EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Janet Inglis v Bradford Diocesan Academies Trust

Heard at: Leeds (by CVP) **On**: 23, 24, 25, and 26 May 2022

Before: Employment Judge A James
Ms H Brown
Mr G Corbett

Representation

For the Claimant: Mr R Anderson, counsel

For the Respondent: Ms A Chute, counsel

JUDGMENT

(1) The claims for age discrimination (section 13 and 19 Equality Act 2010) are not upheld and are dismissed.

(2) The claims for unfair dismissal/constructive unfair dismissal (sections 94 and 95 Employment Rights Act 1996) are not upheld and are dismissed.

REASONS

The issues

1 The agreed issues which the tribunal had to determine are set out in Annex A.

The hearing

2 The hearing took place over four days. Evidence and submissions on liability were dealt with on the first three days. It was arranged that on the fourth day, the tribunal would give its decision and reasons and, if the claimant was successful, would defer remedy to the same date listed for the final hearing of

a second claim recently issued by the claimant, 1802389/2022. This is because of a potential overlap between factual matters relevant to that claim and mitigation issues in this claim. Given the agreement between the parties on that point, the tribunal was agreeable in principle to this suggested approach. However, in light of the above judgment, the remedy issues in this claim fall away in any event.

3 The tribunal heard evidence from the claimant Janet Inglis (who will be referred to in the rest of this Judgment as 'the claimant'); and for the respondents from Carol Dewhurst CEO of the respondent Trust, Denise Stirling, Chair of the Governors at Immanuel College and Jane Tiller, former Executive Headteacher of Immanuel College. There was an agreed trial bundle of 178 pages to which the relevant redundancy policy was added during the hearing, and a limited number of other documents, to give a bundle of 201 pages. We would like to express our gratitude to counsel, their instructing solicitors, and to the parties, for the pragmatic and sensible way that the issue of the extra documents was dealt with. As well as for counsel's expert advocacy, and written and oral submissions, which has assisted the Tribunal greatly.

Findings of Fact

The claimant's teaching career

4 The claimant commenced her career as a teacher in 1974. The claimant has had a distinguished career in teaching. This is reflected for example in her being nominated for an honour by Jane Tiller in 2014, and subsequently being awarded a British Empire Medal in the New Year's Honours list in 2015 for her work in improving behaviour at the school.

5 The claimant began employment as a Deputy Head Teacher at Immanuel College on 1 September 2001. The leadership team at that point consisted of a Headteacher and 3 to 4 Deputy Headteachers.

6 The notice provisions in the claimant's contract provided:

> *[Y]our employment will be subject to BDAT giving notice of no less than two months expiring on 31 December or 30 April, and by no less than three months' notice expiring on 31 August, as per Conditions of Service for Teachers in England and Wales (Burgundy Book)*.

Those notice provisions did not change during the claimant's employment at Immanuel College.

7 The redundancy Policy contains the following, under the heading 'Alternatives to Redundancy':

> *The Trust has a commitment to maintaining job security, where possible. Therefore when there are potential redundancy situations, the Trust will endeavour to redeploy and retrain staff where this is reasonable and appropriate and does not unduly impact on learning at the Trust.*

Immanuel College

8 Immanuel College is a secondary school and sixth form college based in Bradford. During the first few years of the claimant's employment, the college

had a number of challenging issues to deal with. There were several changes to the senior management team. Jane Tiller was appointed as Head Teacher in 2005.

9 On 1 February 2016, Immanuel College became part of the respondent Trust. The Respondent is an Academy Trust, currently responsible for 17 schools (four secondary schools and 13 primary schools) across Bradford.

10 The claimant's employment transferred under TUPE to the respondent Trust on 1 February 2016. Soon afterward, Jane Tiller became an Executive Headteacher, with partial responsibility for leadership at two other schools within the respondent Trust. This was later reduced to one other school.

Changes to the claimant's hours and role

11 During 2016, the claimant's core responsibilities at Immanuel College became part-time, at her request. She worked 80% of a full-time equivalent role. Her level of pay was set at L31 of the leadership group pay scale.

12 After Ms Tiller's appointment as Executive Head, the Trust determined that it was necessary for others to provide a leadership role at Immanuel College, when Ms Tiller was carrying out her leadership role at the other schools she had executive responsibility for. A decision was made to advertise for and appoint two Associate Head Teachers. In September 2016, the claimant and another Deputy Headteacher Ruth Hartley were appointed to the Associate Headteacher roles. They formed an Executive Leadership Team with the Headteacher, Jane Tiller. The claimant's level of pay was set at L34 and remained at that level until her employment was terminated.

13 In September 2018 the claimant's hours were reduced further, again at her request, from 80% to 60% of full-time hours. Her pay was reduced accordingly. A contract was issued to confirm this. All other terms and conditions remained the same.

14 In September 2018, the other Associate Headteacher (AHT), Ruth Hartley, left Immanuel College. Two Deputy Headteachers were appointed. The senior leadership structure became Ms Tiller and the claimant (the Executive Team) and three Deputy Headteachers, Sean Pickles, Ellen Doherty and Emma Sey.

Alleged less favourable treatment – September 2019

15 In 2019 the claimant formed the view that she was being side-lined. She felt there was a change in Jane Tiller's attitude towards her. She perceived that whilst meetings with her did not stop, they became less frequent. The claimant noted that Ms Tiller had regular meetings with the Deputy Head Teachers, which she was not included in. Subsequently, issues were discussed at Senior Leadership Team (SLT) meetings, which the claimant was not aware of. The tribunal accepts that this was the claimant's honest perception.

16 The tribunal also accepts however that there was no attempt or intention to side-line the claimant. The tribunal further accepts that one of the objectives set for Ms Tiller was to ensure development of members of the SLT to ensure that there were robust succession planning processes in place. Development opportunities and mentoring was offered to all the Deputy Head Teachers (DHTs), not just Sean Pickles. The Trust anticipated that at some point in the future, Ms Tiller would retire, and there might be interest from internal

candidates in the Headteacher role. The tribunal accepts that the claimant did offer specific mentoring to Sean Pickles, at Ms Tiller's request. He had specifically expressed an interest in a Headteacher role. However, monitoring and development opportunities were offered to all of the DHTs.

17 Further, the purpose of the meetings between Ms Tiller and the DHTs was to prepare them for Fridays, when the claimant and Ms Tiller were not in the building. Given the claimant's knowledge of the school, wide experience and myriad skills, it was felt that the claimant did not need to be at those meetings. Nor was it considered that the claimant required any further mentoring or development, given her wide skill set.

18 Yet further, the claimant was involved in a complex investigation regarding a member of staff in late 2019, which concluded in January 2020. This also led to her availability to attend SLT meetings being decreased. The claimant continued to chair SLT meetings when Jane Tiller was not at the college.

Jane Tiller's announcement of intention to retire – November 2020

19 In November 2020, Ms Tiller advised Ms Dewhurst of her intention to retire. Prior to that, Ms Tiller and the claimant had often had informal discussions about their plans, when they retired. Such discussions had gone on for years, although neither had ever suggested any firm retirement date. There was no suggestion in evidence that the claimant had at any point during those discussions, expressed an interest in applying for Ms Tiller's role, if she retired before the claimant.

20 The tribunal finds, on the basis of the second sentence of the penultimate paragraph of the minutes of the meeting on 24 November 2020, referred to below, that there was a discussion with Ms Dewhurst about Ms Tiller's role being replaced by a Head Teacher role solely for Immanuel College, and the potential impact on the claimant's role.

Leadership and Management Group meeting – 24 November 2020

21 At the Leadership and Management Committee of Immanuel College Governing Body on 24 November 2020, a decision was made in principle to replace Ms Tiller's role as Executive Headteacher, with a stand alone Headteacher role at Immanuel College. Ms Stirling and Ms Tiller attended that meeting, together with other governors. Ms Dewhurst was not present. The minutes record:

> *The Trust have asked JT to stay on and she has agreed to stay for 1 day a week at Immanuel and 1 day a week at BBEC as a Consultant Headteacher to support transition, and she had agreed this.*
>
> *As a consequence, the school is now going to return to the original structure of one Headteacher with three deputies, and no Associate Headteacher. JT will support the new Headteacher and there will not be any 'substitute' for JT when she is not in school. There will be a re-structure of the SLT to do this there has been a successful succession plan, with deputies nurtured and trained in their roles.*
>
> ***With implementation in September 2021?*** *Yes, the new structure will apply then, and the role of Associate Headteacher will disappear. …*
>
> *An update will be brought to the next meeting. JT advised that the CEO at BDAT has been very supportive of the proposal.*

The restructure was agreed proposed JW, seconded by PR and agreed unanimously.

22 On the basis of the evidence presented to the tribunal, the tribunal finds that Ms Tiller did not argue with the proposal. However, nor did Ms Tiller vote for the proposal, since she was not going to be part of the SLT going forward. Ms Tiller therefore abstained.

23 The tribunal accepts Ms Stirling's evidence that when the decision was made in 2016 to offer Ms Tiller the Executive Head post, there had been a discussion at the College's Governing Body, to the effect that when Ms Tiller retired, the College would revert to an SLT structure made up of a Head Teacher and 3 Deputy Heads, since there would be no ongoing need for an AHT at that stage. Those governors who were present for that discussion in 2016, reminded the meeting about that on 24 November.

24 The decision that had been made in principle to make the claimant's role of AHT at Immanuel College redundant still had to go through a formal process. First, the College's Governing Body had to formally approve the decision, and put forward a fully costed proposal to the Trust Board. The Trust Board then needed to formally approve the proposal. At that point, the decision would become official. The tribunal finds however that in all probability, a fully costed proposal would have been approved by the Trust Board. Indeed, from the Trust's point of view, it made strategic and financial sense to do so. Unfortunately, that decision had clear implications for the claimant's role.

Conversation between the claimant and Jane Tiller – 30 November

25 On 30 November 2020, a conversation took place between the claimant and Ms Tiller. Ms Tiller informed the claimant that Ms Dewhurst and Ms Stirling wanted to have a meeting with her. There is a dispute as to what was said at that meeting. The tribunal prefers the evidence of the claimant about this meeting on the basis that Ms Tiller could not say that what the claimant alleged was or was not said, just that she could not recollect of those things had been said. That was not surprising due to the passage of time. Further, this was a meeting which was likely to stick in the claimant's mind, more than Ms Tiller's.

26 The tribunal finds that Ms Tiller came to the claimant's office and stated that the claimant was to be invited to a meeting. Ms Tiller informed the claimant she had handed in her notice and would be leaving in August 2021 (but had negotiated two days per week of mentoring/coaching). Ms Tiller told the claimant that she (Ms Tiller) was sorry, and gave an indication that she did not agree with the decision made by the governors. That was not strictly speaking true, although, as found above, Ms Tiller did not formally vote for the proposal either. Given Ms Tiller's position, it is not entirely surprising that she did not want to be formally associated with the decision that had been taken. Ms Tiller told the claimant that she had lost sleep about it. Ms Tiller did not disclose the reason for the meeting, but upon the claimant asking whether she was going to be dismissed, Ms Tiller told the claimant: 'you've done nothing to be dismissed for'.

27 It was therefore clear to the claimant from this discussion, that the meeting on 2 December was not going to be a positive one. Whilst the claimant was not told the purpose of the meeting by Jane Tiller, she guessed from a

subsequent discussion with her trade union rep (see below) that it would be about redundancy.

30 November 2020 email from Ms Dewhurst

28 Carol Dewhurst subsequently sent an email to the claimant on 30 November 2020 which said:

> *I hope you are well. I think Jane has mentioned that Denise Stirling and I would like to have a brief meeting with you on Wednesday to give you some advance … information about some decisions agreed at Governors regarding the future leadership structure at Immanuel College. These changes are linked to Jane's decision to step down as substantive Head at the end of this academic year and therefore the leadership profile across BDAT secondary schools.*
>
> *Please can you confirm you [are] able to join us for a conversation on Wednesday at 3.45 in Jane's office. I can confirm Jane will now not be present in this meeting.*

29 The claimant responded by email and asked if she needed her union rep with her. The clamant was a member of the Association of School and College Leaders (ASCL). The claimant was told she did not need her union rep with her at that time.

30 The claimant subsequently spoke with her trade union. It was suggested to the claimant that she should record the meeting, and that she should not say anything. The claimant was informed that a union representative would not be available to come along with her to the meeting on 2 December. The claimant was asked to send a copy of the redundancy policy to the union. She did so.

31 The tribunal finds as a fact that the reason for the meeting being suggested by Ms Dewhurst was to give her a 'heads up' that her role might be redundant. This was out of respect for the claimant who was a long standing and highly respected member of staff. The respondent wished to give the claimant as much notice as possible of the formal process that would be commencing in January 2021. The intention was to make the claimant aware of the direction of travel, and give her time to think about the implications, ahead of a formal process being started. Further, the tribunal finds that that it would have been likely that the claimant could have found out from another source before the formal process had been instituted. The tribunal does not consider there is anywhere near sufficient evidence upon which it could conclude that the purpose of the meeting was to engineer a situation whereby the claimant would offer her resignation. Unfortunately however for everyone concerned, the meeting did not go as planned.

Informal meeting – 2 December 2020

32 On 2 December 2020, there was a meeting between the claimant, Carol Dewhurst, and Denise Stirling. The claimant asked if she could record the meeting. It was agreed that she could.

33 The transcript of the meeting records:

> *Carol: So, as you are aware, Jane has now confirmed that she is intending to retire as substantive head from next summer. That has meant that the trust and the governing body have had quite a lot of conversations about the leadership structure across Immanuel. What we've decided is that*

we're going to be opening a process in January, where we are looking at a restructure program. As part of that process, we will be looking to make your post redundant. I know it's a big thing to take in, and we're not having a formal conversation today. We will be starting in January, but we wanted to give you a couple of weeks heads up on it….

34 The claimant was asked if she had any questions, to which she replied: '*not at this stage*'. The conversation continued:

Carol: Okay. What we thought is by giving you these few weeks, it gives you a chance to get those questions right, and to make sure you've got all the information you need to make decisions. As you will know, as part of looking at any restructure, we do look at finances. So, if you want more information from me about any kind of finance information, I'll gladly get it you, so you can make an informed decision. But we just wanted to give you a heads up today.

Janet: When do you expect the redundancy to occur?

Carol: So, we're opening the process straight in the new year. It's part of a collective process across the trust. We'll look to get a meeting in with you fairly promptly, because now we've had this conversation you won't want it hanging over your head. We're hoping to finalize it by the end of January, so that we could look at making you redundant, making the post redundant, from the end of April. But we can of course talk to you about that timing and the detail when we get to that point. Do you want to say anything? …

35 The claimant commented:

Janet: You could have let me go at end of August [2021] with dignity. That's all I'm saying at this point. …

Carol: Well, we haven't looked at the complete timeframe. This is an informal heads up to you. If that's something you want us to explore, I can go and run the numbers and we can have a further conversation as part of the formal consultation.

36 Towards the end of the meeting the following was said:

Janet: *I'm sure you're aware that I talked to [Jane] about staying on for Christmas, for various reasons. Christmas next year. For mental health reasons as much as anything. Clearly I've already spoke to my union, which you would expect because I knew what was coming.*

Carol: *MM-Hmm*

Janet: Okay, I will just go away now and talk to my union

Carol: Okay. We would want you to bring your union to the next meeting

Janet: Okay.

Carol: We will run through the proper process with you then. Is that all right? If you need more information in the meantime, just give me a shout, Janet. You've got my email…

Janet: Is that all?

Carol: Yeah.

Denise: As I said, Janet, my intention today was not to upset you, but I really wanted you to know that we recognize your contribution, and this has been a difficult decision. But in terms of the restructure - [the recording cuts off at this point].

37 During cross examination, the claimant accepted that the meeting was a 'heads-up' about the process that would be formally commencing in January 2020. The claimant also accepts that there was no mention of age during the meeting.

38 The reference by Ms Dewhurst to a collective process across the Trust, was because at that time there were three other proposed redundancy exercises, in three of the primary schools which form part of the respondent Trust. The Trust Board agreed to those proposals on 18 December; a meeting took place with all of the trade unions on 11 January; and individual one to ones commenced from early January to mid-February.

39 The claimant spoke to her trade union representative after the meeting. During the discussion, it was agreed that the claimant would be no financially worse off if she stayed to the end of August 2021, compared to being made redundant in April 2021 and receiving a redundancy payment on top. The claimant was told that if she wanted to resign, that was fine.

40 On 3 December 2020, Ellen Doherty came to speak to the claimant as she had been made aware that the claimant was upset. Ms Tiller had asked her to do so, since Ms Doherty was responsible for welfare and Ms Tiller was aware that the claimant was worried and upset, following the conversation on 2 December.

7 December 2020 conversation

41 The claimant's husband had been made redundant prior to these events and the claimant told us that process upset him. The claimant wanted to avoid that happening to her.

42 The claimant had a brief conversation with Ms Tiller on 7 December 2020. Ms Tiller did not recall this conversation. The claimant did. We find that it did take place. Ms Tiller had approached the claimant to ask how she was. It was to be expected that she would do so, out of concern and respect for her. The claimant raised the possibility of being allowed to remain until the end of the academic year if she offered her resignation. Ms Tiller replied: 'absolutely', or 'definitely'.

Meeting on 10 December 2020

43 Following that conversation, the claimant asked for a further meeting with Ms Dewhurst and Mrs Stirling. Prior to the meeting, the claimant spoke to the College Chaplain to ask if he would accompany her. He told her he could not as he was a governor and knew what was happening, so there would be a conflict.

44 A meeting took place on 10 December 2020. The claimant did not ask for this meeting to be recorded. This is unfortunate, since there is a dispute as to what was said. Having taken account of all of the evidence, the Tribunal prefers, on the whole, the claimant's version of events. This is partly because all of those present agreed that the meeting was a similar length, or slightly longer than the 2 December 2020 meeting. Had the claimant simply handed

over her resignation letter, before any discussion, it is likely that the meeting would not have taken so long.

45 At the beginning of the meeting, the claimant asked if there was any possibility she could stay on until August 2021 and finish the academic year, and if that were possible, she had a resignation letter with her, confirming her resignation from 31 August 2021. The claimant was told that they would have to check with Jane Tiller about the claimant working until August 2021. Since the claimant had already spoken to Jane Tiller, the claimant knew she would be agreeable. She therefore handed over her resignation letter. Ms Dewhurst and Mrs Stirling thanked the claimant for her contribution to the school. The claimant apologised for cutting Mrs Stirling off at the meeting on 2 December. The claimant was noticeably upset and emotional during this meeting.

46 The resignation letter is dated 7 December 2020 and reads as follows:

> *I would like to take the opportunity to inform you that I will be resigning from my post at Immanuel at the end of the summer term 2021 in order to become an official 'retiree'.*
>
> *The twenty years at Immanuel have been eventful, difficult and, at times, emotional, however they have been the most fulfilling of my entire career.*
>
> *I arrived at Immanuel knowing that if there were sufficient good people who believed in the mission of the College it would become a beacon of excellence. Under the leadership of Jane Tiller this has been achieved; it has been a privilege to work alongside her at Immanuel and in a number of other schools both in the BDAT chain and in the wider Bradford area.*
>
> *Knowing that we leave Immanuel in a better place than it was when we arrived I can go in peace.*

47 Shortly after the meeting, at 10:57, Ms Dewhurst sent an email to the claimant, accepting her resignation. Her email said:

> *Thank you for sharing your letter of resignation. Having discussed it with both Denise and Jane, we are able to accept this and I really hope it means you and Jane can enjoy your last two terms working together and your remaining months at Immanuel. Denise will let Governors know and Jane will speak to you directly about how you wish to share your news with staff.*
>
> The claimant responded at 11.22:
>
> *Thank you Carol, this means a great deal to me.-Have a lovely Christmas.*

Appointment of Head Teacher

48 The Head Teacher role was subsequently advertised internally and externally. The advert was placed on 8 January 2021 with a closing date of 25 January 2021. Shortlisting took place on 27 January 2021. Day 1 of the interviews process took place on 3 Feb 2021, and Day 2 on 4 February. There were five applications, four external and one internal. Two candidates were short-listed; two were interviewed, one internal and one external candidate. Both candidates attended both days of the interview process. Sean Pickles was appointed to the role of Headteacher for Immanuel College alone. He was not given responsibility for any other schools within the Trust.

49 The claimant was not encouraged to apply for the Headteacher role but nor did she express any interest in applying for it. The role was in any event a full-time role and the claimant was at that stage working 60% of full-time hours.

Deputy Head Teacher vacancies

50 In April 2021, the respondent advertised a Deputy Head Teacher role, on full-time hours, and salary banding L22-26. In June 2021, the respondent advertised a further Deputy Head Teacher role, at 20% of full-time hours, at salary banding L22. The claimant did not apply for either the full-time or 20% post and did not enquire whether the F-T post could be done part time. Ellen Doherty worked 80% in her Deputy Headteacher role. The claimant was not encouraged to apply for either post by Ms Dewhurst or Mrs Stirling or anyone else within the Trust.

51 The claimant's employment ended on 31 August 2021, in line with her resignation letter.

'Failure' to submit a grievance

52 Prior to her employment ending, the claimant did not raise a grievance about the circumstances leading up to her alleged dismissal. Whilst we accept that the claimant was upset during this period, and felt mentally low, she mainly kept this to herself due to her professionalism; and perhaps out of stoicism too. The claimant told us that she did not raise a grievance because she was in a low mental state. The claimant did not visit her GP. The claimant did not take any further advice from her trade union about the situation or about the raising of a grievance. The claimant was concerned that taking a grievance might damage working relationships during the last few months of her employment, particularly given that the decision taken in principle to make her role redundant had been taken at the highest level. The tribunal accepts the respondent's evidence that had the claimant brought a grievance, it would not have damaged working relationships. We find however that the claimant was genuinely concerned about that.

53 The upshot of all this however was that the respondent had little or no indication from the claimant during the last few months of her employment that she was profoundly upset by what had happened and considered herself to have been dismissed. In those circumstances nor did the respondent have any indication that the claimant might want to stay on beyond 31 August 2021 and so might be interested in any of the vacancies.

54 Acas Early Conciliation Certificate took place between 4 August and 2 September 2021. The claim form (ET1) was submitted on 16 November 2021.

Relevant law

Dismissal

55 In *Tanner v D T Kean [1978] IRLR 110* – the EAT said (at paras 3-4):

> *There are some words and acts which as a matter of law could be said only to constitute dismissal or resignation, or of which it could be said that they could not constitute dismissal or resignation, but in many cases they are in the middle territory where it is uncertain whether they do or not, and there it is necessary to look at all the circumstances of the case, in*

particular to see what was the intention with which the words were spoken'.

56 In *B D Gale Ltd v Gilbert [1978] IRLR 453* – the EAT said, when reflecting on the above-quoted words from *Tanner* as to whether words are ambiguous or not:

> *This Tribunal* [that in *Tanner*] *is saying, some words are words which as a matter of interpretation could only fairly be interpreted as amounting to words of dismissal or resignation. Other words on any interpretation could not. In those cases you look at the words and you make your decision as to what they mean, but in cases where the words are in the middle territory you go on to look at all the circumstances of the case…*

57 In *Sothern v Franks Charlesly & Co* [1981] IRLR 278 (at paras 19-23, and 24-26) the Court of Appeal considered the words '*I am resigning'*, and found them to be unambiguous having looked at the context in which they were given.

58 In *J & J Stern v Simpson* [1983] IRLR 52 (paras 6-7), the EAT rejected a submission that when considering whether words used are ambiguous or unambiguous, the words are to be looked at alone. The EAT held that the correct interpretation of the Court of Appeal decision in *Sothern v Franks Charlesly*, and supported by Arnold J in *Gale v Gilbert,* is to construe the words in all the circumstances of the case in order to decide whether or not there has been a dismissal.

59 The Tribunal's attention was drawn to the following case law examples of ambiguous words:

a. *Wilkinson v Yorston* EAT/1005/100 – '*the above named was employed at the Sunniside Club to work with a qualified instructress as she is not qualified. The qualified staff I had are not with me now and up to now I have not getting any [sic] so I do not have any work for her and had to lay her off*' – considered to be ambiguous as to whether it was a lay off or a dismissal.

b. *Tanner* – '*that's it; you're finished with me'* – ambiguous.

c. *East Kent Hospitals University NHS Foundation Trust v Levy* UKEAT/0232/17/LA – the claimant handed in a letter saying '*please accept one month's notice from the above date'*. The EAT held that although the word 'notice' in the employment context might generally signify an unambiguous notification of termination of the contract, that was not so in the circumstances of the case. The claimant had an offer of a position within another department and her 'notice' could equally be taken to refer to her notification of her departure from the records department.

If the words were ambiguous, how should they be interpreted?

60 In *Tanner v D T Kean [1978] IRLR 110*, the EAT said (at para 4): the test is to consider the intention of the speaker (in that case the employer, and so whether they intended to dismiss), and in doing so, *'a relevant, and perhaps the most important, question is how would a reasonable employee, in all the circumstances, have understood what the employer intended by what he said and did'.*

61 However, no further authorities support the view that the intention of the speaker is the relevant test. In *Gale v Gilbert*, Arnold J in the EAT said the '*undisclosed intention of a person using language whether orally or in writing as to its intended meaning is not property to be taken into account in concluding what the true meaning is. That has to be decided from the language used and from the circumstances in which it was used'*. This was approved by Fox LJ in the Court of Appeal in *Sothern* (at para 19).

Further guidance re dismissals

62 If a dismissal is to operate on a future date, the notice must specify that date, or at least contain facts from which that date is ascertainable.[1]

63 If an employer has given notice of dismissal to expire on an ascertainable date, but then agrees to postpone the date of termination and the employee leaves in accordance with that agreement, there is still a dismissal.[2]

Resignation amounting to dismissal

64 If it is indicated to an employee that their contract is to be terminated, and the employee is expressly invited to resign, a court is entitled to conclude that, as a matter of common sense, the employee was dismissed – even though the employee takes the more respectable alternative of signing a letter of resignation than being the recipient of a dismissal letter. [3]

65 For such a construction to apply, the operative cause of the agreement must be the threat of dismissal and not the promise of financial or other inducements: see *Sheffield v Oxford Controls Co Ltd [1979] IRLR 133*, *[1979] ICR 396*. In *Sheffield*, it was held that the financial inducements, rather than the threat of dismissal, were the operative cause of the employee's departure and that he had resigned. Ultimately it is a question of fact and causation, not the divination of rules of law: *Optare Group Ltd v TGWU [2007] IRLR 931, EAT*.

Unfair dismissal

66 Then Employment Rights Act 1996 ('ERA'), s.98(1)-(2) provides that in determining whether a dismissal is fair/unfair, it is for the employer to show the reason (or principal reason) for dismissal, and that it is either a reason falling within subsection 2, or some other substantial reason justifying the dismissal. A reason falls within subsection 2 if it relates to, *inter alia,* redundancy.

67 ERA, s.98(4) provides that if the employer has shown a potentially fair reason for dismissal, the determination of the question of whether the dismissal was fair/unfair (having regard to the reason shown by the employer) depends on whether, in the circumstances (including the size and administrative resources of the employer's undertaking), the employer acted reasonably/unreasonably in treating it as a sufficient reason for dismissing the employee; and, shall be determined in accordance with equity and the substantial merits of the case.

[1] *Morton Sundour Fabrics Limited v Shaw* 2 ITR 84 (25 November 1996)

[2] *Mowlem Northern Ltd v Watson* [1990] IRLR 500 (EAT)

[3] *East Sussex County Council v Walker* 7 ITS 280 (18 May 1972) (National Industrial Relations Court – on appeal from the industrial tribunal)

Constructive dismissal

68 An employee is entitled to terminate the contract with or without notice and treat herself as constructively dismissed, when the employer has committed a repudiatory breach of contract, *Western Excavating (ECC) Ltd v Sharp [1978] ICR 221*, namely:

> *a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.*

69 If there is a repudiatory breach the employee must show that she resigned at least partly, in response to the breach, *Nottinghamshire County Council v Meikle [2004] IRLR 703 CA*.

70 The Claimant relies on the implied term existing in all employment contracts, a breach of which is a repudiatory breach:

> '*the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee' Malik v BCCC SA [1998] AC 20*, 34H-35D.

71 The parties were asked by the panel to make a further short written submission on the case of *Brown v Neon Management Limited [2019] IRLR 30 (Brown)* and on how it might be applicable to the facts of the case brought by the claimant. The material part of that case held:

> *(1) The first two claimants had affirmed their employment contracts by their initial resignation on notice on 16 March 2018.*
>
> *It was well-established that in the face of a repudiatory breach of contract the employee could not leave it too long before resigning otherwise he would be taken to have affirmed. In the present case, the claimants clearly indicated that they would have been working out the entirety of their notice periods, which, in one case, involved a further year of employment. It would have been unconscionable to keep the right to discharge a repudiated contract alive for that length of time in the absence of any further breaches of contract.*

Discrimination

72 The Equality Act 2010, s.13(1)-(2) provides: a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

73 A claimant must show that he/she was treated less favourably than a real or hypothetical comparator. Other than the protected characteristic, there must be no material difference between the circumstances of a claimant and the comparator (s.23(1)). Where there is an actual comparator who shares some, but not all, of a claimant's relevant characteristics, the tribunal can consider the comparator's treatment as evidence as to how a hypothetical comparator would have been treated. [4]

[4] *Watt (formerly Cater) v Ahsan* [2007] UKHL 51.

74 If less favourable treatment is established, the tribunal must consider the reason why. If the protected characteristic had a '*significant influence on the less favourable treatment, discrimination would be made out*.[5] The crucial question however is *why* a claimant received the less favourable treatment – what was the reason why the alleged discriminator acted as they did? What, conscious or unconsciously, was their reason? [6]

75 The Equality Act 2010, s.19(1)-(2) provides that: 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 relation to a relevant protected characteristic of B's if:

a. A applies, or would apply, it to persons with whom B does not share the characteristic;

b. It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;

c. It puts, or would put, B at that disadvantage; and

d. A cannot show it to be a proportionate means of achieving a legitimate aim.

76 In a case involving sex discrimination, namely *Dziedziak v Future Electronics Ltd EAT 0271/11* Mr Justice Langstaff said:

> *the matters that would have to be established before there could be any reversal of the burden of proof would be, first, that there was a provision, criterion or practice, secondly, that it disadvantaged women generally, and thirdly, that what was a disadvantage to the general created a particular disadvantage to the individual who was claiming. Only then would the employer be required to justify the provision, criterion or practice, and in that sense the provision as to reversal of the burden of proof makes sense; that is, a burden is on the employer to provide both explanation and justification.*

77 In relation to PCPs, in a case involving the protected characteristic of disability, *Ishola v Transport for London [2020] EWCA Civ 112* it was held that:

> *however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP. In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs*

[5] *Nagajaran v London Regional Transport* [1999] IRLR 572.
[6] *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] IRLR 830.

(whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one.

Burden of proof

78 The Equality Act 2010 s136 provides that if there are facts from which a tribunal could decide, in the absence of any other explanation, that person A has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision.

79 Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258*. The tribunal can consider the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (*Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA*.)

80 The Court of Appeal in Madarassy, a case brought under the Sex Discrimination Act 1975, held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. LJ Mummery stated at paragraph 56:

Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'

81 Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in *Hewage v Grampian Health Board [2012] IRLR 870* at para 32:

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

Time limits

82 The relevant time-limit is set out in section 123(1) Equality Act 2010. The tribunal has jurisdiction if the claim is presented within three months of the act of which complaint is made. By subsection (3), conduct extending over a period is to be treated as done at the end of the period. If the claim is presented outside the primary limitation period of three months, the tribunal may still have jurisdiction if the claim was brought within such other period as the Tribunal thinks just and equitable.

83 The burden to satisfy this rests on a claimant[7]. The Court of Appeal has emphasised that there is no presumption in favour of the extension of time.

[7] *Porter v Bandridge Ltd* [1978] IRLR 271 and *Consignia plc v Sealy* [2002] IRLR 624 at para. 23.

The onus is on C to convince the ET that it is just an equitable to extend time, in the context that time limits in employment cases are intended to apply strictly. *Robertson v Bexley Community Centre [2003] IRLR 434*.

Conclusions

84 The Tribunal has applied the law to the facts to determine the issues. The conclusions are set out below in relation to each of the issues the Tribunal has been asked to determine on liability.

85 In reaching our conclusions, we have considered the burden of proof under the Equality Act 2010. This is however one of those cases where we have been able to arrive at clear conclusions as to the reason for the alleged less favourable treatment, on the basis of our findings of fact.

Direct age discrimination, S13 EqA 2010

Issue 3. Was C treated less favourably than an actual/hypothetical comparator?

Issue 3 a. C will rely upon the hypothetical comparator of an employee in the same position as her – Associate Headteacher (for the avoidance of doubt, C will use the examples of the three other deputies as evidence for the purpose of considering the hypothetical comparator):

i. Under the retirement age of 66;

ii. Aged under 60; and/or

iii. Aged under 50.

86 We conclude that the claimant was not treated less favourably than an actual or hypothetical comparator because of age. In relation to the decision taken in principle to delete the post of Assistant Headteacher at Immanuel College, we conclude that this was a strategically and commercially understandable decision for the respondent to take. Following Ms Tiller's announcement of her intention to retire, it was almost inevitable that the proposal would follow shortly thereafter. when JT announced her retirement. The respondent could have chosen to retain the claimant's post - but it was not surprising that a decision was taken in principle instead to delete it, particularly in light of the discussion at the governors meeting in 2016 when the AHT roles were created. See the fact findings on this above. Regardless of the age of the AHTs at the point that the Executive Head role was due to end, the AHT roles were also likely to be made redundant in light of that discussion.

Issue 3 b. The less favourable treatment relied upon is:

i. Dismissing C (whether expressly or constructively);

87 See 3 a above and Issue 13 below. The claimant was not dismissed. In any event, the circumstances surrounding the termination of the claimant's employment did not amount to less favourable treatment. The tribunal has been able to reach clear conclusions as the reason for the decision to delete the AHT role in principle, without considering the burden of proof provisions.

ii. In the alternative, selecting C for anticipated/potential redundancy in circumstances where there was no genuine redundancy situation and the actual reason for doing so was related to reducing its wage bill when there

was no need for such economy and/or removing C from the leadership team in order to facilitate the transition to a new leadership team with a new headteacher;

88 The tribunal concludes that there was a genuine redundancy situation, by reason of the above (see 3a and 3b.i.).

iii. In the alternative, if the Tribunal considers there to have been a genuine redundancy situation, the decision to only select C for anticipated/potential redundancy instead of selecting her from, or placing her in, a pool of candidates;

89 The tribunal has concluded that there was a genuine redundancy situation. Had a formal process been started, there could have been, and if it was raised by the claimant, should have been, consultation about the selection pool. There was however no employment law obligation in the circumstances of this case to widen the pool at the stage that a decision was made in principle by the Leadership and Management Group of Immanuel College to make the AHT post redundant. It was an option to do so; it was not an obligation and the decision not to do so was not because of the claimant's age.

iv. Not offering C, or putting C forward for, the headteacher vacancy;

90 The respondent did not do so as a matter of fact, but this was because the claimant had resigned, in circumstances in which it was reasonable for the respondent to assume that the claimant was content with that decision. There was no obligation to put the claimant forward for this vacancy in such circumstances. In any event, the role was full-time. The claimant did not enquire if it could be done on a part-time basis. There was nothing said or done by the claimant to indicate to the respondent that the claimant wanted to stay beyond 31 August 2021. Nor had the claimant previously expressed any interest in doing so during discussions between her and Ms Tiller about their retirement plans. Had the claimant applied for any of the posts, her applications would no doubt have been considered.

v. Not offering C, or putting C forward for, the deputy headteacher vacancies.

91 As above, 3b.iv and see the relevant findings of fact.

Issue 4. Was any less favourable treatment because of the protected characteristic of age?

92 In light of our foregoing conclusions, this is not applicable.

Issue 5. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

> *a. If the Tribunal does find that any of the Claimant's pleaded PCPs do exist then given the retirement of the Executive Head Teacher, the resulting deletion of the Executive Head Teacher role and creation of a Head Teacher role it was a legitimate aim for the Respondent to restructure and offer an appropriate salary for the duties encompassed in the new Head Teacher role (which held different duties). The role was open for the Claimant to apply for in a competitive interview process (and her salary would have been protected for 3 years).*

93 In light of our foregoing conclusions, this is not applicable.

Issue 6. The Tribunal will decide in particular:

b. was the treatment an appropriate and reasonably necessary way to achieve those aims;

c. could something less discriminatory have been done instead;

d. how should the needs of the claimant and the respondent be balanced?

94 In light of our foregoing conclusions, this is not applicable.

Indirect age discrimination (in the alternative to direct discrimination), s19 EqA 2010

Issue 7. Did R have a provision/criterion/practice of dismissing, or selecting for potential dismissal, high earning members of the senior leadership team in order to reduce its wage bill when there was no need for such economy, and/or dismissing or selecting for potential dismissal senior members of the senior leadership team in order to facilitate the transition to a new leadership team with a new headteacher?

95 The tribunal concludes that neither of the above PCPs are made out on the facts. The tribunal concludes instead that the actual PCP is as follows: if an Executive Head role is created at a school with the Trust, resulting in an AHT role(s) being created to back fill the duties of the Headteacher promoted to the Executive Headteacher role, then once the Executive Head returns to her previous role/announces her intention to retire in circumstances where the Executive Head functions are no longer required to be carried out, the AHT role(s) would also be made redundant, subject to a formal consultation process. That PCP did not give rise to any disadvantage indirectly related to age.

Issue 8. Did R apply the above PCP in carrying out the act(s) set out in 3b above?

96 In light of our foregoing conclusions, this is not applicable.

Issue 9. Did the PCP apply, or would it have applied, to employees in one or more of the categories set out at 3a above within the leadership team?

97 In light of the foregoing conclusion, this is not applicable.

Issue 10. Did the PCP put employees over the age of 66 within the leadership team at a particular disadvantage?

98 In light of the foregoing conclusion, this is not applicable.

Issue 11. Did the PCP put C at that disadvantage?

99 In light of the foregoing conclusion, this is not applicable.

a. Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were the same as at Issue 5 above.

100 In light of the foregoing conclusion, this is not applicable.

b. The Tribunal will decide in particular:

i. was the PCP an appropriate and reasonably necessary way to achieve those aims;

ii. could something less discriminatory have been done instead;

iii. how should the needs of the claimant and the respondent be balanced?

101 In light of the foregoing conclusions, this is not applicable.

Issue 12 - Remedy for discrimination

102 The Tribunal has been asked not to come to any conclusions on these issues, just to find the facts relevant to the grievance/Acas Code of Practice issue, which we have done.

Unfair dismissal, s94 Employment Rights Act 1996 ('ERA 1996')

Dismissal

Issue 13. Was C dismissed on notice within the meaning of s95(1)(a) ERA 1996 at the meeting on 02.12.20?

103 We remind ourselves that the intention of the respondent is not relevant to the question as to whether or not, as a result of what was said at the meeting on 2 December 2020, the claimant was dismissed. In deciding whether the claimant was dismissed, we have taken account of the following circumstances.

a. We have concluded that there was a clear plan for the claimant's role to be made redundant.

b. There was a reference on 2 December to the claimant being made redundant, but that was immediately corrected to her role being made redundant.

c. The 30 November meeting with Ms Tiller, had made it clear to the claimant that some bad news was going to be given to the claimant at the 2 December 2020 meeting.

d. The claimant had already worked out that it was likely she would told of the plan to make the AHT role redundant. The claimant called her trade union, precisely because of that expectation.

e. The Tribunal has rejected the contention that Sean Pickles being lined up for the Headteacher role and the claimant was being marginalised. We have reject that conclusion on the facts. We have found instead that succession plans were in place.

f. The claimant and Ms Tiller had discussed retirement on a number of occasions. At no point during those discussions did the claimant give Ms Tiller any indication that she was interested in the Headteacher role when Ms Tiller retired.

g. Further, the claimant had twice reduced her hours during the previous three to four years, suggesting a certain direction of travel, prior to her retirement.

h. There was talk of finances at the 2 December 2020 meeting which gave rise to a reasonable perception that the claimant would be made redundant at the end of the formal process, which was due to be completed by the end of January, with the redundancy effective at the end of April. It was however stated that they could discus the timing when they got to that point i.e. the point of the formal consultation process.

i. There was no suggestion on 2 December that the claimant's role would not be made redundant; or that the claimant could be redeployed. Indeed, redeployment was not discussed.

j. At the conclusion of the meeting, Mrs Stirling gave the claimant formal words of consolation not of reassurance. The claimant remarked that they could have let her go in August with dignity.

k. The 7 December meeting came about because the claimant thought it was inevitable, following the 2 December meeting, that her role would be made redundant and so would she. She wanted to avoid the formal redundancy process, that had upset her husband when it happened to him. She considered a possible compromise could be that she stay in post until 31 August, but become, in her words, 'an official retiree'. Ms Tiller made clear to the claimant that there was a real possibility of that, on 7 December. That was subsequently agreed on 10 December, a meeting which the claimant had sought out.

104 Bearing in mind all of the above, the Tribunal concludes that it was reasonable for the claimant to assume, on the basis of the discussion on 2 December, that the result of the formal redundancy process would be that she would be made redundant by the end of April 2021. In retrospect, that meeting could have been handled much better by Ms Dewhurst and Mrs Stirling, regardless of the claimant being defensive and uncommunicative at the meeting. It was understandable why the claimant was, given her expectation as to what the meeting was going to be about, following her discussion with Ms Tiller on 30 November. Further, the talk of finances at the 2 December meeting, would have reinforced the claimant's understanding that the die was cast. The failure to say anything about possible re-deployment was a notable and regrettable omission

105 However, whilst the Tribunal has much sympathy for the claimant given the above, we conclude that it was not reasonable for the claimant to assume, as a result of what happened at that meeting, and the surrounding circumstances, that she had been given formal notice of her dismissal on 2 December, with her employment terminating on 30 April 2021. The Tribunal therefore concludes that the claimant was not dismissed at that meeting.

Issue 14. Alternatively, was C dismissed when she resigned on 10.12.20 (i.e. was this a 'gun to the head' resignation which satisfies s95(1)(a))?

106 The Tribunal concludes not. The claimant did not want to be dismissed on 30 April 2021 by reason of redundancy. For understandable reasons, the claimant wanted to avoid that. The claimant negotiated instead that she would leave on 31 August 2021 and become 'an official retiree'. The words spoken by the claimant on 10 December, the wording of the 7 December 2020 resignation letter and subsequent emails on 10 December, all suggested that the claimant was content with that decision. The result of these events was that the claimant agreed to terminate her employment on 31 August 2021 on terms which were acceptable to her – in particular, she would avoid dismissal by reason of redundancy in April 2021, and the potential embarrassment and upset that was likely to cause her. The respondent in turn avoided the need to go thorough a formal redundancy consultation process, but knew that the AHT post would cease on 31 August 2021 when the claimant vacated that role

Issue 15. What was the reason for C's dismissal?

1. R will say that there was a redundancy situation.

2. C's primary argument is that there was no true redundancy situation, and that the reason for her dismissal was for her to be removed from R's wage bill and/or to facilitate the transition to a new leadership team.

107 If there was a dismissal, we would have found that the reason was redundancy.

Issue 16. Was the dismissal fair (having regard to the reason shown by R)? C will say that it was not due to the following:

1. R selected to make C redundant without considering, either fairly or at all:

i. Whether it was necessary to make C redundant;

ii. Whether C could be placed in a pool of candidates for potential redundancy alongside the three deputies;

iii. Whether C could be redeployed within the business;

2. R chose C for redundancy on the basis of her age, seniority and/or as a costs-saving measure because of her high salary.

108 If we had found that there was a dismissal, the tribunal would have found that dismissal to be unfair, due to the failure to mention or discuss the possibility of re-deployment.

Constructive unfair dismissal

Issue 17. Alternatively, was C constructively dismissed within the meaning of s95(1)(c) ERA 1996? C will say:

Issue 17.3. R's conduct (i.e. what was communicated to C) at the meeting on 02.12.20 was a repudiatory breach of C's employment contract, namely the implied term of trust and confidence; and 4. C accepted the repudiatory breach and resigned as a result of it.

109 We conclude that the respondent did not breach the implied term in the circumstances of this case. Undoubtedly, the process could have been handled better for the reasons set out above, and in particular, the meeting of 2 December 2020. It was nevertheless emphasised at that meeting that there was going to be a formal process, that the claimant should bring her trade union to the next meeting, and that the timing of the redundancy could be discussed.

110 Had we concluded that there had been a repudiatory breach, the tribunal would in any event have concluded that the claim failed on the issue of affirmation. According to the principle set out in ***Brown***, the claimant affirmed any repudiatory breach, by agreeing to remain well beyond her notice period. That brings the facts into the territory of an agreed termination of the claimant's contract on terms that were acceptable to both parties, rather than a constructive dismissal. Both parties thereby avoided the stress, time and effort of a formal redundancy process, the respondent achieved the result of the deletion of the AHT role at Immanuel College, and the claimant was allowed to leave at the end of August 2021, as requested, 'with dignity'.

Issue 18. If the claimant was dismissed, what was the reason or principal reason for dismissal – i.e. what was the reason for the breach of contract?

111 Again, we would have found that the reason was redundancy.

Issue 19. Was it a potentially fair reason?

112 Yes.

113 *Issue 20. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?*

114 Had we held that there was a constructive a dismissal, the tribunal would have held that the dismissal was not fair for the same reason as set out in relation to Issue16 above.

Remedy for unfair dismissal

115 These issues are no longer relevant and no conclusions need to be reached.

Time-limits

116 As above, this issue is no longer relevant and no conclusions need to be reached. In view of the Tribunal's decision not to uphold the claims for age discrimination, the issue of whether any or all of those claims were not submitted within three months and if not, to exercise our discretion to allow such claims to be submitted at a later date, is academic.

Closing remarks

117 The tribunal would like to conclude by saying that we consider the circumstances of this case sad and regrettable. It is a great shame that such a distinguished career, which the claimant undoubtedly had, should have ended in circumstances where the claimant feels so unhappy about the circumstances leading to her employment ending. Without laying the blame for that at anybody's door; and acknowledging that it is always easy to be wise after the event; the Tribunal hopes that the respondent will reflect on what has happened, with a view to learning any lessons to be learned, and to avoid such a situation arising in future.

Employment Judge A James
North East Region

Dated: 9 June 2022

Sent to the parties on:

ANNEX A – AGREED LIST OF ISSUES

1. The Claimant ('C') brings claims for:

    a. Direct age discrimination;
    b. Indirect age discrimination (in the alternative);
    c. Unfair dismissal; and
    d. Constructive unfair dismissal (in the alternative).

Jurisdiction – time limits

2. If any of the claims for discrimination are out of time, would it be just and equitable for the Tribunal to extend time under s123(1)(b) Equality Act 2010 ("EqA 2010")?

Direct age discrimination, S13 EqA 2010

3. Was C treated less favourably than an actual/hypothetical comparator?

    a. C will rely upon the hypothetical comparator of an employee in the same position as her – Associate Headteacher (for the avoidance of doubt, C will use the examples of the three other deputies as evidence for the purpose of considering the hypothetical comparator):

        i. Under the retirement age of 66;
        ii. Aged under 60; and/or
        iii. Aged under 50.

    b. The less favourable treatment relied upon is:

        i. Dismissing C (whether expressly or constructively);

        ii. In the alternative, selecting C for anticipated/potential redundancy in circumstances where there was no genuine redundancy situation and the actual reason for doing so was related to reducing its wage bill when there was no need for such economy and/or removing C from the leadership team in order to facilitate the transition to a new leadership team with a new headteacher;

        iii. In the alternative, if the Tribunal considers there to have been a genuine redundancy situation, the decision to only select C for anticipated/potential redundancy instead of selected her from, or placing her in, a pool of candidates;

        iv. Not offering C, or putting C forward for, the headteacher vacancy; and/or

        v. Not offering C, or putting C forward for, the deputy headteacher vacancies.

4. Was any less favourable treatment because of the protected characteristic of age?

5. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

> a. If the Tribunal does find that any of the Claimant's pleaded PCPs do exist then given the retirement of the Executive Head Teacher, the resulting deletion of the Executive Head Teacher role and creation of a Head Teacher role it was a legitimate aim for the Respondent to restructure and offer an appropriate salary for the duties encompassed in the new Head Teacher role (which held different duties). The role was open for the Claimant to apply for in a competitive interview process (and her salary would have been protected for 3 years).

6. The Tribunal will decide in particular:

> b. was the treatment an appropriate and reasonably necessary way to achieve those aims;
>
> c. could something less discriminatory have been done instead;
>
> d. how should the needs of the claimant and the respondent be balanced?

<u>Indirect age discrimination (in the alternative to direct discrimination), s19 EqA 2010</u>

7. Did R have a provision/criterion/practice of dismissing, or selecting for potential dismissal, high earning members of the senior leadership team in order to reduce its wage bill when there was no need for such economy, and/or dismissing or selecting for potential dismissal senior members of the senior leadership team in order to facilitate the transition to a new leadership team with a new headteacher?

8. Did R apply the above PCP in carrying out the act(s) set out in 3b above?

9. Did the PCP apply, or would it have applied, to employees in one or more of the categories set out at 3a above within the leadership team?

10. Did the PCP put employees over the age of 66 within the leadership team at a particular disadvantage?

11. Did the PCP put C at that disadvantage?

> a. Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were see 5 above.
>
> b. The Tribunal will decide in particular:

i. was the PCP an appropriate and reasonably necessary way to achieve those aims;
ii. could something less discriminatory have been done instead;
iii. how should the needs of the claimant and the respondent be balanced?

12. Remedy for discrimination

12.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

12.2 What financial losses has the discrimination caused the claimant?

12.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

12.4 If not, for what period of loss should the claimant be compensated?

12.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

12.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

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

12.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

12.9 Did the respondent or the claimant unreasonably fail to comply with it?

12.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

12.11 By what proportion, up to 25%?

12.12 Should interest be awarded? How much?

Unfair dismissal, s94 Employment Rights Act 1996 ('ERA 1996')

Unfair dismissal

13. Was C dismissed on notice within the meaning of s95(1)(a) ERA 1996 at the meeting on 02.12.20?

14. Alternatively, was C dismissed when she resigned on 10.12.20 (i.e. was this a 'gun to the head' resignation which satisfies s95(1)(a))?

15. What was the reason for C's dismissal?

1. R will say that there was a redundancy situation.
2. C's primary argument is that there was no true redundancy situation, and that the reason for her dismissal was for her to be removed from R's wage bill and/or to facilitate the transition to a new leadership team.

16. Was the dismissal fair (having regard to the reason shown by R)? C will say that it was not due to the following:

1. R selected to make C redundant without considering, either fairly or at all:
i. Whether it was necessary to make C redundant;
ii. Whether C could be placed in a pool of candidates for potential redundancy alongside the three deputies;
iii. Whether C could be redeployed within the business;

2. R chose C for redundancy on the basis of her age, seniority and/or as a costs-saving measure because of her high salary.

Constructive unfair dismissal

17. Alternatively, was C constructively dismissed within the meaning of s95(1)(c) ERA 1996? C will say:

3. R's conduct (i.e. what was communicated to C) at the meeting on 02.12.20 was a repudiatory breach of C's employment contract, namely the implied term of trust and confidence; and
4. C accepted the repudiatory breach and resigned as a result of it.

18. If the claimant was dismissed, what was the reason or principal reason for dismissal – i.e. what was the reason for the breach of contract?

19. Was it a potentially fair reason?

20. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

Remedy for unfair dismissal

21. Does the claimant wish to be reinstated to their previous employment?

22. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

23. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

24. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

25. What should the terms of the re-engagement order be?

26. If there is a compensatory award, how much should it be? The Tribunal will decide:

27. What financial losses has the dismissal caused the claimant?

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

29. If not, for what period of loss should the claimant be compensated?

30. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

31. If so, should the claimant's compensation be reduced? By how much?

32. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

33. Did the respondent or the claimant unreasonably fail to comply with it?

34. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

35. If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?

36. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

37. Does the statutory cap of fifty-two weeks' pay apply?

38. What basic award is payable to the claimant, if any?

39. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?