was the reason for the dismissal. The Respondent tells us it was redundancy.
4.4. Mr Clarke tells us that there were two main teams, domestic and small works on the one hand and commercial on the other, with the school team as part of the commercial work. The school work involved renovation and newbuilds. Those contracts were coming to an end, and the company did not succeed in getting the new contracts on offer. He describes being told to cut £100,000 of the £650,000 tender figure and being unable to do so. They lost that £650,000 contract and others.
4.5. The managers were told that there were difficulties over keeping the staff in work. Mr Bewick reported a conversation with Mr Clarke about the schools contract coming to an end, and that they would have to make staff redundant. Mr Pitman said that they had to make redundancies, the people in school renovation projects had nothing to go on to. Mr Taylor gave the same account.
4.6. In support of that, there were in fact three dismissals of skilled staff and one trainee in January and February 2020.
4.7. We find that there was a genuine redundancy situation as at January 2020: the need of the business for employees to carry out work of a particular kind was diminishing or expected to diminish.

When was the decision to dismiss Mr Robson made?

4.8. There are no records of the decision-making – the notes of the management meeting in January 2020 when this was discussed do not show the date of the meeting. The decision must have been made by 22 January 2020, when Mr Clarke invited Mr Robson to a meeting. Mr Robson was dismissed at the meeting on 24 January.
4.9. There had been a decision to make at least two redundancies by 24 January, because Mr Clarke told Mr Robson that the junior level 2 trainee was also losing his job, but he told us that Mr Robson was the first to be dismissed.

Who made the decision and why?

4.10. Mr Clarke made the decision. It was his company, he consulted his managers but the decision was his.

4.11. It is not up to us to decide what decision should have been made. We have to look at what Mr Clarke thought at the time that he settled on the redundancy, what was in his mind and whether there was a factual basis for that.

4.12. We accept there had been a loss of the expected commercial contracts. Wage costs are a huge part of any company's ongoing operating costs. On that basis, it was reasonable to conclude that there had to be a reduction in the workforce.

4.13. The generous company-wide Christmas bonus, implies prosperity, but it is not unusual to have a bonus payable based on the previous year's performance, payable to those still employed in December. It does not necessarily reflect the position in January.

4.14. The evidence that work continued to be available for Mr Robson during his period of notice does not contradict the coming difficulty. The new contracts would have been from April or perhaps later.

4.15. We accept that there was a genuine redundancy situation and that the reason for the dismissal in Mr Clarke's mind was redundancy. The requirements of the business for employees had diminished.

*How many redundancies were to be made***?**

4.16. We have seen notes of a management meeting in January, at which Mr Clarke, Mr Bewick, Mr Pitman, Mr Taylor, the accounts manager and one other (RS) were present. That notes 3 redundancies in the previous year, and a down-turn in contracts. It notes that those able to carry out commercial and domestic work are the most valuable. It does not identify how many redundancies are needed. It does not mention any scoring or selection process. It is a summary, written later, not a contemporary record of a meeting and it does not give the date of the meeting. It does not establish much about the decision-making.

4.17. Mr Robson was told at the meeting on 24 January that two were being made redundant, the other being the trainee. There are no notes of that meeting or of the meeting on 12 February.

4.18. We know that two others were later made redundant from the schools team. We know from Mr Robson that that happened in February, because he heard about it before leaving, but after his letter of 17 February. We have heard no evidence about that process, save that Mr Clarke told us that they did not challenge the decision; we do not even know if they volunteered for redundancy.

4.19. We do not know how many redundancies were decided on in January.

What selection process was used?

4.20. The Respondent relies on having identified a pool – the schools team – that being the team whose contracts had not been renewed, and applying a series of selection criteria (page 93) including length of service,

qualifications, domestic experience, commercial experience, performance, skills, flexibility, attendance.

4.21. The teams were not fixed, Mr Robson had worked in different parts of the business. There were staff in equivalent positions currently working on domestic and industrial/commercial contracts, who were not included in the pool. It is not clear that this was an appropriate pool or that it was strictly applied – if it had been, the other trainee, scoring 18, would have been dismissed. Mr Clarke kept him on because there is a need to bring young people into the business, and he would naturally be reluctant to interrupt his son's training. It is a small company, with staff with substantially interchangeable skills in the different teams. A reasonable employer would at least consider a pool comprising the skilled engineering/ plumbing staff from across the organisation, identifying in particular those with multiple skills who were most valuable to the business.

4.22. The scores were referred to on 17 February in a letter and Mr Robson replied by return pointing out that this was the first mention of any such process having been undertaken.

4.23. The document containing the scores was not produced until at least 10 February. Mr Clarke tells us it was produced for the meeting with Mr Robson and his union representative of 12 February, although it was not produced to them at that meeting because nobody asked for it!

4.24. That is challenged by Mr Robson's email of 17 February, in which he states that he had directly asked the basis for his selection both at that meeting and the earlier one, and there had been no mention of a scoring exercise having been carried out. That is consistent with his appeal letter of 29 January, in which he expressly asked about the basis for his selection, including through any scoring procedure.

4.25. We are confident that if the scoring had been in place by the date of either meeting, it would have been disclosed.

4.26. Mr Clarke tells us that the scoring matrix simply formalised earlier informal discussions, although it is agreed that there had been no consultation with Mr Robson or warning to him of a risk of redundancy.

4.27. We do not accept that it was a formalisation of any informal process. Even if the scores had not been neatly set out in a table, Mr Clarke would have referred to it in supporting his decision. He would have been able to explain the approach taken and the reasons for the outcome.

4.28. This selection process was not used in identifying Mr Robson for dismissal.

4.29. The matter does not end there. We need to establish whether redundancy for Mr Robson was likely, even if the scoring was only carried out later – if the scoring was reliable and identified him as amongst those scoring lowest, redundancy might have been likely in due course, even if not on 24 January.

4.30. The Respondent says Mr Robson would have been dismissed in any event, because of his scores.

4.31. We have to consider how the scores in the matrix were reached.

4.32. Mr Clarke sets out the scoring at para 8 of his witness statement. No explanation of how scores reached is given there or in the other witness statements or documents..

4.33. The score sheet on page 93 of the bundle. Scoring is low to high, low being the worst. Scoring is of the 7 skilled or trainee workers on school contracts, including the chargehands.

4.34. Mr Robson scored 28. The lowest two are scored 13 and 18, with two at 27. The matrix is used to justify the selection of four candidates for redundancy, including Mr Robson.

4.35. Mr Robson's scores were as follows, totalling 28:

Length of service (4)
Qualifications (4)
Domestic experience (2)
Commercial experience (5)
Performance (2)
Skills (3)
Flexibility (3)
Attendance (5)

4.36. The two chargehands retained, Liam Greenham and Tom Fox, scored 5 on each of performance, skills, flexibility and domestic. They scored 37 and 38 respectively.

4.37. Mr Clarke could not explain any of the scoring and told us that he had relied on his managers. He said he did not ask them to justify the scores, simply accepted them and the outcome they led to. When asked, he did not know what the criteria were for the different categories – as for example as between skills and qualifications or in relation to flexibility. He could only say that the score for performance reflected a lot of different considerations and metrics. He did not cite any. He could not support the scoring by reference to any evidence.

4.38. Mr Pitman is a contracts manager. He explained the process like this,

> "We sat down with a list and discussed each bloke and a score from that was derived and from that he made his decision as to who to let go."

4.39. He told us that Mr Robson's performance was ok, there were no issues over it that he can recall. Asked about the score applied to Mr Robson for performance of 2 out of 5, he told us, "I wouldn't particularly have given that score." He hadn't known Mr Robson's work well for the last couple of years. He referred us to Mr Bewick as the recent contracts manager

4.40. Mr Bewick said that Mr Clarke did the scoring (para 3 ws). Part of his role as a contracts manager is assessing and matching skills to build a team. He said he had no knowledge any issues in relation to performance or skills

arising with Mr Robson. He told us he himself had no issues with Mr Robson's performance.

4.41. When pressed on why Mr Robson had been assessed as 2 out of 5 for performance, he said this,

> "At the time I can't recall but if that is how we viewed it at the time but that is generally how we would have felt. It may be that he was possibly slower or it may have been other factors"

4.42. That is not a reason for attributing a score of 2 out of 5.

4.43. Mr Bewick was asked about Mr Robson's skills. Mr Robson had scored 3 out of 5. He is qualified as a gas engineer and plumber pipe/fitter, with many years of experience. The two chargehands each scored 5 for skills. Mr Bewick referred to the fact that the chargehands had the skill set for organizing a team; apart from that, he said, there was no difference between them. Mr Fox, one of the chargehands, is not a gas engineer. His score of 5 and Mr Robson's score of 3 out of 5 are not justified on that evidence.

4.44. Mr Bewick said nothing in evidence that helped to understand the way Mr Robson had been scored. His evidence raised obvious questions about the fairness of the process

4.45. Mr Taylor told us that they had had, and that he had contributed to, a discussion about scoring. He had had no concerns about Mr Robson's performance. He had limited knowledge of it only from some years ago, when he had performed fine. He had not heard of any concerns. He had not been in a position to provide much input and did not know why Mr Robson had been given 2 out of 5 on performance.

4.46. Having heard from all the managers giving evidence, we have no oral evidence to support the scoring applied. There is little agreement as to how it was undertaken.

4.47. There is no evidence in relation to the assessment of Mr Robson's abilities in the bundle – the firm has produced no records, appraisals, nothing from the personnel file

4.48. There is no reference to any issues being raised with him at any time in relation to complaints or poor performance or lack of flexibility.

4.49. Mr Fox is not said to have been involved in the scoring. However, he told us he knew Robson quite well. He too had had no problems with his performance. Notwithstanding that, he thought the score of 2 out of 5 was fair. He did not explain that further.

4.50. We do not know how the scoring was reached.

4.51. We can infer that it was not based on objective evidence or records. It is telling that no manager has offered any evidence to support any of the scoring. Their evidence contradicts the scoring given.

4.52. While the cross-examination focused on performance and skills, there were other areas that are left similarly unexplained. In domestic work, for example, Mr Robson reports substantial experience in domestic work, including some in this company. No justification has been given for allocating him 2 out of 5, the same level as the junior trainee.

4.53. The scoring matrix came into being after the dismissal and after the dismissal had been challenged.
4.54. We draw the inference that the scoring matrix was developed to justify the decision already made.
4.55. That means that the decision to dismiss Mr Robson on 24 January is unexplained and unsupported by evidence.

Was alternative employment for Mr Robson considered?

4.56. Mr Robson was dismissed on 24 January, to work 8 weeks' notice.
4.57. Alternative employment was not discussed or offered.
4.58. On 31 January 2020, four advertisements were published, three for a gas engineer and one for short term contracts for plumber/pipe fitters. Two of those Mr Clarke challenges, on what, after the close of evidence, he called "falsified and inflammatory claimant documentation in the case files bundle and this in turn has corrupted the case files bundle."
4.59. Those two advertisements were said to be for work with Clarke's Construction Ltd
4.60. Mr Clarke tells us that his firm used to be called S J Clarke's Construction Ltd.
4.61. One of the job advertisements is word for word identical with an advertisement placed by the Respondent.
4.62. It is likely that these are all advertisements for the same gas engineer job, but we do not have to rely on the two contested advertisements since it is common ground that Clarke's Mechanical Ltd was advertising on 31 January for a gas engineer, a full-time permanent job, as well as for short term contracts for plumber pipe fitters.
4.63. Those advertisements must have been placed a day or some days beforehand, and we are satisfied reflected vacancies that existed a week earlier, that is, at the date of dismissal – that is common sense.
4.64. Mr Clarke tells us that the website advertisement for a plumber pipe/fitter was probably out of date. He produces no evidence for that. It is reasonable to infer that an advertisement offering work is genuine. It seems to have been produced by an employee he regards as competent.
4.65. It is agreed that there was a need for a gas engineer in the small works department which is why the job was advertised.
4.66. Mr Clarke did not offer that role to Mr Robson. He said he preferred to keep that work for the members of his team that he was keeping on. He told us Mr Greenham and Mr Fox took on that work.
4.67. Mr Robson was qualified for the advertised posts. Mr Fox was not a gas engineer.
4.68. Mr Clarke also told us that he did not know of the advertisements when they were placed, but it is established that he knew of them at the latest by 5 February. It would be surprising that, in a small company, he did not know, but it remains the case that even at the 5 February he did not reconsider offering Mr Robson the vacancy.

4.69. That would be a reasonable decision, if the selection for redundancy dismissal had been fair. The Respondent tells us that they had in effect decided to dismiss three skilled men out of a team of five, given that they had two trainees and decided to keep one. If Mr Robson had scored amongst the lowest three, he could not hope to be offered the one vacant role. But the scoring was not fair or objective or supported by evidence. And the pool could have included those with interchangeable skills.

4.70. The failure to offer the alternative employment that was available reflected a clear decision that Mr Robson was not going to be kept on, made at an early stage.

Would Mr Robson have been dismissed in due course?

4.1. The finding that the reason for selecting Mr Robson was contrived to support the decision already made means that there is no basis for a finding that Mr Robson was likely to have been made redundant in any case, sooner or perhaps later. We have not heard reliable or persuasive evidence that he was likely to be dismissed had a fair process been used.

4.2. We have not heard evidence as to the company's progress after this dismissal, and the evidence does not point to any later round of redundancies or suggest that Mr Robson, with a fair process, might later have been selected for redundancy.

Unfair dismissal Conclusions

4.3. There was no selection process in place when Mr Robson was dismissed. The redundancy selection process was produced after that and to justify that decision. The scoring was not fair. There is no justification from the managers or Mr Clarke for the scores attributed. The scores are both unsupported by evidence and contradicted by the manager's own evidence.

4.4. It is clear the process was unfair. There was no warning or consultation, no fair selection and no consideration of alternative employment.

4.5. Having failed to show any fair basis for his dismissal for redundancy, we look again at the question of whether the principal reason for the dismissal was redundancy, even though the basis for Mr Robson's selection was unfounded.

4.6. We have not seen documentary evidence to support the loss of contracts. We have heard Mr Clarke's account of a significant loss of contracts that had been expected. That happened in January 2020. From each of his managers we heard that they were discussing the reduction in work and learning from him that there would have to be redundancies. That is reported to have been in January. That account is not without conflict – even Mr Clarke said there was discussions over some months, whereas the Christmas bonuses paid out were generous and do not reflect financial stress or concern about future work.

4.7. We are satisfied nonetheless that there was a redundancy situation, and so that was the reason for the dismissal, albeit that the selection of Mr Robson was contrived and unfair.
4.8. This was a dismissal on the grounds of redundancy but unfair as to the failure to warn or consult, as to the basis of selection and as to the failure to consider or offer alternative employment. We do not find that Mr Robson contributed in any way or that he was likely to have been dismissed had a fair process been followed.

Direct Discrimination on the grounds of Age

Two questions arise:

1 Was the dismissal on the grounds of age;
2 Was Mr Robson being called Half-dead Dave and is that age discrimination.

The dismissal in the context of discrimination.

4.9. The Tribunal is satisfied that the respondent has not supported the dismissal decision by fair and objective evidence. But equally, there is – unsurprisingly – no direct evidence that the decision was motivated by Mr Robson's age.
4.10. The Tribunal took a two-stage approach
4.11. Has the Claimant proved facts from which the Tribunal could find that the respondent has committed discrimination, in the absence of explanation?
4.12. These are established:

- He was the first to be dismissed
- That followed no fair procedure
- No sufficient reason has been given
- The basis for his selection does not withstand scrutiny
- There was a settled intention not to offer him a vacancy that existed at the same time and for which he was qualified.
- He was the oldest member of the skilled team

4.13. The Claimant has proved facts from which the Tribunal could find that the respondent has committed discrimination. That is because there is no other reason for his selection: he was skilled and versatile, with no history of performance or conduct issues. The scoring used was fictitious. In the absence of evidence to justify the dismissal, the context points to his selection being because of his age: he was the oldest.
4.14. When we come to consider the Respondent's explanation, we find no explanation for the selection that carries weight, is consistent or supported by evidence.
4.15. It is said that there was no consideration of his age. He was past the usual retirement age. Most employers would be alive to the age profile of their staff. There might be concerns about an inconveniently short future

career, about future performance concerns or health. It is unlikely that the employer gave Mr Robson's age no thought.

4.16. If age played no part, we are left with no explanation because none has been given that stands up to scrutiny. It is altogether more probable that he was picked as the first to go, being seen as an inevitable candidate for dismissal simply by reason of his age. That would not have applied to a member of a younger age group.

4.17. The Respondent did not plead justification.

4.18. In our judgment, Mr Robson's age was an effective cause of his dismissal.

Half-Dead Dave

4.19. It is Mr Robson's case that the epithet "Half-dead Dave" was used to refer to him throughout the period from when Mr Pitman used it to Mr Fox, and that it was in general circulation. He says it was used by his peers and by Mr Pitman, including to his face. It was his nickname or one of his nicknames within the team.

4.20. The witnesses for the Respondent deny that, beyond the admissions noted above by Mr Pitman and Mr Fox. Mr Clarke expressly denies knowing anything of such an epithet. The Respondent's case is that it was not used after around 2015, and that single incident is out of time, nor should time be extended. The case is that Mr Robson's nickname was "Disco Dave", not "Half-dead Dave".

4.21. Mr Robson says the agreed incident was in around 2015. The Respondent's witnesses generally say maybe 7 years ago, Mr Pitman says 8 or 9 years ago. Mr Robson only started in 2012 and was dismissed in 2020, so 9 years is unlikely. The date can't be established, but we work on the basis it was around 2015, so 5 or perhaps 6 years before the dismissal.

4.22. It is agreed by all panel members, that the evidence from Mr Pitman shows that the epithet was being used on site at that time. Mr Pitman said he used it because he "thought that was what they all called him on site." He expected Mr Fox to know who he meant, when he hadn't known who "Dave" was.

4.23. Mr Fox gives a different account, of Mr Pitman saying, "Give these to Half-dead", without first saying Dave or Robson.

4.24. Either way, it was a name Mr Pitman had heard enough to believe it to be in common circulation.

4.25. We are satisfied that in around 2015, it was a name in established usage on site, given Mr Pitman's justification for using it – he heard it on site and understood it to be in common usage.

4.26. Mr Pitman saw nothing wrong with it. He described it as banter. Mr Fox says he was embarrassed by it and apologised.

4.27. Mr Robson did not complain.

4.28. No manager intervened to stop it.

4.29. This is an age-related epithet. It is derogatory. It was unpleasant and distressing to Mr Robson, although he did not complain.

4.30. To adopt the submissions made by Mr Sanghera,

- The epithet, Half-Dead Dave, is indisputably a reference to age. It was detrimental.
- A hypothetical comparator from a different age group would not have been called that. This was discrimination on the grounds of age, plain and simple.
- Discrimination of any form is not just banter. That is accepted across society at large.

Conflict of Evidence

4.31. Mr Robson says the name was used continuously from around 2015 onward, including by Mr Pitman himself to his face and used in his presence in January 2020 when Mr Fox explained the reference to Mr Greenham (ws para 9).

4.32. The Respondent's witnesses say that they never heard it again and it was not used again. Mr Fox and Mr Greenham expressly deny the incident Mr Robson relies on in January 2020.

4.33. Mr Clarke says it would be unacceptable but he was unaware of it.

4.34. This is Mr Robson's oral evidence,

> "To the end of my employment I was regularly referred to as Half-dead Dave, and Mr Fox would be telling people the incident. Lee Pitman called me that, he thought it was rather amusing."
> "I was continually referred to as Half-dead. And "Disco", other nicknames, but mentioned many times all the way through, right through, in discussion and people talking about it, and I was told that Mr Pitman called me that, not all the time. There was one incident when he did, in the office, I was in the office and he said, "Well there he is, Half-dead Dave". All through my employment.
> If that was the case, did you ever ask colleagues to stop?
> No. I didn't ask colleagues. It wasn't worth the row and the argument. If I challenged management you seemed to get victimised, I came off worse, I could only deal with it by letting it go away. I just thought only a few years left at work, let's just put up with it. I didn't want the distress of it all."

4.35. He told us he saw it as reflecting his age and he felt vulnerable because of his age. He felt that his job was at risk if he made a fuss.

4.36. The only complaint made about the epithet was at the very end of his employment, in late February 2020.

4.37. Faced with that conflict in the evidence, the majority of the Tribunal accept that the epithet did go on being used:

- Mr Robson is a credible witness. He has not overstated his case in general.

- Mr Pitman's evidence shows it was a name in established us on site by 2015 – he thought Fox would know Robson by that name. No manager intervened. On the contrary, he, as a manager, used it and in the office, not just on site.
- There was no reason for it to stop once established
- Mr Robson did not tell his family. The majority of the Tribunal accept that, having decided to put up with it, it was not something that he would want to share with his daughter or other family members. Many men would not share their discomfiture over name-calling.
- The majority accepted too that it was reasonable in his circumstances not to raise a grievance, fearing consequences.
- Mr Pitman was unapologetic in giving evidence, dismissed it as mere banter. It was unimportant to him. It is obviously derogatory. His unawareness of that or lack of concern points to a culture in which such "banter" was acceptable.
- Managers have gone some way to support an obviously unfair selection process. They were giving evidence while still in post and in the presence of their employer. It would be a difficult moment in which to give adverse evidence on a sensitive point.

4.38. It caused detriment. Mr Robson put up with it, but he did not like it, he was uncomfortable and saddened and embarrassed.

4.39. It was a continuing course of conduct, most recently established in the incident in January 2020.

4.40. This was age discrimination.

4.41. The ACAS dates are 29 January, presentation to ACAS, 14 March 2020, issue of ACAS certificate. The claim was made on 16/03/20. The claim was not out of time.

4.42. For the majority of the Tribunal, this affords additional age-related context for Mr Robson's selection for dismissal That context supports the judgment made by the whole panel that age was an effective cause. Mr Pitman used that to Mr Robson and to refer to him. The majority found that Mr Pitman continued to do so throughout; he saw no harm in it, dismissing it as banter. Mr Pitman was consulted over the scoring. Mr Robson's selection for redundancy is consistent with that attitude. It is an attitude that discloses at the very least a tolerance of age-based discrimination.

4.43. The minority panel member did not find the evidence that use of the epithet continued after 2015 to be persuasive. That is because,

- Mr Robson made no complaint, even when on his evidence the use of the name became prolonged.
- He did not tell his family until after he had left.
- He gives very few instances after the 2015 event – only two specific instances since then
- There is no support from any of the Respondent's witnesses in spite of the admission of the use of the name earlier

- Mr Robson did not even raise this as an issue when in in dispute with the company. He has told us that after the meeting of 29 January, he did not see himself as having a future with the company, the more so after 17 February. In those circumstances, he was free to raise the issue without consequences and still did not.

4.44. The minority member found that there was no continuing course of conduct. The 2015 episode was out of time. There were no just and equitable grounds for extending time over so long a period, throughout which Mr Robson had had the means to complain.

4.45. In summary by a majority, the Tribunal determines that it has jurisdiction and finds that the term Half-dead Dave was used to and to refer to Mr Robson in the course of his employment from at least around 2015 until at least January 2020. It was a continuing pattern of misconduct causing detriment. It was direct discrimination on the grounds of age.

In summary, the Tribunal finds:

4.46. This was a redundancy dismissal but unfair, failing on every test of fairness in section 98(4).

4.47. The employer's reasons for selecting Mr Robson do not withstand scrutiny.

4.48. We conclude that age was an effective cause of his dismissal on 24 January.

4.49. By a majority we find that he suffered detriment in being called Half-dead Dave throughout and not merely in 2015. That was direct discrimination on the grounds of age.

5. Remedy

6. The compensation for unfair dismissal, to include financial losses, was agreed at £10,000.
7. In respect of injury to feelings for the dismissal tainted by age discrimination, we have to be careful not to compensate inappropriately. When someone is made redundant, unless they want the job to end, there will almost always be shock and surprise, a sense of pain and loss. They may well be embarrassed to tell their family and only share their feelings or even the fact of redundancy on finding a new position.
8. Mr Robson had for some time feared losing his job because of his age. When it happened, the dismissal was sudden and unexpected, without the warning and consultation he was entitled to and obviously unfair. He was upset, worried, anxious, fearful for his future working life, humiliated. To the extent that that

would arise out of a redundancy situation, we do not award a sum in respect of injury to feelings. But to the extent that it was tainted, and obviously tainted by age discrimination, the more so when the unfair scoring process was disclosed, demonstrating how far the company was prepared to go to contrive support for the outcome, the pain he suffered is compensatable.

9. The Tribunal agreed that the figure in respect of that is £6,000, itself a lower band Vento award in respect of a one-off act, but serious. That reflects the very obvious nature of the discrimination and the impact of the attempt at concealment.
10. In respect of the name-calling, Half-Dead Dave, the majority of the Tribunal award a further £7,000. That reflects the long-standing use of the name and its frankly derogatory reference to his age. Mr Robson did not talk up his distress, but it was plain that he was distressed and embarrassed, distressed too when he was compelled to tell his family; it became the more painful on becoming known. It affected his confidence, it made him the more anxious for his job, in an environment where that conduct went without comment. He felt dealt with unfairly and felt unable to address it. His fears were well-founded, in that the actual consequence of losing his job had at the date of hearing meant he had not found equivalent employment: short-term contracts were what he could get, without continuity or security.
11. Coming from management as it did, this was not building site banter. As he said,

> "It was saddening. To me, I mean, the most saddening thing about it was that the term originated from a member of the management. It came from him. I also had a nickname of Disco Dave but he didn't use that.
> When we come to the end of all this and my daughter sat me down and said can we go through everything, she was upset. You would be. Half-dead, what, because I am old. It wasn't easy to sit and explain to my family."

12. The calculation of interest was on the statutory basis.
13. The final award was therefore in total the sum of £24,926.14 in respect of the unfair dismissal and unlawful discrimination.
14. That sum is made up as follows:

In respect of the unfair dismissal, by consent,	£10,000.00

Injury to feelings	
In respect of dismissal on the grounds of age,	£6,000.00
In respect of detriment on the grounds of age, by a majority decision,	£7,000.00
Interest on discrimination award	£1926.14
Discrimination total	£14,926.14

Employment Judge Street

Date: 24 January 2022

Reasons sent to parties: 25 January 2022

FOR THE TRIBUNAL OFFICE