EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S. Salmon	**v**	**Confederation of Passenger Transport UK**

Heard at: London Central

On: 15, 18, 19, 20, 21 and 22 October 2021 (+ 16 & 17 November 2021 in chambers)

Before: Employment Judge B Beyzade
Mr P de Chaumont-Rambert
Mr D Shaw

Representation

For the Claimant: Mr A Robson, Counsel
For the Respondent: Mrs H Winstone, Counsel

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. **The unanimous judgment of the tribunal is that:**

1.1. The claim of unfair dismissal is dismissed as the Tribunal does not have jurisdiction to hear the claim because the Claimant was employed by the respondent for less than two continuous years ending with the effective date of termination, contrary to the service requirement at section 108 Employment Rights Act 1996;

1.2. The claimant's claims of direct and indirect age discrimination are not-well founded and are dismissed;

1.3. the claimant's claim for unfair dismissal for the sole or principal reason that the claimant made protected disclosures pursuant to section 103A of the Employment Rights Act 1996 is not well-founded and is dismissed;

1.4. the claimant's claim pursuant to section *105(6A)* of the Employment Rights Act 1996 that he was selected for dismissal for the sole or principal reason that the claimant made protected disclosures is not well-founded and is dismissed.

REASONS

Introduction

2. The Claimant presented a complaint of unfair dismissal, dismissal pursuant to s 103A and s 105(6A) of the Employment Rights Act 1996 ("ERA 1996"), and direct and indirect age discrimination, which the respondent denied.

3. A final hearing was held between 15 and 22 October 2021. This was a hearing held by CVP video hearing pursuant to Rule 46. The Tribunal were satisfied that the parties were content to proceed with a CVP hearing, that it was just and equitable in all the circumstances, and that the participants in hearing were able to see and hear the proceedings. In addition the Tribunal met in chambers (in private) on 16 and 17 November 2021 (deliberations and judgment).

4. The parties prepared and filed a Joint Index and Bundle of Documents consisting of 1088 pages.

5. On the morning of the hearing the claimant's representative made an application (intimated first by letter dated 14 October 2021) to amend the claimant's claim to add further protected disclosures, and also for specific disclosure. The Tribunal refused the amendment application. The Tribunal considered the authorities referred to by the parties including *Selkent Bus Co Ltd v Moore [1996] IRLR 661*; the Presidential Guidance: and the Tribunal's overriding objective. The Tribunal provided oral reasons for its decision at the hearing. Reasons for this having been

given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing, or a written request is presented by either party within 14 days of the sending of this written record of the decision. Following consideration of the claimant's applications, the Tribunal ordered the following:

i) The email dated 12.07.2019 in its unredacted form and the minutes of the meeting that took place on 11.07.2019 shall be supplied by the respondent's representative in electronic form to the Tribunal by not later than 09.30am on Monday 18.10.2021. Both documents shall be paginated and added to the Hearing Bundle Index which shall be supplied at the same time.

ii) The respondent shall conduct a reasonable search for any other minutes of the Finance and Governance Committee between 29 June 2019 and 10 July 2020 in which the claimant is referred to by name or by description and shall supply a copy of any minutes to the claimant and to the Tribunal in electronic form by 04.00pm on Monday 18.10.2021.

iii) The respondent shall supply a statement confirming that it has complied with its disclosure obligations pursuant to the Tribunal's orders made at the Preliminary Hearing on 12th March 2021 which shall be dated and signed by the respondent's Chief Executive and sent to the Tribunal and to the claimant's representative in electronic form by 4.00pm on Monday 18.10.2021.

6. At the outset of the hearing the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, both parties being in agreement with these:

Direct discrimination: s.13 EA 2010 (GoC para 24A)

(i) Was the Claimant subject to direct age discrimination contrary to s.13 Equality Act 2010 in that between late 2018 and the Claimant's dismissal in June 2020, the Respondent treated the Claimant less favourably than it would have treated a person in a younger age group (under 53 years) than the Claimant's age group (53 years and over) [C's age group not agreed by R] (with no other material difference in circumstance) by a course of conduct designed to diminish the Claimant's role within and ultimately exit the Claimant from the Respondent? In particular by:

a. In late 2018, proposing that the Claimant's role be made redundant (as averred at paragraphs 6 and 7 AmGoC);

b. In January 2019, giving the Claimant notice of the redundancy of his Director of Policy Development role (as averred in paragraph 11 AmGoC);

c. In January 2019 to 28 June 2019 (the date of signature of the contract) offering the Claimant a role on a fixed term part-time basis resulting in substantially lower

income and with a substantial part of his previous role removed (as averred in paragraphs 12 and 13 AmGoC);

d. In June 2020, dismissing the Claimant upon the purported grounds of redundancy, in circumstances where there was no real redundancy situation (as averred in paragraphs 17 – 19 and 21 AmGoC).

Indirect Age Discrimination: s.19 EA 2010 (GoC paras 22-24; GoR para 31.1-31.10)

(ii) Did the Respondent apply all or any of the following PCPs ("the PCPs"):

a. *As regards those persons perceived as being part of the 'old guard':*

i. *Dismissing them or encouraging their resignation or otherwise taking steps to ensure their departure from or reduced involvement in the Respondent;*

ii. *Effecting a restructure or series of restructures of the Respondent organisation, from October 2018 through to the Claimant's dismissal in June 2020, which reduced their involvement in the Respondent;*

b. *Dismissing, or encouraging the resignation of, or otherwise taking steps to ensure the departure from or reduced involvement in the Respondent of individuals who were perceived as being older than or more experienced than Mr Vidler.*

c. *The espousal and adoption of a new approach to communication and/or lobbying which emphasised a "more robust engagement", "a louder voice at the negotiating table" and "proactive leadership rather than reactive".*

(iii) Are the above PCPs valid?

(iv) If valid, did the above PCPs or any of them put or would they put people in the Claimant's age group at a particular disadvantage when compared with younger individuals? The disadvantages relied upon by the Claimant are

a. (in respect of (a) and (b) above) individuals in the Claimant's age group were more likely than younger employees (i) to be perceived as being members of the 'old guard'; and/or (ii) to be perceived as being older and/or more experienced than Mr Vidler;

b. and (in respect of (c) above) individuals in C's age group were more likely to be perceived as incapable of changing their methods and/or more likely to be perceived as being reactive rather than proactive.

(v) Did the PCPs put the Claimant at those disadvantages or any of them? See GoC para 23.

(vi) If so, were the PCPs a proportionate means of achieving a legitimate aim? The legitimate aim in issue is "saving costs and flattening the senior management structure in order to change the emphasis of the business to have a more proactive role in the industry and a louder voice, to be achieved by a stronger but less costly

middle management presence" (GoR para 31.10)? Was that a legitimate aim, and were the PCPs a proportionate means of achieving it?

Automatically unfair dismissal: s.103A ERA 1996 (GoC para 25-27; GoR para 32.1-32.4)

(vii) Did the Claimant make a protected disclosure ("the Protected Disclosure") *in that he disclosed information (GoC para 25(a) and (b)) which, in his reasonable belief, was made in the public interest (GoC para 25(c)) and which tended to show one or more of the matters pleaded at GoC para 25(d)(i), (ii) and/or (iii)?*

(viii) If so, was the Protected Disclosure the reason or the principal reason for the Claimant's dismissal such that the dismissal was automatically unfair?

(ix) Alternatively, if (which is denied by the Claimant) the dismissal was for redundancy, was the reason or principal reason for selecting the Claimant for redundancy the making of the Protected Disclosure such that the dismissal was unfair under section 105(6A) ERA 1996?

Unfair Dismissal: s.94 ERA 1996 (GoC paras 28-29; GoR para 33.1-33.4)

(x) Does the Claimant have sufficient continuity of service to bring a claim for unfair dismissal?

(xi) Was there a potentially fair reason for dismissal? The Respondent relies upon redundancy.

(xii) If the reason for dismissal was redundancy, was the dismissal fair or unfair, judged in accordance with equity and the substantial merits? Specifically, in all the circumstances (including the size and administrative resources of the Respondent's undertaking) did the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant?

Time

(xiii) Are the alleged incidents of discrimination in time, or were they a continuing act?

(xiv) If not in time, is it just and equitable to extend time to permit the claims to be heard?

Remedy

(xv) To what remedy is the Claimant entitled? He seeks declarations that he has been discriminated against, subjected to a dismissal by reason of having made a protected disclosure, and unfairly dismissed. He claims compensation (including an award for injury to feelings), including an ACAS uplift. The Claimant also seeks appropriate recommendations.

7. It was agreed that the Tribunal will investigate and determine matters relating to liability only at this hearing.

8. The Tribunal were also provided with a copy of a Chronology (this was prepared by the claimant's representative and the respondent's representative commented on its content and made changes).

9. The claimant gave evidence at the hearing on his own behalf along with Mr A Warrender, both of whom provided witness statements. Mr G Fernley, Mr P Gomersall, Mr R Coyne, Ms A Edge, Mr K McNally, and Mr M Dean gave evidence on behalf of the respondent, all of whom had produced written witness statements.

10. Both parties were represented by counsel, and in addition to producing written submissions on the final day of the hearing, they provided supplemental written submissions after the hearing. An agreed Bundle of Authorities was also supplied containing a copy of the case law relied on in the parties' submissions.

Findings of Fact

11. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the list of issues -

Background

12. On 23rd June 1997 the claimant was employed by the respondent as an Operations Director. In 2007 the claimant's role changed to Director of Policy Development.

13. The respondent is and was at all material times a leading trade membership organisation for the UK's bus and coach industries.

14. In March 2018 a stage 1 Organizational Review of the respondent was undertaken by Fore Consulting Ltd ("the Foster Review"). This comprised of a review of the existing activities of the organisation including its services and functions, income and expenditure, and a comparison with other member organisations. The respondent

split the distribution of membership into 6 bands based on the number of operational vehicles of members in their respective fleets and there were 694 operators at around the time the Foster Report was prepared. The majority of the respondent's operator members owned small vehicle fleets with 95% of operators operating less than 100 vehicles in total.

15. The respondent had an established set of strong relationships with politicians and policy advisors at all levels of Government and was frequently consulted on proposed changes to legislation and policy. The respondent also provided information to their members on what changes in legislation or regulations meant for their businesses, both in the UK and Europe. The report outlined several issues and opportunities associated with the existing operational structure of the respondent and recommended a review of the regional structure of the respondent and the services it provided.

16. In July 2018 the respondent provided a response to the Foster Review and a report to Stagecoach. The report acknowledges that the respondent had previously adopted the approach of working quietly behind the scenes without a strong public profile to great effect and that there was strong case for a different approach to reflect the fact that times had now changed (including the need for a higher profile and thought leadership).

17. Then in August 2018 the largest 5 bus/coach operators also known as the 'Big Five' companies (namely Stagecoach UK, Arriva, Go-Ahead, First Group and National Express) put forward their views on the organisational structures of the respondent.

18. On 31 August 2018 Mr S Posner, former CEO left his employment (because he had concerns with the proposals that were put forward).

19. One 26 September 2018 the proposals were subject to several changes following Council debate. There were a number of proposals including for the Lobbying and Communications Unit to be based in London consisting of CEO & Director of External Relations, Policy Manager, External Relations Manager and Admin Support.

20. Mr Gomersall, who was Interim Chief Executive at the time, sent an email to a number of individuals including the claimant on 29 October 2018 setting out the background and reasons for the respondent's review, proposed new structure, staff and members' consultation processes. He stated that once an agreed proposal was put forward, before entering into any decisions regarding any posts, the respondent will consult fully with individuals to avoid the need for redundancy or mitigate the consequences of any redundancy.

21. Thereafter on 30 October 2018 a Consultation document was published for consideration and discussion up to 30 November 2018. There were six regional workshops across Great Britain in November 2018.

22. On 12 November 2018 the claimant strongly objected to the proposals in respect of staff changes. He observed that the respondent's staff should be treated as heroes rather than being dismissed, having to reapply for junior roles on inferior terms, and raised the risk of reputational damage as an employer.

23. On 16 November 2018 the claimant posted on Twitter tagging two senior managers and the respondent stating, "*Any discussion of the risks of losing expertise and experience by sacking all the staff*?"

Notification of potential redundancy in 2018

24. On 22 November 2018 notification of potential redundancy of their roles was given to several people and letters were sent to Mr Coyne, Finance Director and Mr Gomersall.

25. The claimant prepared a document titled '*Potential contractual dispute between S Salmon and the Confederation of Passenger Transport*' on 25 November 2018 and in this he raised 'cartel abuse' by the big five bus/coach companies in respect of the consultation. However, he did not send this document to the respondent.

26. On 4 December 2018 the respondent's Consultation closed with 155 responses having been received (including responses from 12 staff and 127 consultees using Survey Monkey).

27. An email was sent from the claimant to Mr Gomersall and Mr Dean, Managing Director of the Go-Ahead Group and Chairman of the respondent on 8 December 2018 in which the claimant suggested that if the respondent could get closer to the benefits and pay in his existing package, he will seek less compensation for loss of office and that he was open to negotiation "*on less-than-full-time working*." He requested that the international post be upgraded so that it reported to the CEO as this optimizes the relationship with international operations (including EU).

28. On 12 December 2018 there was a Council meeting to discuss the proposal for the future structure of the respondent. The Chairman outlined to the Council the proposal for the future structure of CPT, and that there was strong approval for the primary aim of refocusing the respondent's public affairs resources to have a stronger voice with the Government at all levels, stakeholders, and the wider transport industry. He reported in relation to the consultant, there was some discussion, and the Chair sought approval focusing solely on the organisation of the structure and not on the position of individual members of staff. The Council gave its approval to the proposed new structure and organisation of the respondent.

29. The final version of the proposed structure meant that 5 members of staff were at risk of redundancy, in addition to Mr Gomersall and Mr Coyne who had already agreed to step down from their posts following the restructure and the appointment of a new CEO. Those five people were informed immediately after the Council meeting and consultation meetings were due to commence on 13 December 2018.

Consultation

30. A first consultation meeting took place with the claimant on 13 December 2018, and Mr Coyne and Mrs Edge (HR Consultant) were in attendance. The claimant was asked to respond to a number of questions, including regarding the procedure followed and what had been explained to him and in relation to any interest he had in the new positions. Regarding the new roles the claimant queried the salary levels

and he said he considered that these may be suitable but may not be pitched at the same salary level as his existing role. The claimant also queried why his previous proposal had been ignored.

31. The claimant sent an email to Mr Coyne on 13 December 2018 forwarding a copy of the email dated 08 December 2018 previously sent to Mr Dean and Mr Gomersall.

32. A letter of the same date was sent to the claimant explaining the situation to him and had set out three alternative roles, that he may apply for including the role of CEO/Director of External Relations, External Relations Executive, and External Relations Manager. The letter stated that the respondent did not consider these roles to be suitable for the claimant but that he could make an application for any of these.

33. The Chief Executive/ External Relations Director role was advertised with a salary as "*circa £100,000*." On the Job Description provided for external recruitment purposes it was stated that for the Chief Executive role the remuneration was "*six figure salary plus benefits*." In respect of the CEO/Director of External Relations vacancy, one of the respondent's employees chose to apply but the claimant did not apply.

Claimant's proposal

34. On 29 December 2018 the claimant set out his proposal for an alternative to his redundancy. This was to create a new role, an International Manager role which the claimant would undertake. He proposed that he would reduce his hours and salary so that the respondent could make a saving in terms of costs. He also stipulated other terms that he would want to be included.

35. A second consultation meeting took place with the claimant on 07 January 2019. The claimant's alternative proposals were discussed with him.

36. On 14 January 2019 Mr Coyne met the claimant to discuss him being employed under a new contract as International Manager, which was due to be a temporary

position to cover the Brexit transition period until 31 December 2019. The claimant asked that this proposal be confirmed to him in writing.

Offer of new contract

37. The claimant was offered a new contract as International Manager working 3 days per week, to run for a minimum of 9 months on 16 January 2019. The letter stated that the main terms included no continuation of service, salary for 3 days per week of £75,000, 8.5% pension based on current salary, life cover, health insurance, and the notice period was to be agreed.

Notice of dismissal

38. The claimant was on 28 January 2019 given notice of dismissal by way of redundancy to take effect on the 1 April 2019, with an enhanced redundancy payment of £78,299.48 and notice pay of £30,845.25.

39. On the same date the claimant was sent a separate letter confirming his appointment in the position of International Manager to take effect from 15 April 2019 for a minimum 9-month period with a basic salary of £75,000.00.

40. Mr Vidler commenced employment as the respondent's CEO on 1 April 2019.

41. On 3 June 2019 the claimant's termination date was extended to the 30 June 2019, and so his new contract as International Manager was to commence on 1 August 2019.

42. On 27 June 2019 the claimant wrote to Mr Vidler stating that he should have been offered the CEO role, which he did not apply for at the time of his redundancy consultation because the pay was too low at £100,000 per annum. He stated that, as the CEO salary had subsequently increased, he must have been either lied to at the time regarding the salary level or that the situation had subsequently changed; in which case, he should have thereafter been offered the CEO role at the revised salary. He stated that he had a strong contractual claim based on 10 years' service as CEO, which will cause reputational damage to CPT and the 'Big 5'. He put forward three settlement alternatives relating to his future with the respondent namely option

1 which would involve taking legal action, option 2 in which a settlement agreement would be agreed (reflecting a clean break), and under option 3 the claimant wanted to receive compensation in the form of a future contractual arrangement. Option 3 outlined a future part time role in the organisation for 16 days per month at a salary of £120,000 and a guaranteed contract of employment of 5 years duration.

Signing new contract

43. On 28 June 2019 the claimant signed the new contract for the role of International Manager. Clause 3 of the new contract stated:

3.Date of Commencement
Date when employment will begin *1st August 2019*
Effective date of continuous employment *1st August 2019*
Date of issue of this statement *26th March 2019*
Please note that no previous period of employment or employment with a previous company will count as continuous employment for the purposes of your employment with the Confederation of Passenger Transport UK.

4.Duration of Employment
Whilst the exact duration of your employment under this contract is unknown, it will continue for a guaranteed period of 9 months (subject to clause 26).

44. The claimant's employment as Director of Policy Development terminated on 30 June 2019. The claimant was issued with a Form P45.

45. On 1 July 2019 the claimant and Mr Vidler discussed his terms of employment in a new proposed role. He stated that Mr Coyne had invited him to consider two roles, namely CEO and Policy Manager during the consultation process and had been given a job description for both roles. The claimant believed that the CEO Job Description included a salary level of £100,000 and this was the basis for his decision not to apply for the role. The claimant discovered 4 weeks prior to the end of his employment on 30 June 2019 that the CEO salary was in fact £150,000 and that therefore the role would have been worthy of further consideration from his perspective. The claimant did not raise this matter with the respondent at the time in question.

46. On 12 July 2019 Mr Dean sent an email to Mr M Threapleton, Chief Operating Officer at Stagecoach and other members of the Big Five companies within the membership

stating that the claimant had sent a letter demanding a 5-year contract, claiming unfair dismissal, threatening to expose 'cartel activity' and that he had become 'a 'terrorist within' and impossible to retain.' He further stated that it was agreed at a specially convened meeting of the Finance and Governance Committee on the previous day to support Mr Vidler's view and find a way to exit him from the business.

47. A telephone discussion between Mr Vidler and the claimant took place on 16 July 2019 during which the claimant's proposals were discussed. The claimant stated that a financial settlement of £1.5 million would be generous and that £1 million would be fair to avoid the stress of going to court. The claimant was asked what would happen if agreement could not be reached by 1 August 2019 and he replied that that was the respondent's choice and that he would be happy to work under the terms of his new contract while the outstanding issues were resolved. The claimant also clarified with respect to option 3 that taking into account the redundancy settlement he had received, he would now revise working 16 working days for a salary of £120,000 to working 17 days per month for the respondent for £100,000 and he expected an understanding to be reached to protect his position after 9 months.

48. On 23 July 2019 Mr Vidler sent a letter to the claimant in relation to his proposed new role. In this letter it was stated that the respondent did not consider the CEO role to be suitable alternative employment, that the claimant did not dispute this at the time, that he showed no interest in the role, and that he did not raise any concerns at the time he discovered that the CEO salary was higher than he thought it was. He also stated that in accordance with the terms of the claimant's new temporary employment contract which the claimant signed on 28 June 2019, whilst employment was for an initial term of 9 months, it was subject to early termination for gross misconduct or by way of 4 weeks' notice from the respondent and he referred to the claimant's comments and their potential impact on any future relationship. The claimant sent an email dated 23 July 2019 advising he will take further advice and contact him again.

49. On 29 July 2019 the claimant replied stating that he had now decided to start the new post, as proposed, which was due to commence on 1 August 2019. The

claimant suggested that they used the provision in respect of work done in excess of 13 days per month that was previously agreed to enable him to work on open data for the respondent (3 days per month).

50. On 31 July 2019 Mr Vidler sent the claimant an email thanking him for his confirmation that he wished to proceed to work with the new contract that was due to start on 1 August 2019 and he suggested a meeting to discuss the claimant's work programme.

Claimant commences role of International Manager

51. On 1 August 2019 the claimant commenced his new employment as International Manager. Thereafter the claimant carried out the duties in his new role including open data work.

Review of claimant's role

52. On 03 February 2020 Mr Vidler sent an email to Mrs Edge advising that the claimant's review took place and he set out his objectives as defining his Job Description for late 2020 and beyond, including to be more involved in the respondent's strategy, and restore his remuneration to 2018 levels and that Mr Vidler told him that it was impossible for this to happen and that there would be a follow up meeting. He sought guidance in the email in relation to letting the claimant know that his contract will end after the minimum nine-month period. On the same day Mrs Edge replied by way of an email advising Mr Vidler that the claimant's contract ends at the end of April 2020 and his notice period was one month but that he could be given more notice.

53. Towards the end of March 2020 as a result of the COVID-19 pandemic the UK Government placed the country into lockdown and a number of restrictions ensued. The impact on the respondent was that there was increased uncertainty about the evolving set of circumstances. The respondent had daily management Zoom meetings which the claimant attended, and new working groups were formed with members. There was also potential financial implications for the respondent.

54. The respondent's focus was on dealing with the immediate impact of the pandemic on the bus and coach industry and on supporting the respondent's members. The respondent made the decision to use all available staff resources including the claimant in order to deal with the increased workload. The respondent also decided to postpone commencement of the redundancy consultation process in respect of the claimant's International Manager role until after the urgent COVID-19 related member work was under control.

55. On 03 April 2020 Mr Vidler sent an email to Mr Coyne requesting an analysis on the 2020 budget and setting out his considerations, part of which identified staffing costs and the claimant '*being around for longer than planned*.' On 07 April 2020 Mr Coyne prepared a budget schedule for the second half of 2020 (July - December) showing a shortfall of £140,000 and sent this by email to Mr Vidler, stating on the email that he has updated the salaries' schedule and assumed that the claimant was going to be working for the respondent for the full year.

Claimant's qualifying disclosure

56. On 14 April 2020 a daily management meeting took place by way of an online Zoom conference. At the meeting there was discussion about measures that could be implemented by the respondent's members to mitigate the risks of transmission of COVID-19 to bus drivers including cash handling and the installation of plastic screens. The claimant expressed concern about bus drivers' safety during the pandemic, indeed he said the question arose whether buses should be running at all. The claimant suggested that if something was not safe, then the bus operators should not be doing it.

57. At the time in question the risk to transport workers including bus drivers arising from the COVID-19 pandemic was in the public domain. It was evident that transport workers were more likely to suffer from infection. The respondent's role in terms of its members were advisory and providing guidance and recommendations to its members. The respondent was considering this issue prior to this meeting in the context of advising its members during the pandemic.

58. Mr Vidler referred the claimant's question to the Operations Group for further consideration. That group had been set up specifically to look into these matters. He asked Mr McNally to consider this. His approach was in line with previous daily management meetings during which other issues were triaged to the appropriate working group.

59. Mr McNally discussed this question raised by the claimant with the Operations Group at the next meeting on 16 April 2020. He stated that this was an important point for discussion with the Rail Safety and Standards Board, which had agreed to review the matrices. The number of fatalities were noted, they were relatively high in London but reflected the position in the general population, and such numbers were to be considered carefully.

60. An email dated 13 May 2020 was sent from Mr Vidler to Mrs Edge with the subject 'couple of contract issues' in which Mr Vidler asked Mrs Edge for further advice on the 'process for exiting' the claimant.

Proposed redundancy of claimant's role

61. On 01 June 2020 there was a conversation via Zoom between Mr Vidler and the claimant, in which the claimant was informed that Mr Vidler believed that the role of International Manager would no longer be required going forward, bearing in mind the respondent intended to reduce its international activities.

62. On 02 June 2020 the claimant was notified by letter of the proposal to terminate his International Manager contract with effect from 3 July 2020 on grounds of redundancy. It was stated in Mr Vidler's letter that he considered that the role of International Manager was not essential as the respondent intended to reduce its international activities going forward through a reduction in the time spent in engaging with international representative bodies. There was a vacancy in Scotland of a Public Affairs Executive which although was not considered to be suitable alternative employment, the claimant was invited to comment and explore this option. The claimant's request that someone else be 'bumped' out of the organization was rejected (the claimant suggested he could take over the Policy

Manager's role which was held by Ms Edwards) and it was proposed that a further meeting takes place on 05 June 2020 to continue discussions with the claimant.

Discussing options with the claimant

63. On 05 June 2020 a telephone conversation took place between Mr Vidler and the claimant in which options were discussed including the Public Affairs Executive role in Scotland, 'bumping' someone else to create an opening for the claimant and putting the claimant on the Coronavirus Job Retention Scheme, all of which were not felt to be appropriate solutions. The claimant asked if there was a role for someone working on international issues, open data and Brexit and it was confirmed that such a role was not available. The claimant stated that he felt targeted potentially due to the statement he made at the daily management Zoom call in April 2020. The claimant asked Mr Vidler to remind his HR adviser that he was a protected employee because he signed his new contract before leaving his previous employment and he cited *Welton v Deluxe Retail* as relevant case law. He made a proposal of early retirement, which he would put in writing and there would be a further discussion on the following Monday.

64. On 09 June 2020 there was a further telephone conversation between Mr Vidler and claimant in which the claimant was advised that his latest proposal was not accepted. It was confirmed that the International Manager post was redundant. The claimant set out his views and stated he, '*therefore intended to pursue resolution through a tribunal on the basis of 21 years' continuous service*.'

Claimant's notice of redundancy dismissal

65. The claimant was issued with a letter confirming his dismissal on the ground of redundancy on 10 June 2020 and the matters discussed at the meeting on the previous day. The claimant was being given just over 4 weeks' notice (which he was required to work), his last working day would be on 10 July 2020, and that any appeal should be made in writing within 5 working days.

Claimant's appeal

66. The claimant sent his appeal against his dismissal to Mr Dean on 11 June 2020. He stated that his role was not in fact redundant (and the outcome was pre-determined),

expressed an interest in Mr Gomersall's role (on the basis that this was converted from a fixed term contract to a permanent role), there was failure to consider voluntary redundancy, that he was victimized as a result of the stance he took at the start of the pandemic and that he was entitled to a statutory redundancy payment. The claimant suggested three possible desired outcomes namely an early retirement arrangement, a financial settlement (he stated he was advised that a Tribunal would probably award him +/- a year's salary) or a new contract incorporating those aspects of his duties the respondent wanted to continue and Mr Gomersall's role, at Mr Gomersall's salary. He also requested his legal costs incurred for his treatment over the last 18 months.

67. On 29 June 2020 the claimant was invited to attend an appeal hearing which would take place on 03 July 2020 by Microsoft Teams.

68. On 03 July 2020 an appeal hearing took place which was chaired by Mr Dean, Ms C Wratton (HR at Southeastern), Mr P O'Neil (Managing Director at Arriva Bus UK), Mr B Hiron (Managing Director of Stephensons of Essex), and Mr I Luckett (Director of Lucketts Coaches). The claimant was accompanied by Mr P White, Director of CPT Scotland.

69. The claimant was informed by letter from Mr Dean dated 08 July 2020 that his appeal has not been successful. Mr Dean stated that he was satisfied for a number of reasons that the requirements for an employee to perform work in the claimant's specific areas had diminished and is likely to continue to do so to a degree where redundancy was the legitimate consequence and that the respondent had followed good practice in his case. It was not agreed that this was not a genuine redundancy situation. In relation to the claimant's question raised at the April 2020 Zoom meeting, it was concluded that it was appropriate for Mr McNally to deal with these matters and that there was no evidence that this discussion influenced the decision to make the claimant's role redundant. It was not considered appropriate or suitable alternative employment for Mr Gomersall's role to be assumed by the claimant, nor was it appropriate to make other employees redundant on the basis that they were currently on furlough. It was further concluded that no statutory redundancy payment was due because the claimant did not have 2 years' continuous service.

Events after rejection of claimant's appeal

70. The claimant's last day of employment with the respondent was on 10 July 2020.

71. Ms L Tang was made redundant at age 50 and Ms C Hay was made redundant at age 51. Mr Coyne who was aged 60 was kept in post and Mr Gomersall was also kept in post and he was 62 years of age.

72. At the date of his dismissal the claimant was 61 years of age.

73. The claimant presented his claim to the Tribunal on 23 October 2020.

Observations

74. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –

75. The Tribunal noted that there was no mention of any individual in any consultation documents up to October 2018. The respondent's focus was on structural reorganisation.

76. A consultation document in relation to a proposal for the future structure of the respondent was circulated on 30 October 2018 to members. There were six workshops scheduled in November 2018. The respondent received 155 replies to its consultation including replies from 12 staff (the Foster report stated that there were 694 members). It was clear that the respondent had a genuine consultation with its members in 2018.

77. The first time that the respondent mentioned that there were three vacancies available to the claimant was in the letter dated 13 December 2018, although the respondent stated that these were not suitable alternative employment. The claimant did not apply for any of these roles. In an email dated 8 December 2018 the claimant wrote to the Chairman and the Chief Executive of the respondent recommending a

modified International Post for himself which was, ultimately, accepted by the respondent.

78. The claimant did not lodge an appeal in relation to the decision to make him redundant from his Director of Policy Development role in 2019, and he did not thereby challenge the substantive or procedural fairness of his redundancy at the material time. The Tribunal was unable to decipher any reasonable explanation for this.

79. The claimant explained that he did not apply for the CEO role, and he believed that the salary for this was £100,000. The Tribunal noted that the respondent's Job Description stated that the salary was in fact "*circa £100,000*." The respondent's external Job Description provided that the remuneration was "*six figures + benefits*." Therefore, the salary for the CEO role was not fixed at £100,000 and the claimant could have at least attempted to negotiate in respect of this (the claimant had negotiated with the respondent in relation to other matters). The claimant stated he had been informed the salary would be £100,000. He felt that such a salary level was not commensurate to the scale and responsibility of the role, and this would result in a salary reduction for him of £23,000 and, therefore, this was not suitable alternative employment. It was not clear why he did not apply for this role and seek to negotiate the salary.

80. Four weeks prior to his employment in his Director of Policy Development role ending on 30 June 2019, the claimant stated that he discovered that the salary for the CEO role was in fact £150,000 (and not £100,000 as he had first thought). The claimant stated that if he raised a complaint, it could have compromised his redundancy settlement at the time. However, the claimant could have brought this matter to the attention of the respondent at the relevant time and if he had done so, the respondent would have had an opportunity to explain the reason for this and to explore this matter further.

81. There was a gap in excess of 4 weeks in employment between the claimant's Director of Policy Development (which terminated on 30 June 2019) and International Manager role (which started on 1 August 2019). The claimant carried

out no work in the period between the two roles, and there was no contract of employment in operation during the period in question. Moreover, the claimant sought to negotiate the terms of the new International Manager role throughout July 2019 despite having signed the contract of employment on 28 June 2019 with an agreed start date of 1 August 2019.

82. The claimant made no reference to the Big Five bus and coach companies allegedly acting as a cartel until June 2019. The claimant made a note for himself on 25 November 2018, but this was not sent to the respondent.

83. In relation to what the claimant had said during the Zoom conference on 14 April 2020, the Tribunal heard accounts of the exchange from the claimant, Mr Vidler, Mr McNally and Mr Warrender, and noted that Mr McNally had prepared a contemporaneous note of the meeting. The claimant did not offer notes on the exchange and stated in his witness statement that he could not be clear in terms of the exact words that he used. The Tribunal did not accept the claimant's account of what he stated during the Zoom meeting.

84. The Tribunal did not accept that on 14 April 2020 Mr Vidler became frustrated with the claimant as a result of the claimant having raised the question in relation to bus and coach drivers' safety. This matter was not within the responsibility of Mr Vidler. It was within the remit of Mr McNally, and it was appropriate for the matter to be referred to him and his working group. It was also difficult to understand how the claimant was able to determine conclusively on a Zoom conference call that Mr Vidler was frustrated. On the balance of probabilities, the Tribunal preferred the respondent's evidence in relation to this matter.

85. The claimant suggested that he should have been bumped into the role of the Policy Manager. The respondent did not agree to do this. This was a significantly more junior role. It was not clear why the claimant was seeking this as he had previously rejected the CEO role and he cited salary as an issue (which he believed to be £100,000). The claimant did not apply for this role during the redundancy process in 2019 and it was not clear why the claimant wanted this role in 2020, nor was it clear

that he had the necessary skills and experience to carry out the duties relating to this post.

86. The Tribunal made its essential findings of fact on the balance of probabilities. Where there was a conflict of evidence, based on the above findings of fact and observations, the Tribunal preferred the respondent's evidence (including evidence from the respondents' witnesses, particularly in relation to evidence that was supported by contemporaneous correspondences and file notes).

Relevant law

87. To those facts, the Tribunal applied the law –

Age discrimination

88. The claimant makes a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges both direct discrimination and indirect discrimination.

89. The protected characteristic relied upon is age, as set out in sections 4 and 5 of the EqA.

Direct age discrimination

90. By section 13 of the EqA a person discriminates against another if because of a protected characteristic, in this case age, he or she treats the employee less favourably than he or she would treat others.

Indirect age discrimination

91. In terms of the claim for indirect discrimination: under section 19(1) of the EqA 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. A provision criterion or practice is discriminatory in these circumstances 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. Under subsection 19(3) EqA age is a relevant protected characteristic.

92. With regard to a comparison by reference to circumstances, section 23(1) EqA provides: "*On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case*."

93. The Tribunal considered the Supreme Court's decision in *Essop and others v Home Office (UK Border Agency) [2017] UKSC 27* saying that it was not necessary in an indirect discrimination for the claimant to show the reason why the PCP put a particular group at a disadvantage. All that was necessary was to show was a connection between the PCP and the disadvantage suffered by the group and the individual. It was always open to an employer to show that the PCP was justified.

Burden of proof

94. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that 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. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

Time limits for bringing a claim

95. The provisions relating to the time limit for bringing a claim under the Equality Act 2010 to the Employment Tribunal is set out in s123 of the EqA:- (1) Subject to section 140B [a reference to the provision extending time for ACAS Early Conciliation] proceedings on a complaint within section 120 [the section giving the power to the Tribunal to hear claims under the EqA] 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.

96. The time limit runs from when the act of discrimination occurs and not when the claimant becomes aware of it (*Virdi v Commissioner of Police of the Metropolis*

[2007] IRLR 24). The Tribunal does have a broad discretion to hear a claim out of time under s123(1)(b) of the 2010 Act. In *British Coal Corpn v Keeble [1997] IRLR 336*, it was suggested that the factors set out below are ones which the Tribunal should take into account in exercising its discretion. However, in subsequent decisions it was made clear that the Tribunal has been given a very wide discretion under the 2010 Act and it should not treat these factors as a "checklist" (*Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] ICR D5*) but, rather, should take into account all relevant factors with no one factor being determinative.

97. The length and reason for any delay as well as the question of any prejudice to the respondent arising from the delay have been said to always be relevant factors (*Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] IRLR 1050*) although the Tribunal requires to bear in mind that no one factor is determinative.

98. The factors which may be relevant to the exercise of the Tribunal's discretion are:- a. the length of and reasons for the delay; b. the extent to which the cogency of the evidence is likely to be affected by the delay; c. the extent to which the party sued had co-operated with any requests for information; d. the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; e. the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

99. The burden of proof in the exercise of the discretion lies on the claimant and past cases have made it clear that it should be the exception and not the rule, with no expectation that the Tribunal would automatically extend time (*Robertson v Bexley Community Centre [2003] IRLR 434*). This does not, however, mean that exceptional circumstances are required for the Tribunal to exercise its discretion and the test remains what the Tribunal considers to be just and equitable (*Pathan v South London Islamic Centre UKEAT/0312/13*).

Unfair dismissal

100. Section 94 of the Employment Rights Act 1996 ('ERA 1996') provides that an employee has the right not to be unfairly dismissed. An employee must have 2 years'

continuous service in order to claim unfair dismissal (section 108 of the ERA 1996). Sections 210 – 219 of the ERA 1996 make provisions in relation to continuous employment, and section 212 of the ERA 1996 provides:

212 Weeks counting in computing period.

(1)Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.

(2). . . . . .

(3)Subject to subsection (4), any week (not within subsection (1)) during the whole or part of which an employee is—

(a)incapable of work in consequence of sickness or injury,

(b)absent from work on account of a temporary cessation of work,

(c)absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose,

(d). . . . . .

counts in computing the employee's period of employment.

(4)Not more than twenty-six weeks count under subsection (3)(a) . . between any periods falling under subsection (1).

101. It is for the respondent to show the reason (or principal reason if more than one) for the dismissal (s98(1)(a) ERA 1996). That the employee was redundant is one of the permissible reasons for a fair dismissal (section 98(1)(b) and (2)(c) ERA 1996). Where dismissal is asserted to be for redundancy the employer must show that what is being asserted is true i.e. that the employee was in fact redundant as defined by statute.

102. An employee is dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that his employer has ceased or intends to cease to carry on that business in the place where the employee was so employed, or the fact that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish (s139(1) ERA 1996).

103. In *Safeway Stores plc v Burrell [1997] IRLR 200* the EAT indicated a 3-stage test for considering whether an employee is dismissed by reason of redundancy. A Tribunal must decide:

a. Whether the employee was dismissed?

b. If so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

c. If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

104. If satisfied of the reason for dismissal, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA 1996).

105. In applying s98(4) ERA 1996 the Tribunal must not substitute its own view for the matter for that of the employer but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

106. The Tribunal considered the EAT's decisions in *Eaton Ltd v King & Others [1995] IRLR 75* and *E-Zec Medical Transport Service Ltd v Gregory [2008] UKEAT/0192/08,* and *British Aerospace v Green [1995] IRLR 433* in the Court of Appeal. When considering whether the circumstances of the claimant's dismissal fell within the range of reasonable responses open to a reasonable employer the Tribunal should consider whether the respondent's choice of any selection criteria fell within a range of reasonable responses available to a reasonable employer in all the circumstances and whether based on the evidence before the Tribunal the scoring was applied in a fair and objective manner. The Tribunal's task, however, was not to subject any marking system to a microscopic analysis or to check that the system had been properly operated but it did have to satisfy itself that a fair system was in operation.

107. It is generally for the employer to decide on an appropriate pool for selection. If the employer genuinely applied its mind to the question of setting an appropriate pool, the Tribunal should be slow to interfere with the employer's choice of the pool. However, the Tribunal should still examine the question whether the choice of the pool was within the range of reasonable responses available to a reasonable employer in the circumstances (*Capita Hartshead v Byard [2012] IRLR 814*).

108. A fair consultation would normally require the employer to give the employee *"a fair and proper opportunity to understand fully the matters about which [he/she] is being consulted, and to express [his/her] views on those subjects, with the consultor thereafter considering those views properly and genuinely*." (Per Glidwell LJ in *R v British Coal Corporation and Secretary of State for Trade & Industry ex parte Price and others [1994] IRLR 72*) cited with approval and as applicable to individual consultation by EAT in *Rowell v Hubbard Group Services Ltd 1995 IRLR 195, EAT* "*when the need for consultation exists, it must be fair and genuine, and should… be conducted so far as possible as the passage from Glidewell LJ's judgment suggests*". A fair consultation process must give the employee an opportunity to contest his selection for redundancy (*John Brown Engineering Ltd v Brown and ors. 1997 IRLR 90, EAT*).

109. The House of Lords in *Polkey v A E Dayton Services Ltd 1988 ICR 142* held that "*in the case of redundancy, the employer will not normally have acted 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 minimise redundancy by redeployment within its own organisation.*" The House of Lords' ruling firmly established procedural fairness as an integral part of the reasonableness test in S.98(4) ERA. Their Lordships decided that a failure to follow correct procedures was likely to make an ensuing dismissal unfair unless, in exceptional cases, the employer could reasonably have concluded that doing so would have been 'utterly useless' or 'futile.'

110. If the Tribunal decides that the dismissal is procedurally unfair, as part of considering the issue of remedy it ought to consider the question whether the employee would

have been fairly dismissed in any event, and/or to what extent and/or when. This inevitably involves an element of speculation (*Software 2000 Ltd v Andrews and ors 2007 ICR 825, EAT*). "*In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence*" (see *Software 2000 Ltd v Andrews and ors 2007 ICR 825, EAT* per Mr Justice Elias, the then President of the EAT).

Qualifying disclosures – s 43A, 43B and 43C of the ERA 1996

111. In relation to the claimant's claim that his dismissal was for the reason or principal reason that he had made a protected disclosure the relevant sections of the ERA 1996 state:

43A Meaning of "protected disclosure": In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B Disclosures qualifying for protection: In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following – (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…(d) that the health or safety of any individual has been, is being or is likely to be endangered…

43C Disclosure to employer or other responsible person: A qualifying disclosure is made in accordance with this section if the worker makes the disclosure — (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to— (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

112. The word ‘disclosure’ does not necessarily mean the revelation of information that was formerly unknown or secret. Section 43L(3) of the ERA 1996 provides that: ‘*any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention*.’

113. Accordingly, protection is not denied simply because the information being communicated was already known to the recipient. This was confirmed by the EAT in *Parsons v Airplus International Ltd EAT 0111/17*.

114. Not all disclosures are protected under the ERA 1996. For a disclosure to be covered, it has to constitute a ‘protected disclosure.’ This means that it must satisfy three conditions set out in section 43B(1) of the ERA 1996 -it must be:
-a ‘disclosure of information,’
-b. a ‘qualifying’ disclosure — i.e. one that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that one or more of six ‘relevant failures’ has occurred or is likely to occur,
-c. it must be made in accordance with one of six specified methods of disclosure.

115. The worker’s reasonable belief must be that the information disclosed tends to show that a relevant failure has occurred, is occurring, or is likely to occur, rather than that the relevant failure has in fact occurred, is occurring, or is likely to occur. In other words, the worker is not required to show that the information disclosed led him or her to believe that the relevant failure was established, and that that belief was reasonable — rather, the worker must establish only a reasonable belief that the information tended to show the relevant failure.

116. This point was considered by the EAT in *Soh v Imperial College of Science, Technology and Medicine EAT 0350/14*. It was explained that there is a distinction between saying, ‘I believe X is true’ and ‘I believe that this information tends to show X is true.’ As long as the claimant reasonably believed that the information provided tends to show a state of affairs identified in section 43B(1) of the ERA 1996, the disclosure will be a qualifying disclosure for the purposes of that provision even if the information does not in the end stand up to scrutiny.

117. The wording of S.43B(1) indicates that some account is to be taken of the worker's individual circumstances when deciding whether his or her belief was reasonable. The statutory language is cast in terms of 'the reasonable belief of the worker making the disclosure' not 'the belief of a reasonable worker.'

118. Thus, the focus is on what the worker in question believed rather than on what a hypothetical reasonable worker might have believed in the same circumstances. However, this is not to say that the test is entirely subjective — S.43B(1) requires a reasonable belief of the worker making the disclosure, not a genuine belief. This introduces a requirement that there should be some objective basis for the worker's belief. This was confirmed by the EAT in *Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4, EAT*, which held that reasonableness under S.43B(1) involves applying an objective standard to the personal circumstances of the discloser, and that those with professional or 'insider' knowledge will be held to a different standard than laypersons in respect of what it is 'reasonable' for them to believe.

119. If the claimant reasonably believed that the information tends to show a relevant failure, there can be a qualifying disclosure of information even if they were later proved wrong. This was stressed by the EAT in *Darnton v University of Surrey 2003 ICR 615*. The EAT held that the question of whether a worker had a reasonable belief must be decided on the facts as (reasonably) understood by the worker at the time the disclosure was made, not on the facts as subsequently found by the Tribunal. This case was cited with approval by the Court of Appeal ("CA") in *Babula v Waltham Forest College 2007 ICR 1026*, when it made clear that a worker will still be able to avail him or herself of the statutory protection even if he or she was in fact mistaken as to the existence of, for example, any criminal offence or legal obligation on which the disclosure was based. Where the legal position is something of a grey area, a worker might reasonably take the view that there has been a breach.

120. In *Kilraine v London Borough of Wandsworth 2018 ICR 1850*, the CA held that 'information' in the context of S.43B(1) can cover statements which might also be

characterised as allegations - 'information' and 'allegation' are not mutually exclusive categories of communication. The key principle is that, to amount to a disclosure of information for the purposes of S.43B the disclosure must convey facts.

121. In relation to a purported disclosure under S.43B(1)(d), as with the other categories of relevant failure, a worker will be expected to have provided sufficient details in the disclosure of the nature of the perceived threat to health and safety. However, this duty does not appear to be too onerous. In *Fincham v HM Prison Service EAT 0925/01*, for example, the employee perceived herself to be the subject of a campaign of racial harassment. She wrote a letter to her employer containing the statement: '*I feel under constant pressure and stress awaiting the next incident*.' Although an employment Tribunal held that this was not sufficient to amount to a qualifying disclosure, the EAT thought otherwise. It said: '*We found it impossible to see how a statement that says in terms "I am under pressure and stress" is anything other than a statement that [the employee's] health and safety is being or at least is likely to be endangered… [That] is not a matter which can take its gloss from the particular context in which the statement is made*.'

122. In *Palmer and anor v London Borough of Waltham Forest ET Case No.3203582/*13 the employment Tribunal considered whether a worker was required to identify '*a specific risk or a specific person or a specific timescale of risk*' but held that, in its view, that would be a gloss on S.43B(1)(d), which refers to the health and safety of 'any' individual. There is no requirement that to attract the protection of the statutory scheme, disclosures must be made in good faith. However, S.49(6A) of the ERA 1996, gives the Tribunal the power to reduce compensation in successful claims under S.103A by up to 25% where '*it appears to the Tribunal that the protected disclosure was not made in good faith*'. The leading case on good faith (in a slightly different context under earlier whistleblowing legislation) is *Street v Derbyshire Unemployed Workers' Centre 2005 ICR 97* where the CA equated 'good faith' with acting with honest motives. It was held that where the predominant reason that a worker made a disclosure was to advance a grudge, or to advance some other ulterior motive, then he or she would not make the disclosure in good faith.

Automatically unfair dismissal – s.103A of the ERA 1996

123. Section 103A of the ERA 1996 provides:

103A Protected disclosure: An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

124. In *Kuzel v Roche Products Ltd [2008] ICR 799*, the CA considered the operation of the burden of proof as regards the reason for the dismissal in an unfair dismissal case brought by reference to both section 98 and section 103A. Mummery LJ envisaged that the Tribunal will decide first whether it accepts the reason for the dismissal advanced by the employer before turning, if it does not find that reason to be proved, to consider whether the reason was the making of the protected disclosure:

a. In his judgment Lord Justice Mummery also rejected the contention that the burden of proof was on the claimant to prove that the making of protected disclosures was the reason for dismissal. However, Mummery LJ agreed with the EAT that, once a Tribunal has rejected the reason for dismissal advanced by the employer, it is not bound to accept the reason put forward by the claimant. He proposed a three-stage approach to S.103A claims: a. First, the employee must produce some evidence to suggest that his or her dismissal was for the principal reason that he or she had made a protected disclosure, rather than the potentially fair reason advanced by the employer. This is not a question of placing the burden of proof on the employee, merely requiring the employee to challenge the evidence produced by the employer and to produce some evidence of a different reason;

b. Second, having heard the evidence of both sides, it will then be for the employment Tribunal to consider the evidence as a whole and to make findings of primary fact based on direct evidence or reasonable inferences;

c. Third and finally, the Tribunal must decide what was the reason or principal reason for the dismissal on the basis that it was for the employer to show what the reason was. If the employer does not show to the Tribunal's satisfaction that it was its asserted reason, then it is open to the Tribunal to find that the reason was as asserted by the employee. However, this is not to say that the Tribunal must accept the employee's reason. That may often be the outcome in practice, but it is not necessarily so.

125. The Tribunal bears in mind that an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case of automatically unfair dismissal advanced by the employee.

126. Whistle-blower protection is analogous to the victimisation provisions in antidiscrimination legislation, in that both seek to prohibit action taken on the ground of a protected act. This has led courts and Tribunals considering claims under S.103A to refer to the substantial body of case law concerning causation under the victimisation provisions in what is now the EqA for guidance. In *Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065, HL*, a claim concerning victimisation contrary to the former Race Relations Act 1976, Lord Nicholls stated that the causation exercise for Tribunals is not legal but factual. A Tribunal should ask: 'Why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason?' This approach was expressly approved in the context of S.103A by the EAT in *Trustees of Mama East African Women's Group v Dobson EAT 0220/05*.

127. The question of whether the making of the disclosure was the reason (or principal reason) for the dismissal is distinct from the question of whether the disclosure was protected under the statutory scheme — *Croydon Health Services NHS Trust v Beatt 2017 ICR 1240, CA*. The former question requires '*an enquiry of the conventional kind into what facts or beliefs caused the decision-maker to decide to dismiss*.' The latter, however, is '*a matter for objective determination by a Tribunal*' and '*the beliefs of the decision-taker are irrelevant to it*.' Furthermore, as Lord Justice Elias confirmed in *Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA*, the causation test for automatically unfair dismissal under S. 103A is stricter than that for unlawful detriment under S.47B — the latter claim may be established where the protected disclosure is one of many reasons for the detriment, so long as the disclosure materially influences the decision-maker, whereas S.103A requires the disclosure to be the primary motivation for a dismissal. Thus, if the fact that the employee made a protected disclosure was merely a subsidiary reason to the main reason for dismissal, then the employee's claim under S.103A will not be made out.

128. Lord Denning MR in *Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA* held that the principal reason for the dismissal is the reason that operated on the employer's mind at the time of the dismissal, it is the: '*set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*'. Lord Justice Underhill adopted this approach in *Croydon Health Services NHS Trust v Beatt 2017 ICR 1240, CA*, stating that 'the "reason" for a dismissal connotes the factor or factors operating on the mind of the decision-maker which cause them to take the decision — or, as it is sometimes put, what "motivates" them to do so'.

Redundancy - s 105(6A) of the ERA 1996

129. Section 105(6A) of the ERA 1996 provides:

(1)An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

(a)the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant,

(b)it is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and

(c)it is shown that any of subsections (2A) to (7N) applies.

…

(6A)This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that specified in section 103A.

Parties' Submissions

130. Parties made detailed submissions which the Tribunal found to be informative. The Tribunal read both parties' representative's submissions and referred to the authorities cited therein. References are made to essential aspects of the submissions and authorities with reference to the issues to be determined in this judgment, although the Tribunal considered the totality of the submissions and authorities from the parties.

131. Parties referred the Tribunal to previous cases that have been decided which the Tribunal found to be informative including but not limited to the following:

No	Case name	Citation
1	Sutton v Revlon Overseas Corporation Ltd	[1973] IRLR 173
2	Moon v Homeworthy Furniture (Northern) Ltd	[1976] IRLR 298
3	Gunton v Richmond upon Thames LBC	[1981] Ch. 448
4	General of the Salvation Army v Dewsbury	[1984] IRLR 222
5	McCrea v Cullen & Davidson	[1988] IRLR 30 CA NI
6	R v British Coal Corp and SoS for Trade and Industry, ex p Price	[1994] IRLR 72
7	Sarker v South Tees Acute Hospitals NHS Trust	[1997] I.C.R. 673
8	Murray v Foyle Meats Ltd	[1999] IRLR 562
9	British Airways v Starmer	[2005] IRLR 862 EAT
10	Pugh v National Assembly for Wales	UKEAT/0251/06
11	MacCulloch v ICI	[2008] IRLR 846
12	Keonig v The Mind Gym	UKEAT/0201/12
13	Welton v Deluxe Retail Ltd t/a Madhouse	[2013] IRLR 166
14	Chesterton Global Ltd v Nurmohamed	[2017] EWCA Civ 979
15	Kilraine v London Borough of Wandsworth	[2018] EWCA Civ 1436; IRLR 846
16	Ishola v Transport for London	[2020] IRLR 368
17	Heskett v Secretary of State for Justice	[2020] EWCA Civ 1487
18	Williams v Governing Body of Alderman Davies Church in Wales Primary School	[2020] IRLR 589
19	South Western Ambulance Service NHSFT v Mrs C King	UKEAT/0056/19/OO
20	Simpson v Cantor Fitzgerald	[2021] ICR 695

Discussion and decision

132. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

Unfair Dismissal: s.94 ERA 1996 (GoC paras 28-29; GoR para 33.1-33.4)

(vii) Does the Claimant have sufficient continuity of service to bring a claim for unfair dismissal?

133. There was no contract of employment in place between 1 July 2020 and 31 July 2020. The claimant's previous role as Director of Policy Development came to an end of 30 June 2020. His Form P45 was issued, and the claimant received a redundancy payment. The claimant signed a contract of employment on 28 June 2020 for his new role as International Manager starting on 1 August 2020. His new contract and the correspondences between parties stated that continuity of employment would not continue, and the new role would start on 1 August 2020.

134. The claimant's representative referred to the case of *Welton v Deluxe Retail Ltd (t/a Madhouse) [2013] IRLR 166* and Harvey on Industrial Relations at 7.05:
"The position at the start of the period relied on for continuity purposes can also be contrasted with the position where there is a gap in the employment (with the same or a relevant successor employer). Here continuity is only broken if there is a sufficient period where there is no contract of employment […]"

135. The claimant's representative further submits that Welton is authority for the proposition inter alia that a contract of employment will "govern the relations" between an employee and employer who enter into a new contract at a time before the termination of their present contract, notwithstanding that actual work under the new contract might not be required to be performed until a later date (see esp. paras 17 – 28 of Welton).

136. In *Welton*, the EAT held that there was a contract of employment, notwithstanding that work had yet to be performed under it, and the absence was on account of cessation of work, which could only be regarded as temporary, and the appeal was allowed on these two points. The facts of the present case are materially different. In the claimant's case the Tribunal does not accept that the claimant's absence was on account of cessation of work, which could only be regarded as temporary. In the *Welton* case the period in which work was not performed was a matter of days, but the claimant in this case did not carry out work for more than 4 weeks.

137. The respondent's representative makes the point that in the Welton case the EAT found that the week in which the contract of employment was made was a week which 'counts' under s.212(1), where 'week' is defined as it is in s.232 of the ERA 1996. Mr Welton worked for part of the week in which he was dismissed. The following week, he signed the contract of employment for the new role, which he took up the week after. As such, s.212(1) covers the situation and gives continuity. It was held that the entering into a contract of employment in a week where no work is otherwise carried out counts as a week. The claimant's employment ended, and he received his P45 on or around 30 June 2019, as confirmed by claimant's counsel and neither party conducted itself as if a contract of employment was in existence at that time.

138. The respondent's representative submits that the claimant's intention was to negotiate a settlement for himself or to completely re-negotiate its terms. It was not until the very end of the month (being July 2019) that he finally agreed to accept terms that he had been previously offered.

139. The Tribunal considered section 212(3) of the ERA 1996. In relation to 212(3)(a) there was no evidence to suggest that the claimant was incapable of work in consequence of sickness of injury. The Tribunal could find no evidence to show that there was a temporary cessation of work. The claimant's role as Director of Policy Development had in fact terminated and the claimant started a new role on 1 August 2020 as International Manager. The Tribunal was not satisfied on the facts of the claimant's case that there was an arrangement or custom such that the claimant could be regarded as continuing in the employment of the respondent for any purpose between 1 July – 31 July 2020. There was confirmation in the contract of employment dated 28 June 2020 that the claimant's previous employment would not count towards his continuity of service.

140. Considering all the evidence and circumstances, the claimant did not have 2 years' continuous service which is required to make a claim of unfair dismissal. Therefore, the Tribunal does not have jurisdiction to consider the claimant's claim for unfair dismissal and his claim for unfair dismissal stands dismissed.

(viii) Was there a potentially fair reason for dismissal? The Respondent relies upon redundancy.

141. In the event that the Tribunal found that the claimant had the required 2 years' continuity of service (which did the Tribunal did not find), the Tribunal would have concluded that redundancy was the genuine reason for the claimant's dismissal. The respondent's members were not happy and wanted to change the strategic direction of the respondent. The members and the Council were not content with the way that the respondent were progressing and wanted to proceed in a different way, that meant that different skills and competencies were required.

142. The Tribunal were satisfied that there was a reduction in the need for the claimant's role as International Manager and any residual elements of the role he carried out would be absorbed within the new staffing structure.

143. The claimant was recruited as International Manager in significant part to assist with the Brexit transition period. Once this period was over, his role was no longer necessary. The open data work which he carried out for around 3 days a month was a small part of the role and it was in fact a short-term project. This was the agreed understanding between both parties.

144. The respondent carried out a genuine consultation in relation to the proposed redundancy including having held three separate meetings with the claimant.

145. The Tribunal referred to s98 ERA 1996, which sets out how a Tribunal should approach the question of whether a dismissal is fair. There are two stages: firstly, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in s98(1) and (2) of the ERA 1996. If the employer is successful at the first stage, the Tribunal must then determine whether the dismissal was fair or unfair. This requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given.

146. The Tribunal referred to the definition of redundancy in s139(1) of the ERA 1996. That states that an employee is dismissed by reason of redundancy if the dismissal

is wholly or mainly attributable to the fact that their employer has ceased or intends to cease to carry on that business in the place where the employee was so employed, or the fact that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish. The Tribunal considered the matters set out in *Safeway Stores plc v Burrell (above)*. The claimant was dismissed by the respondent, so the first element was satisfied.

147. It is also clear that the respondent had determined that it required to cut costs and that this would done by reducing wage costs. A conclusion was reached that the respondent's team could operate without an International Manager. The requirement for employees to carry out work of a particular kind was accordingly expected to cease or diminish. The second test was, therefore, also satisfied.

148. We must not look behind the employer's decision or require it to justify how or why the diminished requirement has arisen provided that it was genuinely the reason for dismissal: *Moon v Homeworthy Furniture (Northern) Ltd [1976] IRLR 298*.

149. In relation to the final point, the Tribunal was satisfied that the claimant's dismissal was wholly caused by the fact that the respondent determined that, to reduce costs, the claimant's post namely International Manager would require to be removed. The Tribunal were accordingly satisfied that the claimant's dismissal occurred because of a genuine redundancy situation. The Tribunal were also satisfied that the claimant was dismissed solely due to redundancy.

(ix)If the reason for dismissal was redundancy, was the dismissal fair or unfair, judged in accordance with equity and the substantial merits? Specifically, in all the circumstances (including the size and administrative resources of the Respondent's undertaking) did the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant?

150. In the event that the Tribunal found that there was two years' continuity of service (which the Tribunal did not find), the Tribunal also considered the fairness of the respondent's decision to make the claimant's role redundant and the fairness of the

process overall. The Tribunal then considered s98(4) of the ERA 1996. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reason shown by the respondent. The answer to that question depends on whether, in the circumstances (including the size and administrative resources of the employer's undertaking) the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the employee.

151. This should be determined in accordance with equity and the substantial merits of the case. The guidance given in cases such as *Iceland Frozen Foods Limited v Jones [1982] IRLR 439* that the Tribunal must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent was considered. In considering whether the respondent in this case acted reasonably in treating redundancy as a sufficient reason for dismissing the claimant, the Tribunal had regard to the guidance laid down in *Polkey* in relation to whether the respondent acted reasonably in treating redundancy as sufficient reason for dismissal.

152. Mr Vidler contacted the claimant by Zoom on 01 June 2020 to advise him that he believed the claimant's role was no longer necessary and this was followed up by way of a letter dated 01 June 2020. There were three meetings that took place in total with the claimant. The claimant was provided with opportunities to make alternative proposals and to raise questions about the respondent's proposals. He was also given the opportunity to apply for the vacant role in Scotland which he chose not to pursue.

153. The claimant suggested that he be placed on furlough. The respondent considered this and felt it was not appropriate as his role was no longer necessary. The Tribunal was satisfied that this was within the band of reasonable responses, and that the respondent's decision was in accordance with the aims and objectives of the Coronavirus Job Retention Scheme.

154. The claimant stated that he should have been 'bumped' into a more junior role namely the Policy Manager role. The respondent considered this and rejected his suggestion. He did not apply for the role at the time when the role was offered when the previous redundancy consultation took place in 2019. He stated that the salary

for the CEO post which he believed was £100,000 was too low and the salary for the Policy Manager role was significantly below this level. The current post holder had been working in the role for quite some time. The claimant was looking to change her role to include what he believed were residual international aspects of his role. The respondent did not consider this to be appropriate and the requirement for the claimant to carry out international work had diminished significantly. It was unclear whether the claimant could perform all aspect of the Policy Manager role.

155. The Tribunal considered the fact that Mr Dean was consulted by Mr Vidler prior to the appeal and whether in light of this he could be considered to be an impartial appeal chair. The Tribunal noted that a thorough appeal hearing took place, there was a panel which made a unanimous decision, and there was a genuine appeal process in which the claimant's grounds of appeal were considered fairly and reasonably. The claimant had sought legal advice and he had a companion accompanying him at the appeal hearing. The Tribunal considered the process as a whole and concluded that this was fair and reasonable.

156. The Tribunal were satisfied that the respondent's decision to make the claimant's role redundant was fair and reasonable, and fell within the band of reasonable responses that were open to a reasonable employer to make in all the circumstances. In the circumstances, if the claimant had two years' continuous service (which the Tribunal found he did not have), the claimant's claim for unfair dismissal would have been dismissed as the respondent had established a fair reason for dismissal namely redundancy, and the respondent's decision to dismiss the claimant was both procedurally and substantively fair.

Time Limits – Equality Act 2010

Are the alleged incidents of discrimination in time, or were they a continuing act?

157. The Tribunal concluded that the acts of discrimination in points (i) (a) to (c) of the list of issues relate to events that were presented to the Tribunal outside the time limit provided in section 123 of the Equality Act 2020.

If not in time, is it just and equitable to extend time to permit the claims to be heard?

158. The Tribunal were not satisfied that it would be just and equitable to extend time.

There was little evidence put before the Tribunal in terms of why the claimant delayed in not presenting his complaints on time. There was no adequate explanation in relation to why the claimant did not bring a claim in respect of these events earlier, why he did not seek legal advice or seek to research the issue of time limits sooner. He had been in receipt of legal advice for several months prior to presenting his Tribunal claim. Some of the events are rather dated, as far back as 2018, and this was likely to cause substantial prejudice to the respondent and the respondent's witnesses. The Tribunal were not satisfied that it would be just and equitable to extend time based on the claimant's evidence and having considered all the circumstances. The claimant's claim relating to his dismissal in June 2020 would still continue.

159. The Tribunal did not find that any of the allegations of direct or indirect discrimination made in the list of issues were well-founded.

160. In the circumstances and based on the Tribunal's findings of fact, it cannot be said that there was a continuing act of discrimination and therefore the claimant's claims in points (i)(a) to (c) of the list of issues were presented outside the statutory time limit, the Tribunal does not have jurisdiction to hear those claims, and they are dismissed.

Direct discrimination: s.13 EA 2010 (GoC para 24A)

(xvi) Was the Claimant subject to direct age discrimination contrary to s.13 Equality Act 2010 in that between late 2018 and the Claimant's dismissal in June 2020, the Respondent treated the Claimant less favourably than it would have treated a person in a younger age group (under 53 years) than the Claimant's age group (53 years and over) [C's age group not agreed by R] (with no other material difference in circumstance) by a course of conduct designed to diminish the Claimant's role within and ultimately exit the Claimant from the Respondent? In particular by:

a. In late 2018, proposing that the Claimant's role be made redundant (as averred at paragraphs 6 and 7 AmGoC);

161. Notwithstanding the Tribunal dismissing the claimant's claims relating to (i)(a) to (c) of the list of issues on grounds that we do not have jurisdiction to hear those claims

because they were lodged outside the statutory time limit, in the event the Tribunal was wrong to so decide, the Tribunal considered the merits of those complaints.

162. The Tribunal noted that the claimant relied on the age group he was part of as being 53 years and over and he compared himself with the age group that were below 53 years. Initially he relied on the age group of 55 and over and under 53 years. Ms L Tang was made redundant at age 50 and Ms C Hay was made redundant at age 51. Mr Coyne who was aged 60 was kept in post and Mr Gomersall was also kept in post and he was 62 years of age. It was not clear why the claimant chose this particular age group given that the evidence was clearly inconsistent with his contention that his age group were subjected to direct age discrimination.

163. The Tribunal concluded that proposing that the claimant's role be made redundant in late 2018 was in no sense so whatever related to the claimant's age or to the age group to which he refers. There was no evidence to show that the claimant or employees from his age group were treated less favourably. In fact the claimant did not lodge an appeal in respect of his 2018 redundancy, he made a proposal that he be provided with an entirely new role which the respondent accepted, and he was given a substantial redundancy settlement. The claimant was clearly not treated less favourably on account of his age or his age group.

b. In January 2019, giving the Claimant notice of the redundancy of his Director of Policy Development role (as averred in paragraph 11 AmGoC);

164. The Tribunal were satisfied that in giving the claimant notice of redundancy in January 2019, his age (or his age group) played no role whatsoever in relation to the respondent's decision to put him on notice of redundancy. The Tribunal accepted that there was a legitimate business reason for the proposed redundancy and the claimant did not challenge the decision or lodge an appeal at the time.

c. In January 2019 to 28 June 2019 (the date of signature of the contract) offering the Claimant a role on a fixed term part-time basis resulting in substantially lower income and with a substantial part of his previous role removed (as averred in paragraphs 12 and 13 AmGoC);

165. The Tribunal were satisfied that the decision to offer the claimant a new contract on 28 June 2020 was in no sense whatsoever connected with his age or his group. The claimant voluntarily accepted the new terms of employment and he signed these on 28 June 2020. He sought to negotiate the new terms and added on additional responsibilities relating to Open Data for which he was to receive additional remuneration. There was a costs saving for the respondent in terms of salary, albeit there was also a substantial redundancy payment paid to the claimant.

> *d. In June 2020, dismissing the Claimant upon the purported grounds of redundancy, in circumstances where there was no real redundancy situation (as averred in paragraphs 17 – 19 and 21 AmGoC).*

166. As the Tribunal has found that redundancy was the reason for the claimant's dismissal, and the Tribunal accepted that this reason was the genuine reason for his dismissal (and that there was no other reason for the claimant's dismissal), the Tribunal did not find that this complaint was well-founded. The claimant's age or his age group was in no sense whatsoever connected with the claimant's dismissal.

167. The claimant argues that the respondent, selected the claimant for redundancy because of his age. He says, as we know, the claimant reduced his hours and his salary when he took on an entirely new role in 2019 and we have seen a contract recording that. On behalf of the respondent it is pointed out that if there was a contract recording that, then perhaps one might infer that it had been agreed and not objected to by the claimant. Be that as it may, the claimant says that he had to reduce his hours. He invites us to find that he was selected for redundancy for the reason of his age. We need to look at the treatment of comparators to see if we can infer that age played a role from different treatment given to others. We do not find that there were any other employees dismissed in comparable circumstances who were the claimant's age, or within his age group.

168. It is right also, and it is common ground, that Mr Coyne and Mr Gomersall who are aged 60 and 62 respectively, continued to work with the respondent after the termination of the claimant's employment and this is pointed to by the respondent as showing that the alleged less favourable treatment did not take place.

169. To that end, we do not have a comparable situation from which the claimant can demonstrate less favourable treatment. His case was that he was selected for redundancy because of his age and there were younger employees not selected for redundancy. The allegation of direct discrimination has not been made out based on the evidence heard by the Tribunal.

170. The claimant does not establish a prima facie case of less favourable treatment based on his case of being dismissed due to his age or his age group. Ms Tang and Ms Hay were also dismissed. Ms Tang is 50, Ms Hay is 51. The difference between Ms Tang's age of 50, and the claimant's age of 61, was not a relevant difference in terms of age which suggests that age played no role in any decision to dismiss the claimant. As we say, age played no role in the decision to dismiss the claimant. Even if the burden transferred on the direct age discrimination claim to the respondent, the respondent showed that age played no role whatsoever in relation to its decision to dismiss the claimant.

171. In any event, in terms of establishing a prima facie case of age discrimination, he fails to do that. His dismissal was unconnected with age. The reason for the dismissal was that there had been a decision to make the claimant's role redundant. The revenue forecast had been revised following the events of early 2020 and the accounts we have seen corroborate that to the extent that small persistent losses were being sustained, justifying, or giving a basis in evidence for a decision to make the claimant's role redundant.

172. Therefore, the claim against the respondent for direct age discrimination is unsuccessful.

Indirect Age Discrimination: s.19 EA 2010 (GoC paras 22-24; GoR para 31.1-31.10)

(xvii) Did the Respondent apply all or any of the following PCPs ("the PCPs"):

d. *As regards those persons perceived as being part of the 'old guard':*

i. *Dismissing them or encouraging their resignation or otherwise taking steps to ensure their departure from or reduced involvement in the Respondent;*

173. The Tribunal considered the claimant's allegation in relation to the 'old guard' and whilst some members of the particular age group referred to by the claimant were

dismissed, others were not. It was also not made out that any staff members were dismissed on grounds of or in connection with their age. There was no evidence that any previous dismissals or any proposed dismissals were due to age. There was no evidence of a PCP applied by the respondent in relation to this matter.

ii. *Effecting a restructure or series of restructures of the Respondent organisation, from October 2018 through to the Claimant's dismissal in June 2020, which reduced their involvement in the Respondent;*

The restructure had the effect of

e. *Dismissing, or encouraging the resignation of, or otherwise taking steps to ensure the departure from or reduced involvement in the Respondent of individuals who were perceived as being older than or more experienced than Mr Vidler.*

f. *The espousal and adoption of a new approach to communication and/or lobbying which emphasised a "more robust engagement", "a louder voice at the negotiating table" and "proactive leadership rather than reactive".*

(xviii) Are the above PCPs valid?

174. The relevant PCPs above were identified and included in the list of issues by agreement of the parties at an earlier case management preliminary hearing. During the course of this hearing, and in particular the respondent's evidence, it became clear that not all of the respondent's employees who were older than or perceived as being older than Mr Vidler were dismissed. The proposed changes in terms of a new approach of communication were in no way whatsoever connected with the claimant's or any other employee's age. There was no evidence of a PCP that the respondent dismissed or encouraged employees to end their employment or to have reduced involvement or in relation to the effects of the restructure (including new ways of communication), nor was there any evidence that this PCP was applied to the positions filled by the 'old guard', or indeed the age group of 53 years and over of which the claimant complains. For the purposes of this case therefore, and based on the evidence heard by the Tribunal, there was not a PCP that the respondent the respondent dismissed or encouraged the resignation of the 'old guard' or that it effected a restructure or series of restructures that reduced the said employees' involvement in the respondent.

(xix) If valid, did the above PCPs or any of them put or would they put people in the Claimant's age group at a particular disadvantage when compared with younger individuals? The disadvantages relied upon by the Claimant are

a. (in respect of (a) and (b) above) individuals in the Claimant's age group were more likely than younger employees (i) to be perceived as being members of the 'old guard'; and/or (ii) to be perceived as being older and/or more experienced than Mr Vidler;

b. and (in respect of (c) above) individuals in C's age group were more likely to be perceived as incapable of changing their methods and/or more likely to be perceived as being reactive rather than proactive.

175. Although this matter does not require to be considered as the Tribunal did not find that any of the PCP's were made out or that they were valid PCPs on the basis of its findings of fact, the second question was considered in the event the Tribunal were wrong in terms of its conclusion on whether there were valid PCPs.

176. The second question therefore is whether the application of the above PCPs put people of the claimant's age group, namely 53 years old and above, to any particular disadvantage when compared with persons who do not have this protected characteristic. On the face of it the evidence does not show that there was statistical disadvantage or disparate impact applied to those aged 53 and over. Put simply not all employees that were aged 53 or over were dismissed. Conversely, there were employees who were aged below 53 years of age that were dismissed, and indeed, there were employees in the claimant's age group who were retained by the respondent.

(xx) Did the PCPs put the Claimant at those disadvantages or any of them? See GoC para 23.

177. We have proceeded to consider this matter notwithstanding our earlier findings, in case we are wrong as to the above conclusion. As noted by Lady Hale in paragraph 26 of her judgment in *Essop* the reasons why one group may find it harder to comply with the PCP than others are many and various. The reason for the disadvantage need not be unlawful in itself, nor be under the control of the employer. In this case the evidence speaks for itself. If an employee is under age 53, he or she may still have been dismissed and indeed there was evidence that two employees in that age

group were dismissed. Accordingly, we find that the application of the PCP on the face of it did not place the claimant individually at the disadvantage complained of.

178. However, as noted in paragraph 32 of Lady Hale's judgment in *Essop*, it still remains open for the respondent to show that this particular claimant was not put at a disadvantage by the requirement. This relates to the "undeserving" claimant who has suffered a disadvantage for reasons which have nothing to do with the disparate impact and is undeserving in the sense that that claimant might otherwise "coat tail" upon the claims of the deserving claimants. We mean no disrespect to this claimant Mr Salmon in referring to him as "undeserving" but do so by reference to analysing his position in this respect.

179. We have found that the claimant was clearly aware of the workings of the respondent's redundancy process. In terms of his redundancy in 2019, the claimant had a meaningful consultation in which he was informed about available vacancies (including the CEO role), and he choose not to put himself forward for these. He was eventually offered a redundancy payment and a new role with the respondent which he accepted. During the redundancy process in 2020, he was provided with information that a vacancy was available and the respondent met with him repeatedly to discuss the proposed redundancy. This is the antithesis to demonstrating that the respondent applied the PCPs suggested by the claimant, along with the evidence in terms of the statistics.

180. For these reasons we find that there was no causal link between the purported PCPs and any alleged disadvantage suffered by the claimant. For the reasons above, we find it was not the application of the PCPs which put the claimant at any particular disadvantage, but his failure to apply for one of the available vacancies in 2018/2019 or in 2020 which may have provided him with an opportunity to continue to be employed by the respondent on a permanent basis.

181. For this reason we dismiss the claimant's claims for indirect age discrimination

(xxi) If so, were the PCPs a proportionate means of achieving a legitimate aim? The legitimate aim in issue is "saving costs and flattening the senior

management structure in order to change the emphasis of the business to have a more proactive role in the industry and a louder voice, to be achieved by a stronger but less costly middle management presence" (GoR para 31.10)? Was that a legitimate aim, and were the PCPs a proportionate means of achieving it?

182. However, even if we are mistaken in this conclusion, we would have dismissed the claimant's claim for indirect age discrimination in any event on the basis that the respondent's actions were justified. We have considered the justification defence put forward by the respondent, and our conclusions are these:

184.1 The respondent's actions would only be justified if they amount to a proportionate means of achieving a legitimate aim. The legitimate aim relied upon in connection with the claimant's redundancy is saving costs and flattening the management structure in order to change the emphasis of the business to have a more proactive role in the industry and a louder voice, to be achieved by stronger but less costly middle management presence: and

184.2 We have heard no cogent argument on behalf of the claimant to suggest that this is not a legitimate aim. The claimant's representative suggests that this aim could have been achieved by following a fair redundancy process. We have found that a fair redundancy process was followed in all the circumstances. We reject the submission that the respondent were required to offer the claimant the Policy Manager role, which was less senior, and he previously declined to apply for the CEO role with a salary of circa £100,000 (and he did not apply for the Policy Manager role at the relevant time, and that role was occupied by another employee).

183. In any event we agree with the respondent that it has established a legitimate aim in this respect.

184. The next point to consider is the extent to which the PCP in question was a proportionate means of achieving this legitimate aim. We note the following points: (i) a fair and reasonable redundancy process took place, and no particular age group was precluded from fair participation in the process by reason of age; (ii) the respondent's rationale in terms of its business case is entirely neutral, and definitely neutral with regard to age; (iii) in any event the claimant could have put himself

forward for a vacant role in 2018/2019 or in 2020 to seek to avoid redundancy, which is also an age neutral process. There is no disparate impact by reference to age and the statistical evidence does not support the claimant's contention.

185. For these reasons we conclude that if we are wrong in our conclusions in relation to the validity of the PCPs and their impact on the claimant's age group and the claimant, we find that the introduction and maintenance of the purported PCPs amounted to a proportionate means of achieving a legitimate aim, and we would have also dismissed the claimant's indirect age discrimination claim for this reason.

Automatically unfair dismissal: s.103A ERA 1996 (GoC para 25-27; GoR para 32.1-32.4)

(xxii) Did the Claimant make a protected disclosure ("the Protected Disclosure") *in that he disclosed information (GoC para 25(a) and (b)) which, in his reasonable belief, was made in the public interest (GoC para 25(c)) and which tended to show one or more of the matters pleaded at GoC para 25(d)(i), (ii) and/or (iii)?*

186. The Tribunal found that the claimant's made a disclosure in that he expressed concern at a meeting on 14 April 2020 about bus drivers' safety during the pandemic, and he said that the question arose whether buses should be running at all. The claimant suggested that if something was not safe, then the bus operators should not be doing it. This amounted to making a qualifying disclosure under s.43B(1)(b) and (d) for the following reasons.

187. They were disclosures of information regarding members of the respondent failing to comply or that they were likely to fail to comply with their legal obligations and that the health and safety of employees within the member organisations was being or was likely to be endangered as a result of drivers being required to work during the pandemic when there was inadequate knowledge about COVID-19. However, there was no evidence of any actual or likely concealment by the respondent before the Tribunal.

188. The claimant had a reasonable belief that the disclosures he made tended to show a breach of the relevant member organisations' legal obligations and health and

safety obligations. The respondent had a duty to advise its members in relation to matters including health and safety.

189. The claimant had a reasonable belief that the disclosures were being made by him in the public interest as he believed that members' safety was being compromised. That group of people concerned was sufficiently wide to support the claimant's reasonable belief that the disclosures were made in the public interest.

190. In any event the Tribunal found that the protected disclosures were made to Mr Vidler who told the Mr McNally about the concerns, who in turn had taken appropriate steps in line with his responsibilities. The Tribunal considered this disclosure in context. The Tribunal were satisfied that there were disclosures made by the claimant on 14 April 2020 to the claimant's employer under s.43C(1)(a).

(xxiii) If so, was the Protected Disclosure the reason or the principal reason for the Claimant's dismissal such that the dismissal was automatically unfair?

191. Having considered all the evidence before it, the Tribunal was persuaded that the reason for the claimant's dismissal was his redundancy. The claimant raised his concerns as set out in paragraph 187 above in relation to members' safety prior to the redundancy process having started, albeit these were raised after the respondent had provisionally made enquiries with Mrs Edge in relation to terminating the claimant's role. Moreover it was initially intended that the claimant's role would last for nine months as he oversaw the Brexit transition period and the Open Data tasks he were performing (which were a short-term project). This was period were extended as the respondent required additional resources at the start of the pandemic. The Tribunal was not persuaded that the qualifying disclosure made by the claimant was the reason or the principal reason for his dismissal because of those considerations and in light of the findings of fact set out above. Moreover, having considered the reasons advanced by the respondent for the claimant's dismissal, the Tribunal was persuaded that the reason for the claimant's dismissal was the claimant's redundancy. In their evidence before the Tribunal, the respondent's witnesses were adamant that the claimant's protected disclosures were not the reason or principal reason he was dismissed. The reason advanced were the claimant's role being redundant and the Tribunal accepted the

respondent's evidence in this respect. Having accepted this evidence, the Tribunal were satisfied that the qualifying disclosure made by the claimant played no part whatsoever in relation to the respondent's decision to dismiss the claimant.

192. The Tribunal considered the fact that the disclosures were made on 14 April 2020, and the claimant's employment ended on 10 June 2020 (consultation began on 1 June 2020). The Tribunal also considered the fact that the position of bus drivers was in the public domain and the respondent was considering health and safety advice that could be provided to its members, and all the other circumstances. The discussion on risk to drivers was a live, ongoing issue which was properly taken forward in Mr McNally's subgroup promptly and without delay. The respondent acted in accordance with their obligations towards their members. It was ultimately members that had responsibility for their employees' health and safety and the respondent's role was to provide advice. The Tribunal did not accept that the reason or the principal reason for termination of the claimant's employment in these circumstances were the protected disclosures made by the claimant.

193. The claimant claim for unfair dismissal pursuant to section 103A of the ERA 1996 is therefore dismissed.

(xxiv) Alternatively, if (which is denied by the Claimant) the dismissal was for redundancy, was the reason or principal reason for selecting the Claimant for redundancy the making of the Protected Disclosure such that the dismissal was unfair under section 105(6A) ERA 1996?

194. The Tribunal did not accept that the reason or the principal reason for selecting the claimant for redundancy in these circumstances were the protected disclosures made by the claimant such that the dismissal was unfair under section 105(6A) ERA 1996. Based on the findings of fact and observations above, the Tribunal were satisfied that the qualifying disclosures made by the claimant played no part whatsoever in relation to the respondent's decision to select the claimant for redundancy. The claimant's claim for unfair dismissal pursuant to section 105(6A) of the ERA 1996 is therefore dismissed,

Remedy

(xxv) To what remedy is the Claimant entitled? He seeks declarations that he has been discriminated against, subjected to a dismissal by reason of having made a protected disclosure, and unfairly dismissed. He claims compensation (including an award for injury to feelings), including an ACAS uplift. The Claimant also seeks appropriate recommendations.

195. As the claimants' claims have been dismissed in their entirety, remedy does not require to be considered.

Conclusion

196. The claimant's claims made pursuant to sections 103A and *105(6A)* of the ERA 1996, indirect age discrimination, direct age discrimination and for unfair dismissal are dismissed.

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Employment Judge B Beyzade

Dated: 7 February 2022

Sent to the parties on:

8 February 2022
.....
For the Tribunal Office