EMPLOYMENT TRIBUNALS

Claimant: **Mr J Holding**

Respondent: **Omega Plc**

Heard at: **Leeds by CVP** **On: 20-22 December 2021**

Before: **Employment Judge Maidment**
Members: **Mr M Weller JP**
Mr M Taj

Representation
Claimant: **Mr A Hiles, union representative**
Respondent: **Mr N Bidnell-Edwards, Counsel**

RESERVED JUDGMENT

The Claimant's complaints of unfair dismissal and indirect age discrimination fail and are dismissed.

REASONS

Issues

1. The Claimant brings a complaint of unfair dismissal, ordinary and automatic, based on him having been constructively dismissed. The acts of the Respondent relied upon were defined as follows:

   1.1. Did the Respondent (1) leave the Claimant on furlough when other employees were asked to return to work; (2) implement a redundancy selection procedure intended to ensure that the Claimant was selected for redundancy as a result of the Claimant raising health and safety concerns in his capacity as a member of the health and safety committee?

   1.2. Did the Respondent initially fail to offer the Claimant alternative employment in the warehouse which was available to employees at risk of redundancy and only offer this to the Claimant when he drew attention to the respondent's omission?

   1.3. Did the Respondent unfairly and unreasonably describe the Claimant as "being the main protagonist" and having "whipped the men up into a frenzy" at a toolbox talk in the course of employment Tribunal proceedings brought by another employee in October 2020?

   1.4. Did Mr Robin Simmonite unfairly and unreasonably criticise the performance of the Claimant in the role he was carrying out picking in the warehouse during the trial period which began on or around 1 September 2020 with the intention that the Claimant would choose to leave his employment with the respondent?

2. Did these things breach the implied term of trust and confidence? The Tribunal will need to decide whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the respondent; and whether it had reasonable and proper cause for doing so. Did the Claimant then resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation. Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that he chose to keep the contract alive even after the breach.

3. 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? Was the reason or principal reason for dismissal one falling within section 100(1)(a) or (b) of the Employment Rights Act 1996 ("health and safety cases")? If so, the Claimant will be regarded as unfairly dismissed.

4. If not, was the reason or principal reason for dismissal a potentially fair reason. If so, did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

5. The Claimant separately complains of indirect discrimination because of age. He bases this on his belonging to the 50 plus age group. The Claimant relies then on the Respondent having a "PCP" of scoring employees in the Claimant's pool for selection for redundancy more highly if they had recent experience of work. Did the Respondent apply the PCP to the Claimant? Did the Respondent apply the PCP to people who were not in the 50 plus age group? Did the PCP put employees in the 50 plus age group at a particular disadvantage when compared with employees who were not in the 50 plus age group, in that employees in the 50 plus age group were less likely to have been recalled from furlough and so were less likely to have recent experience of work? Did the PCP put the Claimant at that disadvantage? Was the PCP a proportionate means of achieving a legitimate aim?

6. The Tribunal spent some time initially ensuring that the issues between the parties were clearly identified. It was raised, on behalf of the respondent, that the Claimant had acted improperly in sending without prejudice communications to the Tribunal which involved the Respondent warning the Claimant that it may seek costs against him. It was said that such documentation should not have been considered by the Tribunal in circumstances where the Respondent had effectively been issued with a rebuke. Employment Judge Maidment had in fact dealt with this correspondence in duty post. He explained that the Claimant had written to the Tribunal out of concern for this warning and in circumstances where it appeared that he might be considering withdrawing the complaint. Whilst the Tribunal could not give advice, it was felt appropriate to comment upon the nature of the Tribunal's cost regime. Employment Judge Maidment could recall simply reading the respondent's setting out of its case on the facts and its assertion that, based on those facts, it was likely to succeed in defending the Claimant's claims. That assertion was, however, based on disputed facts. This was not a case where the Tribunal would have considered making the Claimant's pursuance of his complaint conditional upon the payment of a deposit. It was clarified ultimately on behalf of the Respondent that the correspondence had not in fact been labelled as being 'without prejudice' and no further issue was being taken by the Respondent on this point. No application was made.

7. The Tribunal then referred to the Claimant having attempted to further particularise his complaint of indirect discrimination which particularisation again, by coincidence, had come before Employment Judge Maidment at an earlier point in time. He had asked for a letter to be written to the parties on 29 November stating that it appeared that the basis of claim articulated on behalf of the Claimant may in fact disclose that his claim was one of direct discrimination and that it was in the interests of justice to allow the claim to be considered in the alternative as one of

direct/indirect discrimination. Mr Bignall-Edwards objected to a claim of direct discrimination being included in the issues for the Tribunal's determination. However, on further discussion with Mr Hiles, it was confirmed by him that the Claimant's wish was simply to pursue the complaint of indirect discrimination as previously identified by Employment Judge Evans in the earlier case management process.

Evidence

8. The Tribunal had before it an agreed bundle of documents comprising of some 380 pages. During the hearing and at the Tribunal's request, further statistical information was provided in respect of the age profile of employees within the respondent's workforce and that was accepted into evidence without objection on the Claimant's side.

9. The Tribunal privately read into the witness statements exchanged between the parties and relevant documentation so that when each witness came to give evidence he/she could do so by confirming his/her statement and then, subject to brief supplementary questions, be tendered for cross examination. The Tribunal heard firstly from the Claimant and then on his behalf from Mr Steve Clamp and Mr Ben Breeze, his former colleagues. A written but unsigned statement from another former colleague, Mr John Clay, was also accepted into evidence by the Tribunal, but on the basis that only significantly reduced weight could be given to such statement when the witness was not present be cross examined on it.

10. On behalf of the Respondent the Tribunal heard firstly from Ms Jayne Spencer, HR Manager, Mr Tony Knott, Head of Paint Operations, Mr Simon Spurr, Safety, Environmental and Facilities Manager, Mr Dave Wells-Burr, Team leader and finally from Mr Robin Simmonite, Warehouse Manager.

11. Having considered all relevant evidence, the Tribunal makes the factual finding set out below.

Facts

12. The Respondent is a manufacturer of kitchens and employs around 340 employees based at a site near Doncaster. The Claimant commenced employment on 13 July 2015 and worked in its paint shop as distinct from the other manufacturing areas consisting of the machine shop and assembly area. During 2020 the Respondent ran two different types of paint spray line – a water-based spray line called Ibotoc and a solvent-based spray line called Mito. The Claimant worked then on the solvent based only and had not been signed off as trained and competent to work on the water based Ibotic line.

13. The Claimant was interested and knowledgeable in health and safety issues and had been throughout his previous employment history. He was a member of the respondent’s health and safety committee which involved him in working with Mr Simon Spurr, safety environment and facilities manager. The Respondent sought to have a representative from each work area on the committee. The previous representative from the paint shop area had wished to stand down and approached the Claimant to see if he would volunteer. The Claimant did and as the sole volunteer, with no suggestion that he was not acceptable to the paint shop workforce, he was appointed to the post unelected. Historically the Respondent has not had the need to run elections for representatives in circumstances where there has tended not to be more than one individual in each area interested in carrying out the role.

14. The evidence is that the Claimant got on well with Mr Spurr and that they could and did express themselves frankly and directly to each other. Neither appeared to the Tribunal to be individuals who bore grudges. Mr Spurr described the Claimant often seeking his advice on safety issues and he himself going to the Claimant to discuss safety matters, recognising that the Claimant had particular expertise. The Tribunal accepts that that was the nature of their relationship. The Claimant told the Tribunal that Mr Spurr was the best health and safety person he had worked for, that he was someone he could deal with and a “straight talker”. The Claimant accepted that Mr Spurr would walk through his area of the paint shop at least every couple of days.

15. The committee met typically on a monthly basis with the last meeting attended by the Claimant being in February 2020. No meetings took place thereafter due to the coronavirus pandemic, a period of shutdown, then reduced working within the Respondent and in circumstances where not all of the representatives were attending work.

16. It is noted that the Claimant was also a member of the respondent’s works council but had resigned following a disagreement.

17. The Respondent conducted daily toolbox talks which addressed production schedules for the day, but which also provided an opportunity to raise any health and safety issues. Mr Spurr, on occasions, conducted specific toolbox talks on particular safety issues of potential concern with groups of employees.

18. The Respondent previously ran a solvent-based Mito paint spray line only, but in or around August 2018 introduced an Ibotic water based line. Mr Spurr became

aware of an issue of employees experiencing skin irritation in September 2019 when he was called to the first aid room and saw that one of the operatives, Mr Ben Breeze had a visible rash. Mr Spurr was told that Mr Breeze had been to see his doctor and had been prescribed some cream. Within a week of that, Mr Spurr called a health and safety toolbox talk of the paint shop operatives to discuss their safety concerns. Thereafter a COSHH risk assessment was carried out and a review of the type of PPE provided. The Respondent spoke to the paint manufacturers regarding the paint's usage.

19. The Claimant's evidence is that he had raised safety issues regarding skin irritation with the team leaders (not Mr Spurr) and that he saw it as their responsibility to escalate matters, including bringing them to the attention of Mr Spurr.

20. On 25 September 2019 Mr Spurr sent an email to a number of managers reporting that he had seen the operatives on the water-based paint spray line on 25 September. In, the Tribunal accepts, clear frustration, he described the Claimant and a colleague Steve Clamp as the "main protagonists" and of the Claimant whipping the operatives up into a frenzy. It is clear from the email and the Tribunal accepts that Mr Spurr was particularly frustrated that the operatives had been discussing their safety concerns, but that he had not been made aware of them earlier. He expected the Claimant, as a safety representative, to be at the forefront of any discussion that day. The Claimant told the Tribunal that some people were worried about raising concerns. If he himself had known about some of the issues, he said he would have raised them earlier. He maintained that Mr Spurr had some knowledge of concerns about the water line. Mr Spurr felt that the Claimant was making assumptions and jumping to conclusions regarding particular risks, not least in an assertion that the chemicals might cause cancer. He took objection to the Claimant suggesting to the operatives that management was not doing enough to ensure their safety.

21. The Tribunal notes that the Claimant is raising no complaint about what was said to him or his colleagues at the meeting by Mr Spurr. The Claimant only became aware of this email on or around 2 October 2020 when it was disclosed as part of Employment Tribunal proceedings brought by Mr Breeze. The Claimant told the Tribunal that he was shocked when he learnt of the email. On discovering the existence of this message there is no suggestion that the Claimant sought to discuss it with Mr Spurr or anyone else within the respondent.

22. After the toolbox talk, contact was made by one or more of the operatives with the HSE (but not by the Claimant) which caused the HSE to attend the site on 17 October to carry out a full inspection, the results of which were sent to the Respondent on 27 November. The HSE identified a number of safety breaches to

be remedied by 20 December. The HSE also subsequently wrote to the Respondent on 4 February 2020 to say that further numerous employee concerns had been raised about safety and that they were, therefore, not in a position to close their investigation file. The Respondent did, the Tribunal accepts, seek to address the safety issues step-by-step and no improvement notice was served on the Respondent by the HSE. It is evident from the health and safety committee meeting minutes in January and February 2020 which followed the visit, that recommendations were being reviewed and actioned taken. Mr Spurr was unaware of who had made any report to the HSE.

23. A number of the respondent's witnesses have been referred in cross examination to email correspondence on 11 March 2020 from a director, Tracey Bairstow, to Mr Knott where she recounted a walkaround she had conducted of the paint shop area and a number of safety concerns having been brought to her attention by the Claimant. An email in response suggested that particular safety concerns, including regarding dirty filters, were unfounded. Mrs Bairstow subsequently spoke to Mr Spurr about the issues the Claimant had raised with her. He told the Tribunal that they were entirely separate from the matters being raised by the HSE. He rejected a suggestion in cross-examination that the Claimant was a "thorn in his side". There was no reference to such safety disclosures to Mrs Bairstow by the Claimant in his Tribunal claim or in the identification of issues at the preliminary hearing. Nor did he address these particular events in his own witness statement.

24. Mr Spurr explained to the Tribunal that he had no involvement whatsoever in deciding who returned from furlough and when within the paint shop and none in the subsequent redundancy exercise, other than him being an employee representative for a completely separate area. The Tribunal accepts his evidence in circumstances where the Claimant did not seek to assert that he had any such involvement.

25. Indeed, the lockdown as a result of the coronavirus pandemic caused the Respondent to furlough the vast majority of its workforce from late March 2020. From early May, the Respondent considered a phased return to work of staff to resume limited operations. Its order book and the need to work in a Covid safe environment prevented the return at this stage of the entire workforce. Staff were returned to the workplace in phases.

26. Mr Tony Knott had joined the Respondent only on 14 February 2020 as Head of Paint Operations. As such he had only a period of around 5 weeks to directly observe the operatives in the paint shop who worked across 2 rotating shifts, albeit his office faced onto the solvent line which the Claimant operated. He determined who ought to be brought back when operations resumed after the most stringent

period of lockdown and completed a schedule of employees. He did so without specific knowledge of the ages of the employees in circumstances where that information was held confidentially by HR and not disclosed to the operational managers. The schedule evidences that there was reference against each employee to the skills they possessed and the Tribunal accepts that this information was derived from a skills matrix held by the Respondent and that Mr Knott filled in the information only after speaking to the paint shop team leaders who had greater knowledge of the operatives. The respondent's focus was on bringing back multiskilled employees first who could handle different machines and processes and be switched from one to another at short notice. The Claimant was noted as only being able to operate the solvent spray line.

27. Knowledge of health and safety or being a representative was not recorded within any skills matrix and was not knowledge the Respondent considered it required in bringing people back to work. Mr Spurr was working towards achieving a Covid safe workplace bringing himself up to date with government and HSE guidelines regarding the pandemic.

28. Mr Wells-Burr's evidence was that the Claimant wasn't selected to come off furlough, as priority went to multiskilled employees. Those who could work on both paint lines were chosen in advance of the Claimant who was said to only work on the Mito line. The evidence before the Tribunal, including from Mr Clamp, is that the processes on the paint lines did regularly change as new paint products were introduced.

29. The Claimant's own evidence as to skills is that he had worked on the solvent paint line for 2 ½ years, but had previously begun to train on the water-based Ibotic line in early 2019. However, he said that he began to suffer from a slight skin rash on his forearm and was moved back to the Mito solvent line, where he remained. The conclusion was that the Claimant might just have been having a unique allergic reaction to some of the chemicals, which he accepted at the time. The Claimant told the Tribunal that he considered himself and Mr Clamp to be the senior operatives. He said that he had trained some of the operatives who had subsequently been assessed as more skilled than him. There were, however, no formally designated senior operatives.

30. The Claimant was advised by letter of 12 May 2020 that he would remain on furlough. On 12 June 2020, a letter to staff informed them that the customer demand necessitated a slowing down in terms of bringing further employees back off furlough.

31. In the paint shop all agency worker contracts were cancelled. Four employees were brought back on 26 May, all aged below 50. Two were then brought back on 1 June, one of whom was aged 51. A further two were brought back on 29 June, both aged in their 20s. That left 4 employees including the Claimant aged 54, Mr Clamp aged 52 and individuals aged 58 and 62 respectively. All of those were the four employees subsequently selected for redundancy from the paint shop, all choosing a trial period in alternative employment with the exception of the 62 year old who decided to take redundancy severance. Mr Clamp and the employee aged 58 remain employed in the respondent's warehouse.

32. The Claimant did visit the site unannounced on a date in June 2020. Mr Knott told the Claimant that he was not following the health and safety protocols relating to Covid. The Claimant's position is that he complained to Mr Knott about not being returned to work referring specifically to the exclusion of older workers. Mr Knott denies that this was said and was not challenged on the point in cross examination. The Tribunal cannot therefore make a positive conclusion that a reference to older/younger workers was made by the Claimant.

33. The outlook for the respondent's business indeed continued to be problematical and by the week commencing 13 July the board approved a proposal to reduce headcount across the business by approximately 35, placing 125 employees at risk of redundancy across the business pending a process of collective consultation. Mrs Spencer had only joined as HR manager on 6 July. The announcement was made to staff of the proposed redundancy exercise on 17 July 2020. The Claimant received a letter explaining that it was proposed to make 4 employees redundant from his team of 12 in the paint shop.

34. Meetings with a body of employee representatives commenced from 20 July and a presentation was given of the respondent's proposal. The first collective consultation meeting took place on 22 July and a proposed scorecard for selecting people for redundancy was put forward. The selection criteria were drawn up by Mrs Spencer as ones she had used, including with union agreement, in previous role she had held in the manufacturing sector. This involved firstly an assessment of skills and competency tailored for each area of work and the key tasks and responsibilities involved to be scored independently by two relevant line managers. Attendance was to be assessed based on absences in the previous year up to 31 March before furlough commenced in line with data held by HR. On a similar basis scores were to be awarded in respect of timekeeping. Employees were to be scored for their conduct on the basis of live disciplinary warnings. Finally, line managers were to score employee behaviours measured against the respondent's business values of integrity, teamwork, accountability, leadership, innovation, adaptability and flexibility. Scores were to be weighted with skills and competency given the highest weighting of x5, attendance and lateness a weighting of x3 and

business values a weighting of x2. The Claimant and his colleagues were sent copies of the proposed scorecards requesting them to provide any feedback through their employee representatives by 24 July.

35. The HR team compiled a Q&A sheet in response to questions raised by employees and their representatives which were updated as time went on. Amongst other things, it was asked whether length of service should be used as part of the selection criteria. The Respondent rejected this proposal as it could amount to age discrimination.

36. Having considered the representations raised, the scorecards were agreed at collective level on 6 August. Line managers then scored the individuals in their work areas out of a maximum of 5 point under each criterion.

37. The Claimant was initially scored with his colleagues in the paint shop by Tony Knott, Head of Paint Operations and Ryan Finch, Painting Operations Team Leader. The Claimant was scored with 160.5 and 188.5 points by Mr Knott and Mr Finch respectively. Those schools were submitted to HR on 31 July. Mr Knott based his scores on the knowledge he had of each employee and gave examples justifying his scores on the scoresheet. Whilst he believed that each operative was treated the same in this regard, he accepted, as explained below, that it was a fair way forward for a further round of scoring to take place by other members of the management team when concerns were raised regarding the time he had been able to observe the operatives. He told the Tribunal that his observations were that the Claimant did not drive the production plan and show accountability for achieving production targets. He had seen the Claimant appear aggressive and not to be welcoming of new staff put on the Mito line. One individual had been, he believed, ganged up on and referred to as being smelly, including by the Claimant. Mr Knott was not aware of the email Mr Spurr had sent on 25 September. He was aware that concerns had been raised by the HSE but he did not know by whom. The HSE report was on the notice board and steps to comply with recommendations were ongoing. He was asked about Tracey Bairstow's email of 13 March 2020. He felt that the filters were still effective and pointed out that there was no issue of skin infection on the Mito line. He was adamant that the Claimant's redundancy was based on the assessment sheet scores and nothing else.

38. The Claimant was then invited, as an employee identified at risk by the scoring exercise, to a first individual consultation meeting with Mr Knott on 5 August. The Claimant was given a copy of his scores and an explanation as to how he had been scored. As part of his comments, he raised whether length of service had been used and was told that this would amount to age discrimination. The Claimant asked about the potential for alternative employment and was told this would be

discussed as part of further consultation. The Claimant was provided a copy of the notes of the meeting and confirmed their accuracy. He subsequently, on 5 August, queried by email whether all alternatives to redundancy had been considered.

39. A further collective consultation meeting took place on 6 August to review the representations made by employees in the first individual consultation meetings.

40. On 9 August the Claimant emailed Jayne Spencer challenging his scoring. In particular, he challenged the amount of time Mr Knott could have had to form an assessment of the Claimant given that he had joined the Respondent only a couple of months before the furloughing of staff. The Respondent considered this and chose to carry out a further scoring exercise for the paint shop involving two additional team leaders, Shaun Docherty and Dave Wells-Burr. The scores would then be taken as an average of 4 assessments. The Respondent decided that if similar challenges were made in other selection pools, the same solution of using additional assessors would be adopted. This was further discussed at the next collective consultation meeting on 12 August. The Claimant accepted now that he had been assessed by appropriate people.

41. Mr Wells-Burr, who had managed the Claimant at times throughout the Claimant's employment, told the Tribunal that he spent around 30 – 40 minutes compiling his own scorecard template for each employee without seeing those already completed or discussing his scoring of anyone else. He said that his scoring of the Claimant and others was based on his full working knowledge of each of them. Under skills, the Claimant received a mark of 2.5 rather than 5, because he could only operate one of the solvent and water based paint lines. Mr Wells-Burr said that that was his own experience of the Claimant and it was evidenced by the training records where the Claimant was not signed off as trained and competent to operate the water-based line. To be ticketed, he would have had to gone through a 3-6 month training period and then be signed off as competent. Anyone could work on either of the lines with supervision but that was different from being able to operate the lines independently. The Claimant's core activity was as the main operator for the Mito line. He was scored in a similar manner in respect of mixing and loading paint as he could do this for one line, but not the other.

42. Mr Wells-Burr then scored the criteria in the section headed "business values" looking at the guidance given in the definition box and then applying a score out of 5 giving the rationale for each score in the comments box. He gave the Claimant a score of only 1 point under flexibility, heavily influenced by the fact that the Claimant had done little overtime whereas others had been prepared to do so when the business needed it. In cross examination he described that he had had numerous discussions with the Claimant about his loss of temper. At times he said the

Claimant took on all the pressure and responsibility, for instance, for getting rid of waste himself and could get a bit agitated. He said that whilst the Claimant was passionate about health and safety, he did not always put himself across in the right way and lead by example. When put to him that the Claimant put health and safety above achieving production targets, he said that he would hope that everyone would. He too said he was never aware of specific employee ages and did not consider age at all. Nor was he looking at only very recent experience of the Claimant given he and Mr Docherty had been brought in to conduct additional scoring exercises on the basis that they had worked with the Claimant and others for longer than, for instance, Mr Knott.

43. A particular issue the Claimant had raised related to comments around his flexibility and a lack of willingness to work overtime particularly in the summer of 2019. The issue was investigated by HR and a statement provided by a manager Andrew Rawlinson. This was passed to Mr Knott who raised it in the Claimant's individual consultation meetings.

44. Mr Andrew Rawlinson had been involved in the implementation of a new IT system known as Project Elysium which went live in August 2019. He said that when he spoke to the paint shop team, the Claimant and Mr Clamp had stated that it was not their responsibility to help get the business out of a problem that was not of their causing. Mr Rawlinson said he understood that they had been encouraging colleagues not to work overtime. Significant overtime hours were worked in the paint shop in October, November, and December. The Claimant, it was said, had not recorded a single hour of overtime in this period to help the recovery programme.

45. Those provisionally selected were informed on 13 August of internal vacancies they could consider if the redundancy was confirmed. The Claimant pre-empted that message by emailing HR himself on 13 August, saying that he would like to be considered for a vacancy in the warehouse if he was unsuccessful in keeping his paint shop role. He was aware of vacancies there from another colleague. He was told that a tour of the warehouse would be arranged for him so that he could see the tasks involved in that alternative role. The Claimant was also invited to a further individual consultation meeting arranged for 18 August. The Claimant was given feedback on the issue of flexibility which had been investigated and it was confirmed that he had been re-scored by two other team leaders. He was told that he remained provisionally selected for redundancy following that re-scoring. It was noted that he was aware of available vacancies and had applied for a warehouse role. He was told about a four-week trial within that role and that the redundancy package would remain available during this period.

46. The Claimant was given a tour of the warehouse by its manager, Mr Simmonite, on 19 August. Afterwards, the Claimant confirmed his interest in taking a warehouse role on a trial basis as an alternative to redundancy. The Claimant was allocated an area of work reporting to a team leader, Mr Carl Dimaline. The Claimant was also invited to a further individual consultation meeting to take place on 21 August. This was in fact chaired by Mr Simmonite given that the Claimant was moving to the warehouse area. There was discussion of the new role and an explanation that there would be a trial period of 4 weeks with weekly feedback on performance.

47. Mr Spurr spoke to the Claimant once he was working in the warehouse and the Claimant told him that he couldn't continue as a representative on the health and safety committee because of his new shift patterns. Mr Spurr said that he hoped that the Claimant would continue as there was value in having a safety representative covering each shift worked by the warehouse staff. He said that he could look at changing the times of meetings to accommodate the Claimant. The Claimant did not, however, wish to pursue this offer.

48. The evidence is that the Claimant struggled to reach the required pick rates of kitchen doors for this role during the trial in the warehouse which commenced on 1 September. Before the Tribunal, the Claimant said that the pick rates were impossible to achieve. He went to see Mrs Spencer to explain that. He raised with her no complaints and said nothing about feeling pressurised or treated unfairly. Mrs Spencer said that to be fair, the Respondent would give the Claimant additional time to see if he could reach the required performance levels and the offer of a redundancy payment if things didn't work out would be extended. The Respondent wrote to the Claimant recording an extension of his trial period through to 23 October. He was told that it was hoped that this would allow sufficient time for him to successfully secure the role, but that insufficient improvement in picking rates could lead to the termination of employment.

49. The target pick rate was 400 doors a day and as a new employee the Claimant was expected to have to build up to that level over time. However, there was an expectation that the Claimant would start to achieve the required pick rate consistently during his trial period. An improvement was expected to be seen week by week as the Claimant became familiar with the process and equipment used. The Claimant had less contact with Mr Robin Simmonite, than Mr Dimaline, but did see him on a weekly basis to discuss his progress. During the extended trial period it is accepted by Mr Simmonite that he explained to the Claimant that he was still struggling with his pick rate performance and he wouldn't want him to lose his redundancy pay if he didn't make the required pick rate performance by 23 October. The redundancy payment available to the Claimant was enhanced

beyond statutory redundancy entitlement and the Tribunal accepts that Mr Simmonite did not want the Claimant to regret missing out on a significant payment.

50. The Claimant's pick rate figures in the first three weeks of his trial fluctuated significantly with a figure achieved of 66 in week 3 and a high point of 303 picks. During the subsequent two weeks, the Claimant managed to better that achieving on one day a pick rate of 310, but with other days below 200 items.

51. The Claimant emailed the Respondent on 15 October giving notice that he was resigning with effect from the end of the extended trial period on 23 October. He explained that he did not wish to miss out on his redundancy package by staying on in the warehouse beyond that date and then facing the possibility of a performance management process. Therefore, he had decided to leave. The Claimant told the Tribunal that he had been willing to give this warehouse role a go but when he was told constantly that he was not hitting targets and that his employment might finish anyway, he started to have sleepless nights – a reference to the possibility of losing his redundancy payment. At first it felt like the Respondent just wanted him out of the paint shop, but by the end he felt it was from the business entirely. It was put to him that if that was the respondent's aim why did it not just let him fail the trial period and save the redundancy payment. He responded that perhaps the Respondent hoped he would give up himself. He agreed that Mr Simmonite had encouraged him to take the redundancy payment and that was the option he chose. When asked if that was in the respondent's interest, as otherwise it might save money, he said that he still thought that it wanted him out.

52. Mr Steve Clamp was another operative at risk of redundancy who took up the option of alternative employment within the warehouse, albeit in a different area to the Claimant. He was also in the over 50 age group. His evidence was that he had been able to achieve the pick rate targets and had continued in the respondent's employment after satisfying his own trial period.

53. The Tribunal has been provided with statistical evidence of the age of employees within the respondent. Across the respondent, the percentage of employees in the 50+ age group and the age groups aged 40, 30 and 20+ returning from furlough at various stages of return did not diverge significantly from the number in each age group amongst the workforce. In the first phase of return to work in May 2020, 30% of those returning were in the 50+ age group.

54. In the paint shop as a whole, numbering some 46 employees, by July 2020 46% of the 50 – 59 your old age group had returned to work compared to 24% of those aged 20 to 29 years of age.

55. The age demographic of the entire workforce at the point of the commencement of furlough showed 34% to be in the 50+ age group. After the respondent's redundancy exercise and by 31 January 2021 they represented 33% of the workforce. Again, there was no material shift in respect of other age groups. Focusing on the paint shop only the percentage of those in the 50+ age group dropped from 13% pre-Covid to 11% after the redundancy exercise. Within the Claimant's pool of selection 4 of the 5 employees over the age of 50 were assessed in the bottom 4 of employees put at risk of redundancy. Within this pool, 5 employees fell within the 20 – 29 age group, and one in each of the 30 – 39 and 40 – 49 age groups.

Applicable law

56. In order to bring a claim of unfair dismissal an employee must have been dismissed. In this regard the Claimant relies on Section 95(1)(c) of the Employment Rights Act 1996 which provides that an employee is dismissed if he terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate without notice by reason of the employer's conduct. The burden is on the Claimant to show that he was dismissed.

57. The classic test for such a constructive dismissal is that proposed in **Western Excavating (ECC) Ltd v Sharp 1978 IRLR 27CA** where it was stated:

> *"If the employer is guilty of conduct which is 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, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employer is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; or, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract".*

58. Here no breach of an expressed term is relied upon. The Claimant asserts there to have been a breach of the implied duty of trust and confidence.

59. In terms of the duty of implied trust and confidence the case of **Mahmud v Bank of Credit and Commerce International 1997 IRLR 462** provides guidance clarifying that there is imposed on an employer a duty that he "will not without reasonable and proper cause conduct himself in a manner calculated [or] likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee". The effect of the employer's conduct must be looked at objectively.

60. The Court of Appeal in the case of **London Borough of Waltham Forest v Omilaju 2004 EWCA Civ 1493** considered the situation where an employee resigns after a series of acts by her employer. Essentially, it was held by the Court of Appeal that in an unfair constructive dismissal case, an employee is entitled to rely on a series of acts by the employer as evidence of a repudiatory breach of contract. For an employee to rely on a final act as repudiation of the contract by the employer, it should be an act in a series of acts whose cumulative effect is to amount to a breach of the implied term of trust and confidence. The last straw does not have to be of the same character as the earlier acts, but it has to be capable of contributing something to the series of earlier acts. There is, however, no requirement for the last straw to be unreasonable or blameworthy conduct of the employer, but it will be an unusual case where perfectly reasonable and justifiable conduct gives rise to a constructive dismissal.

61. If it is shown that the employee resigned in response to a fundamental breach of contract in circumstances amounting to dismissal (and did not delay too long so as to be regarded as having affirmed the contract of employment), it is then for the employer to show that such dismissal was for a potentially fair reason. If it does so, then it is for the Tribunal to be satisfied whether the dismissal for that reason was fair or unfair pursuant to Section 98(4) of the Employment Rights Act 1996. The Claimant here asserts that the reason for his dismissal was an automatically unfair one – that the or principal reason effectively for the acts of alleged treatment which amounted to a fundamental breach was by reason of his health and safety activities as a designated health and safety representative. There is no real dispute that the Claimant took part in relevant activities, particularly in his stance taken at a health and safety toolbox talk in September 2019.

62. Indirect discrimination, as defined in Section 19 of the Equality Act 2010, occurs where:

> *"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.*

For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

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

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,

it puts, or would put, B at that disadvantage, and

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

63. Applying the legal principles to the facts as found, the Tribunal reaches the conclusions set out below.

Conclusions

64. The Tribunal considers firstly the Claimant's complaint of unfair dismissal. Taking the acts relied on by the Claimant as amounting singularly or cumulatively to a breach of trust and confidence chronologically, the Tribunal considers firstly Mr Spurr's email of 25 September 2019. Clearly, Mr Spurr, from the way he described the Claimant was expressing frustration and a degree of annoyance. This was clearly a heat of the moment reaction, as he accepted in evidence. The email related to a toolbox health and safety talk after which he did describe the Claimant as the main "protagonist" and suggested that he had been whipping up others into a frenzy. He did not express those feelings to the Claimant but rather to his own managers. Indeed, the Claimant only learned of the email on or around 2 October 2020. He was surprised when he saw it, because he had not considered that Mr Spurr had said anything problematical at the meeting itself. The Claimant and Mr Spurr had a significant amount of mutual respect for each other. The Claimant thought that Mr Spurr was the best health and safety manager he had worked under and Mr Spurr recognised that the Claimant had a substantial amount of industry expertise and was a person whose opinion he would wish to know. They were both quite direct and straight talking, but neither saw that as problematical.

65. The evidence is of Mr Spurr taking his health and safety responsibilities seriously. Of course, his very role was to identify and ameliorate risks to health and safety. The Tribunal considers that Mr Spurr welcomed the raising of genuine health and safety concerns. He expected the Claimant to raise such concerns and as a health and safety representative to speak up on behalf of others. Mr Spurr's issue was

that he had only just found out about the issue with the chemicals on the Ibotic line potentially causing a skin rash. He believed that he shouldn't have been hearing about these issues from the Claimant for the first time shortly before the toolbox talk (when Mr Breeze made him aware that he had seen his doctor already), but that he ought already to have been made aware, particularly by the Claimant. The Claimant told the Tribunal that he was unable to make people come forward with their concerns if they did not wish to, but the Tribunal agrees that one of the Claimant's roles as a safety representative was to make management aware of concerns rather than wait for or encourage others to do so.

66. Mr Spurr also considered that the Claimant was expressing views as to the risk to health involved without having first himself gained and enabled the Respondent to gain a proper understanding of what, if any, process or chemical used was causing the skin rash and whether there were wider health concerns arising from such rash. Mr Spurr considered that the Claimant appeared to be jumping to conclusions and raising criticisms of the Respondent without giving the Respondent an opportunity to react.

67. The way in which the Claimant was described was not complimentary or a description he welcomed, but there were the aforementioned reasons for Mr Spurr's reaction which indeed certainly had nothing whatsoever to do with the Claimant's age, as at times has been alluded to. There are no facts from which the Tribunal could possibly conclude that the Claimant's age was a factor. The description of the Claimant in context, in any event, was not one which might, viewed objectively, be likely to destroy trust and confidence. There was reasonable and proper cause for a degree of criticism. There is no evidence that the Claimant reacted to the discovery that Mr Spurr had spoken of him in these terms. It is more likely than not that he would have spoken to Mr Spurr had he been significantly offended.

68. It is noted that Mr Spurr was not party to or an influence in any of the subsequent determinations regarding the Claimant's return from furlough or redundancy selection or work in the warehouse, other than to encourage him to remain a safety representative. He had no line management responsibility for the Claimant. It has not been suggested that he sought to turn others against the Claimant.

69. Additional evidence has been heard regarding the respondent's reaction to issues the Claimant raised in March 2020 with Mrs Bairstow, one of the respondent's directors. This was not, however, a matter relied upon by the Claimant in the Tribunal complaint identifying the reasons for his resignation. An argument that the Claimant's actions somehow alienated Mr Knott was not addressed by the Claimant in his own evidence. Mr Knott certainly did not accept that his

assessment of the Claimant was based on anything other than his genuine belief as to the skills he possessed.

70. The Claimant, along with all of the employees in his area of the paint shop, was put on furlough in late March 2020. He and 3 other employees in the 50+ age group were never returned to work on the water-based or solvent paint lines. The determination as to the phased return to work of the operatives was that of Mr Knott, whose knowledge of the Claimant was more limited than some other managers due to his lack of time in the business. The Tribunal is satisfied that the reason he did not consider that the Claimant ought to return to work earlier was because of his assessment that the Claimant in particular could work on the solvent-based paint line but had not been signed off as trained and competent on water-based line. That was reflected in the content of the skills matrix and he considered that it was appropriate to ensure maximum flexibility of labour by bringing back, firstly, those who were signed off to work on both lines. Whilst the Claimant may have worked historically more widely, he worked habitually on the solvent-based paint line. He had stopped working on the water-based line due to a health issue. Whilst he started training on the water based line on its introduction, he had to be removed from that area and never went back. In such circumstances he would not in any skills matrix have been designated as competent to run the line.

71. The Claimant, the Tribunal finds, did not (reasonably) welcome remaining on furlough, but the Respondent had reasonable and proper cause for not including him in the phased return to work. The Tribunal is unable to conclude that the Claimant was kept away from the workplace due to his health and safety activities. Against clear evidence of a skills-based assessment, there are no facts from which the Tribunal could reasonably reach such conclusion. It is the case that the Claimant had raised health and safety issues with Mrs Bairstow, but no evidence that they caused the respondent's managers particular concern. The HSE had become involved (and indeed on a protracted basis) in the concerns previously raised regarding the skin irritation experienced by some employees working on the water-based line, but it is not the Claimant's case that he was the individual who had made the report to the HSE and the respondent's managers were not aware of who had made the report. There is no evidence that they assumed it to be the Claimant.

72. The Claimant then complains that him being placed on furlough was to ensure that he was selected for redundancy and effectively then that his selection for redundancy was, not simply unreasonable, but because of his health and safety activities. Firstly, it must be recognised that this was a genuine redundancy exercise due to a reduction in demand for the respondent's products which would not have occurred but for the coronavirus pandemic. In the Claimant's area of work

this involved a competitive process where 4 out of 12 employees were ultimately at risk of selection for redundancy.

73. The evidence is of the Respondent conducting a thorough and genuine redundancy process. The criteria were not arrived at with a view to disadvantaging the Claimant, but indeed were criteria which Mrs Spencer had used in her previous employments and which she felt had stood up to scrutiny including by trade union representatives. The Claimant was initially assessed by Mr Knott and one other team leader. The pool was then assessed additionally by a further 2 team leaders such that by the end of the process the Claimant accepted that the scoring had been done by the appropriate people. The assessors' views of the Claimant did not materially diverge. It would perhaps be expected that those who did not return from furlough would be vulnerable in any redundancy exercise, given that the return from furlough was based on skills and skills were given a high weighting in the redundancy exercise. Again, the Claimant was scored on the basis of him being limited to 1 out of the 2 paint lines. The assessment of the Claimant against values and behavioural criteria damaged him also in the scoring. Whilst the Claimant might not agree with the scores he was given, they were backed up by examples of the behaviours observed by the managers of the Claimant which cannot be dismissed as merely subjective views. The fact that the Respondent did not regard them as matters to be dealt with under its disciplinary procedure, did not prevent or make it unreasonable for the Respondent to rely upon them.

74. Again, there is no evidence that the scoring of the Claimant was influenced in any sense whatsoever by his health and safety activities. As with the decision not to return him from furlough, his position as health and safety representative and obvious knowledge of health and safety was not something he was given credit for, but that was in circumstances where this was not an aspect of the skills matrix. Nor was this a required skill in the sense that Mr Spurr had the role of ensuring a Covid safe workplace and was able to do so without any employee representative input in circumstances where the health and safety considerations were novel and depended upon fluctuating scientific and government guidelines which every employer was being required to react to.

75. The Claimant next raises that there was an initial failure by the Respondent to offer him alternative work in the warehouse and the offer was only made when he himself raised this as an alternative. That is not a fair representation of the facts. The Claimant was aware of opportunities in the warehouse before his selection for redundancy was confirmed. He raised the possibility of moving to the warehouse having been put at risk but before a further redundancy consultation meeting on 13 August 2020 and the final consultation meetings which took place on 18 and 21 August. He was given a tour of the warehouse on 19 August and shortly afterwards commenced his trial period. There is no basis upon which the Tribunal could

conclude that the Claimant would not have been offered this alternative in any event had he not raised it earlier. The Claimant had no reason for thinking so at the time. The Tribunal is confident that as with others, including Mr Clamp (the other "main protagonist" at the safety toolbox talk), the Claimant would have had this opportunity. The Respondent did not seek to hide it from him, there was no apparent limit on the number of positions available in the warehouse and, once he had started his trial, the Claimant was involved in a discussion with Mr Spurr where Mr Spurr sought to encourage the Claimant to become a health and safety representative in that area.

76. Finally, the Claimant complains that once in the warehouse Mr Simmonite criticised him in his role picking in the warehouse with the intention of making/persuading the Claimant to resign from his employment. The Claimant accepts that he did not manage to hit the picking targets. The Tribunal does not find that those were set unfairly or at a level which would ensure that the Claimant would not be able to prove himself in this role. It is noted that Mr Clamp managed to hit similar targets and that he is in the same age group as the Claimant. Any criticism of the Claimant as regards his pick rate was with reasonable and proper cause. Mr Simmonite was anticipating a situation where the Claimant could not meet the required standard. This was a reasonable anticipation given the low pick levels recorded and a fluctuating series of picking results which did not indicate that the Claimant was getting more used to the work or, for instance, gradually improving. Mr Simmonite wanted the Claimant to be fully aware of the choices open to him and to ensure that the Claimant did not miss out on the opportunity for a redundancy payment if he carried on beyond the deadline in circumstances where he might ultimately not be able to sustain employment in the warehouse. There are no facts found by the Tribunal which could cause it to conclude that Mr Simmonite's position was in any way linked to the Claimant's health and safety activities, particularly in circumstances where Mr Spurr had sought to persuade the Claimant to take on that role as an additional representative on a shift which was missing a representative in the warehouse. Mr Simmonite could not be challenged on this point. The Claimant chose to leave the respondent's employment, rather than to seek a further extension to his trial period.

77. The actions of the Respondent relied upon by the Claimant, even on a cumulative basis, cannot be concluded to amount to a breach of trust and confidence so as to entitle the Claimant to resign immediate effect.

78. Even if they had so amounted, the Claimant is in difficulty in that he effectively affirmed his contract of employment agreeing to work a trial period in the warehouse. Had he met the picking targets, the evidence is that he would have remained in the respondent's employment. Mr Simmonite's comments towards the Claimant might theoretically be relied upon as a last straw reviving the Claimant's

ability to rely on earlier breaches of contract, but again, in context, Mr Simmonite's comment was not in itself a breach of contract and, recognising that it does not have to be, nor can it be said to be improper or problematical in the sense of adding anything to any previous mistreatment of the Claimant.

79. There is no doubt that the Claimant satisfied the legislative requirements in terms of carrying out designated safety activities in the role he played at the September 2019 toolbox talks and that alternatively, being a health and safety representative, he was performing the functions of a member of the health and safety committee. Even had the aforementioned conduct being found to amount to a fundamental breach of contract, the Tribunal, as already explained, does not, however, conclude that the reason or principal reason for the respondent's treatment of the Claimant was his health and safety activities.

80. The Claimant was not constructively dismissed and his claim of unfair dismissal, as pleaded, must fail.

81. The Tribunal then turns to the Claimant's complaint of indirect age discrimination. The Claimant relies on the Respondent having had a practice of scoring employees in the Claimant's pool for selection for redundancy more highly if they had recent experience of work. The Claimant appears to be asserting that employees who were brought back from furlough at an earlier point in time had then the ability to show their skills and abilities upon which they were then favourably assessed and/or that the Respondent was looking at skills and performance in this period, in circumstances where the Claimant was not at work. There is no evidence of that whatsoever. Nor indeed has it been found that the Respondent was looking at what the employees had done only at the point immediately before furlough. More relevant was the skills matrix which encompassed skills gathered over a period of employment if skills were still current i.e. provided any employee remained signed off as competent. It is clear from comments made about the Claimant that earlier periods were being considered including in respect of an IT project where it was observed that the Claimant had been reluctant to work overtime. Again, it is no surprise that those who were not brought back from furlough were disadvantaged in the redundancy exercise given that those who remained furloughed were those who were adjudged to have lesser skills. That, however, had nothing whatsoever to do with age.

82. The Tribunal notes that whilst all 4 of the individuals who remained on furlough (and at risk of redundancy also, were in the 50+ age group) not all were ultimately made redundant. Two of them continued working in the warehouse after successful trials. Also, an employee in the 50+ age group was brought back from furlough at an earlier stage of the phased return to work. The statistical information

which the Tribunal does have is not indicative of the Respondent reconfiguring its workforce generally or in the wider paint shop on the basis of a desire to retain younger people. Indeed, across the business the stages at which employees returned to work after furlough did not appear to show a bias in terms of age but rather that age was not a relevant factor. The complaint of indirect age discrimination must fail and is dismissed.

Employment Judge Maidment

Date 14 January 2022