



EMPLOYMENT TRIBUNALS

Claimant: Mr M Jones

Respondent: Tango Networks UK Ltd (1)
Philip Hesketh (2)

Heard at: Leeds (remotely, by video) **On:** 12,13,14,15 & 16 December 2022

Before: Employment Judge Miller
Ms J Lee
Mr A Senior

Representation

Claimant: Ms W Miller – Counsel
Respondent: Mr A Murphy – employment law consultant

JUDGMENT having been sent to the parties on 19 December 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction, hearing and issues

1. The claimant was employed by the respondent until his resignation on 2 March 2021. He commenced early conciliation against the first respondent on 14 April 2021 and that finished on 26 May 2021. The claimant then commenced early conciliation against the second respondent on 31 May 2021 and that finished on 2 June 2021.
2. The claimant made a claim to the employment tribunal on 21 June 2021 in which he made claims of unfair constructive dismissal, wrongful dismissal and age discrimination.
3. There was a case management hearing on 5 January 2022 at which the issues were set out and case management orders were made. The issues are set out as an appendix to this judgment. There had been some issues prior to that case management hearing relating to the presentation of the

response by the respondents. It is not necessary to address those for the purposes of this hearing.

4. The hearing was heard over 5 days by video. We were presented with an agreed file of documents of 327 pages. The claimant presented a witness statement and attended and gave oral evidence.
5. The respondent's witnesses were:
 - a. Mr Andrew Bale – the first respondent's General Manager for Cloud Services at the time and the person who heard the claimant's grievance
 - b. Mr Phillip Hesketh – the claimant's line manager at the relevant time and the second respondent
6. Both Mr Bale and Mr Hesketh attended and gave oral evidence.
7. The parties were represented by Ms Miller and Mr Murphy as set out above. We would like to record our gratitude for the helpful and proportionate way in which they both represented their respective clients.
8. Regrettably, there were some technical issues with the video hearing which caused some minor difficulties at the time but ultimately they did not impact on the hearing.

Findings of fact

9. We heard a significant amount of evidence and we had submissions from both parties. We have taken all the evidence and submissions into account but have only recorded such findings as are necessary to decide the issues.
10. The claimant was employed by the first respondent from 7 January 2019 as a Channel Account Director. The first respondent sells licences for mobile phone SIM cards for businesses which integrate into the businesses' existing phone systems. Their model, in so far as it applies to the claimant, is to enter into master service agreements (MSAs) with resellers. The resellers then sell the SIMS on to businesses. The first respondent does not contract directly with end user businesses.
11. The claimant's job, as Channel Account Manager and later Channel Account Director was to work with the resellers – to enter into agreements with them for them to sell the respondent's products. The claimant had three main clients – Telco Switch, AVC1 and Red Centric. The first respondent did not get paid under the MSA, rather they received income when the resellers sold their products.
12. The claimant was paid a base salary of £60,000 per year with an additional £40,000 available as commission on the sales of the actual sims. Throughout his employment, the claimant did not earn any commission. Mr Hesketh's oral evidence, which was not disputed, was that the claimant would have to sell (through the resellers) 13,000 sims to make £40,000 commission.

13. It is also important to record that the claimant was aged 59 when he was appointed to this job and was aged 61 by the time his employment ended on 2 March 2021.
14. The chronology of this claim starts, from the claimant's perspective, on 4 December 2020. Before we address that, however, there are some circumstances leading up to that day that we need to address.
15. The claimant was initially managed by a manager in the US. Mr Hesketh took over his line management from around August 2020. Mr Hesketh had regular meetings with the claimant – at least weekly. It is the respondents' case that the claimant was not performing well in his role. The claimant certainly had not sold enough SIMs to make any commission by then. Mr Hesketh said that the claimant was very poor at forecasting the number of sales a partner seller would make, which had impacts for the business, and there was a lack of structured account planning and evidence of day to day business.
16. Mr Hesketh refers to some meetings in his witness statement. None of those meetings identify, except one, any inadequate performance. There was one occasion when Mr Hesketh said, about a meeting on 23 September 2020, that the claimant's forecasts were inaccurate. Mr Hesketh makes comments like he was underwhelmed by the claimant and that he needed handholding, but there are no other objectively verifiable or identifiable criticisms.
17. There was no objective evidence before the Tribunal about the claimant's performance in 2020. We are unable to find that the claimant was actually not performing adequately.
18. The claimant's uncontested evidence was also that Mr Hesketh would use phrase such as 'high energy', 'energetic', and 'youthful' in relation to the team.
19. By the end of the year, the first respondent was seeking to appoint a new sales person and the claimant was able to recommend someone he knew – Mr Murray Grimes – as a potential candidate.
20. The claimant suggested the role initially to Mr Grimes and Mr Grimes contacted Mr Hesketh through LinkedIn. Mr Hesketh said, and we accept, that it was clear from Mr Grimes' LinkedIn page – his education history and his picture – that he was a middle aged man (at least). Mr Hesketh had some initial discussions with Mr Grimes on 10 November 2020 and invited him to apply for the new role.
21. Mr Grimes attended a formal interview on 3 December 2020 with Mr Hesketh. There were 16 people interviewed between 1 and 8 December 2020.
22. Mr Hesketh had a conversation with the claimant about Mr Grimes on or around 4 December 2020. The claimant's case, in his claim form, is that in this conversation, Mr Hesketh said "How old is Murray?" the claimant said "Murray is 57". The claimant says Mr Hesketh replied "Yes, he did look old"

and “he wanted someone younger for the role” and “who was ideally female”.

23. The claimant produced a photograph of an entry in his work journal. That is dated 4 December and says “ Murray looked older on photo and was too old for job. Also ideally wanted to employ a woman”. We were asked to find that the claimant had fabricated this note. We do not think he did. We do not know why he made the note – we suspect the claimant had some inkling that Mr Hesketh was not happy with his performance, whether justifiably or not, and he may have been keeping evidence in case things went wrong for him. He might even have been keeping it for Mr Grimes’ benefit. In any event, we find that it is a genuine note.
24. The claimant also raised this in his subsequent grievance and said there “on 7th [not 4th] I was told by you that Murray was competent but couldn't join Tango as you felt he was too old. Murray was offered a second Interview but you told me he wasn't going to get the role as you were looking for someone younger. After the Interview you had asked me how old Murray was and I replied 56 or 57. You responded ‘he looked older’.”
25. There is some inconsistency here, but overall the gist of what the claimant is saying is consistent throughout. We do not place any weight on the reference to 7th. The claimant said in his grievance that he had the note and that clearly refers to 4th. We think it more likely than not it was a typo.
26. Mr Hesketh said that he did have a conversation with the claimant about Mr Grimes but that he said “a lot of the candidates we were interviewing were a mirror image of me, white middle aged men and that it was a shame that we did not attract more diversity into the application process”.
27. It is of course obvious from this that Mr Hesketh, at least by the time he wrote his statement, perceived Mr Grimes to be a similar age to him.
28. In oral evidence, it was put to the claimant that in fact Mr Hesketh said just this: that it was a pity the first respondent did not attract more diverse candidates. The claimant agreed that that was part of the conversation – that Mr Hesketh said he didn't want a team of 50 odd year old balding men and ideally a woman.
29. The claimant's evidence, which was not challenged, was also that “Around the time of Murray's interview, I recall Philip saying, “I don't want a team of bald-headed 50-year-old men - I want to change the dynamics”
30. After the conversation on 4 December, Mr Murray was interviewed a second time, this time by Mr Humble, along with two other candidates. Mr Murray was not invited to a third interview, but the other two candidates were. The first respondent must have considered that Mr Murray was appointable, however, because they decided not to inform Mr Grimes that he had not been successful until after the third interview.
31. It had been the first respondent's initial intention to only recruit one candidate. However, having interviewed the three candidates they decided that they wanted to appoint the two highest performing ones. These were also the two youngest of the three, being in their 40s. Mr Bale said in his

statement to the previous tribunal (in respect of Mr Grimes' separate claims to the Employment Tribunal against the first respondent) that he did not want to unnecessarily increase his workforce and we consider, therefore, that the decision to appoint the two candidates was material to the decision to dispense with the claimant's services. The two successful candidates were informed they were successful on 21 December 2020.

32. Ultimately, one of the candidates refused the job and it was the claimant's case that Mr Grimes should automatically have been offered the job instead. The fact that he was not, that they went out to further recruitment, was, he said, evidence of age discrimination.
33. The first respondent's explanation for this was that they had identified in the recruitment process an opportunity in the mobile resellers market and decided to recruit specifically for that, an area in respect of which Mr Grimes had no experience.
34. We prefer Mr Hesketh's account of the conversation on 4 December 2020. We find that he did express disappointment that the field of candidates was not more diverse. It is also consistent with the claimant's evidence that Mr Hesketh wanted to change the dynamics of the team. Mr Grimes did go on to be progressed through the recruitment process and we find that the reason he was not subsequently offered the job was because of his lack of experience in the mobile market, not his age.
35. The claimant's evidence about this was that Mr Hesketh's attitude to Mr Grimes changed when he found out that he was aged 56 – 57. We find that it did not. Mr Hesketh was aware of Mr Grimes' age range early on, to a fairly narrow band given the information about his early education available on LinkedIn. We find that Mr Hesketh did say words to the effect that he would have preferred a younger person for the role, but in the whole context we think it most likely that this would have been the expression of what he would have preferred, or liked ideally. However, we find, (and in fact it has already been found by another tribunal) that this aspiration did not impact on Mr Hesketh's decision making in that recruitment process.
36. The next relevant incident relates to a meeting between Mr Hesketh, Mr Bale (his line manager) and Mr Bartek, the first respondent's CEO on 18 December 2020. There is a meeting invitation to this meeting. It is from Mr Hesketh and reads:

"We potentially have two very exciting candidates for the UK role. We believe both can add do (sic) a fantastic job for us.

The first one will definitely join us, and I am having a follow up with the second tomorrow morning, he has a couple of interviews in play.

The second is our more desirable candidate.

The purpose of this meeting is if both are within budget (£60k-£70k base + comp) then I'd like to make an offer to each on the provision we move Mark on very early in Jan 2021, and number 2 wants to join".

37. The claimant was informed about this invitation by a colleague and he read it on or around 22 December 2020. It was on a calendar that was visible to the claimant, and other employees.
38. This is a key incident for the claimant and we can see why. He concluded from what he read that the first respondent had decided to dismiss him and replace him with one of the other candidates who was appointed in the recruitment process that involved Mr Grimes.
39. Mr Hesketh said that it was his proposal to dispense with the claimant's services as he had found two suitable candidates. He knew that if they dismissed the claimant before he had 2 years' service, they would not have to go through a lengthy procedure and could dismiss him quickly without him being able to claim unfair dismissal. However, Mr Hesketh said that having considered it, the management team, meaning Mr Bale and himself, thought that was a bit harsh, and decided to instead give him a chance to improve.
40. Mr Bale's evidence in his witness statement to this tribunal was to the same effect. In his witness statement to a previous tribunal about Mr Grimes, he said that the claimant was put on a performance improvement plan (PIP) in December 2020 and that the plan was to dispense with the claimant's services should he not improve in order to appoint a replacement candidate.
41. In the investigation for the grievance appeal, Mr Bale said that "move Mark on" meant move his performance on.
42. In our view, Mr Bale was not a helpful witness. He was evasive during oral evidence and we do not think he was particularly reliable.
43. In his witness statement, Mr Hesketh also refers to a "deep dive" into the salespeople's accounts, including the claimant's, in November 2020 and although he does not provide any further information about what he uncovered, we conclude that he is relying on this as evidence of the claimant's failure to perform adequately.
44. We simply do not believe the respondent's account of what happened at this meeting on 18 December and we find that there was a firm plan to dismiss the claimant and to replace him with another candidate. The respondent planned to do this before the claimant had 2 year's service so they could do it quickly.
45. We find that the proposal to dismiss the claimant came from Mr Hesketh and that was because he did not believe that the claimant was performing in the way he wanted him to. He did not consider him dynamic enough and thought his forecasting was unreliable.
46. Forecasting is relevant to explain here. The claimant was required to forecast how many SIMs the third party sellers would sell in a given period. The forecasting was required to be updated in the first respondent's records regularly. The claimant said that his forecasts were dependant on the information he obtained from the re-sellers. Mr Hesketh said that the claimant should have dug deeper into his client's figures, made more and better relationships and tested their information. We think that, in fact, Mr

Hesketh just had a poor view of the claimant's relationships with the re-sellers. He clearly did not think the claimant was dynamic enough.

47. The claimant was then on holiday from 24 December until 3 January and he was absent with stress from 4 – 11 January 2021. The claimant had a panic attack on 27 December and was too ill to consider returning to work on 4 January 2021. He was given a fit note for 4 weeks but instead self certified for a week and returned on 11 January. He was worried that the first respondent would use his absence to dismiss him. Mr Bale and Mr Hesketh said the claimant was off sick from 24 December. That is not right. He was initially on leave.
48. By the time the claimant returned to work, he had accumulated 2 years' continuous service with the first respondent. In the interim period, one of the two candidates for the two jobs had declined the respondent's offer on 7 January 2021.
49. There was a return to work meeting on 13 January 2021 which the claimant covertly recorded. Mr Hesketh produced a spreadsheet, ostensibly to help him get back to work. We find that this spreadsheet was in fact a list of tasks for the claimant to do. The meeting was generally agreeable however, and there was no explicit criticism of the claimant's performance in that meeting. This was a two way discussion about the claimant's work. Mr Hesketh did raise an issue with the claimant about Telcoswitch, one of the claimant's clients. Mr Hesketh said that he had made a significant amount of progress in a short period with the claimant's client and that the client was broadly speaking unhappy with the claimant and felt that he was not proactive enough. Mr Hesketh said that he had managed to negotiate a deal with this company. The claimant said he could not progress things the way Mr Hesketh could because of his need for authorisation.
50. Although we have transcripts of the recordings of these conversations, they are difficult to follow. However, having been taken through it, we find that at this meeting the claimant had a reasonable response to all the points put to him by Mr Hesketh and Mr Hesketh did not make any clear points about the claimant's performance, nor did he warn him his performance was inadequate.
51. In respect of the deal Mr Hesketh said he managed to negotiate with Telcoswitch, that came to nothing and we think it likely that any problems the claimant was having with this company were due, at least in part, to the nature of the company.
52. The claimant was suspicious that this was the beginning of a plan to remove him under capability. He emailed Mr Hesketh on the same day clarifying further points, confirming that he would do the tasks required of him and raising a concern that the spreadsheet was more of a performance document than an actual aid.
53. In oral evidence, Mr Hesketh said that he had the right to manage the claimant's performance and we find that this was what he was doing – attempting to manage the claimant's performance. However, he was not

explicit at the time that this is what he was doing and we find that it was the start of the process to remove the claimant from the organisation.

54. There was a further meeting on 20 January 2021 which the claimant also covertly recorded. At this meeting, the claimant was on track with his work. Mr Hesketh did not express any concerns with the claimant's performance at this meeting. Mr Hesketh said it was implicit that the claimant was not achieving his targets and that was a big problem. However, the claimant had updated the first respondent's CRM system (Salesforce.com). In oral evidence, Mr Hesketh again said that the claimant's recording was inaccurate and his forecasting was inaccurate but there was no objective evidence to support these assertions and no measures or comparisons against which to judge the claimant's performance.
55. Mr Hesketh was of the view that the claimant's forecasts and updating were poor but he was unable at any point, either in the meetings or before the tribunal, to provide any evidence of that beyond his own oral evidence. Throughout the meeting on 20 January, the claimant gave a response to each of the concerns that Mr Hesketh raised and these appeared to be accepted by Mr Hesketh at the time.
56. Mr Hesketh says in his witness statement that there was another 1:1 on 7 January 2021. We conclude that this is a typo and in fact it was on 27 January as set out in the claimant's particulars of claim. Mr Hesketh said that the claimant was not improving and he reminded the claimant to update business planning sheets and to adjust the start dates of annual plans. Nothing turns on this meeting but we note that as the claimant did not record it, there are no notes of it and no evidence of what was discussed.
57. The claimant's next 1:1 was on the morning of 3 February 2021 which the claimant again covertly recorded. There was a discussion about how the claimant recorded the service effective date. Mr Hesketh was clearly frustrated that the claimant was not doing it correctly when, as far as he understood, the claimant should have known how to do it. The claimant said in that meeting and in evidence that in fact Mr Hesketh was now changing the procedure and the claimant agreed he would do it how Mr Hesketh now required.
58. There is no evidence that we have been shown that the claimant had previously been clearly told how to complete the service effective date and even in the list of meetings that Mr Hesketh recites in his witness statement he does not refer to this as a previous problem. In any event, this is the only matter that is discussed at this meeting on the morning of 3 February before Mr Hesketh told the claimant that he intended to formalise the action plan into a formal improvement plan. He said

"what, I'm gonna do is, is formalise this action plan into a performance Improvement plan. Because... I'm frustrated that things like this happened regularly and it takes up a lot of bandwidth and effort".
59. The claimant then terminated the meeting and said he wanted to obtain advice about this, which he did.

60. The meeting resumed at around 5pm the same day and the claimant recorded the meeting again, this time with Mr Hesketh's reluctant agreement.
61. This is a lengthy meeting and we were taken through it in detail. The claimant said he was there to listen, effectively, and Mr Hesketh said it was a formal performance improvement plan meeting, the purpose of which was to bring the claimant up to the requisite standard. The claimant's concern was that in fact the purpose was to use the performance process to dismiss the claimant and that the documents he was completing were in fact hand over documents for the new recruits.
62. Mr Hesketh's stated view was that the purpose of this meeting was to motivate and manage the claimant and to help him be successful in his job. Mr Hesketh said that what he was telling the claimant was all basic stuff and it should not be necessary for someone on the claimant's salary.
63. The claimant's account is that for every issue Mr Hesketh raised, he had an answer. He was able to update Mr Hesketh on the accounts, his forecasting was accurate and that the claimant was on top of the CRM.
64. In the course of that meeting, Mr Hesketh shared with the claimant a spreadsheet that was very similar to the one he had previously said was a support document to help the claimant's return to work and which he had said would not be used as a performance document.
65. A number of work and account matters were discussed in that meeting including the need to regularly update forecasts, regularly update salesforce.com, the allegedly poor feedback from Mr Lux (a client representative) and discussions about the impact of the pandemic on sales. Despite saying he was just there to listen, the claimant did engage with the meeting and offer explanations. Mr Hesketh set a review for one week's time. The claimant was worried about the impact of the process on his employment and Mr Hesketh said it was not a disciplinary. He said the purpose of the process was to help the claimant improve - to get to the required standards - but that it might go down a disciplinary eventually if the claimant did not improve sufficiently.
66. We find, in this meeting, that Mr Hesketh was attempting to raise performance issues with the claimant. The claimant was able to respond to each one either by way of explanation or by agreeing to the proposed actions. It is not clear whether that was to Mr Hesketh's satisfaction or not and it is not clear to us the extent to which the claimant was failing to perform, or whether Mr Hesketh had any reasonable basis for believing that the claimant was underperforming, as there was by this time, and remains, no objective information against which he is compared.
67. In our view, following the positive meeting of 20 January 2021 the respondent has not shown any objective basis for implementing, on 3 February 2021, a formal performance plan in respect of the claimant without any prior warning. We note, particularly, that in the meeting on 13 January 2021, Mr Hesketh effectively denied that the claimant was entering a performance process but was being supported.

68. The next day, 4 February 2021 the claimant submitted a grievance to Mr Hesketh. He summarised the history from 3 December 20 to 3 February 21, broadly as we have set out. The claimant's complaints were:
- a. That there was no genuine reason for implementing a performance process
 - b. That the real reason the first respondent was looking to remove the claimant was because of his age
 - c. That he was being set up to leave or be sacked and the trust and confidence had gone
69. The claimant asked to whom he would report during the investigation and what would happen to his work.
70. The same day, the claimant also submitted a subject access request to Mr Hesketh asking for, amongst other things "All notes, papers, minutes of meetings, recordings, correspondence, messages, emails, texts or similar between you as my employer and Tara Hufley, Doug Bartek, Andrew Bale and Philip Hesketh in relation to my planned termination for early January 2021 and any other period".
71. Mr Bale contacted the claimant and told him he would be dealing with the claimant's grievance and there would be a grievance meeting on 9 February 2021. He said that the claimant would continue to report to Mr Hesketh but that Mr Bale should be copied into any correspondence and join any meetings they have.
72. The claimant then went off sick on 8 February 2021 and asked for the grievance to go ahead in his absence. He said, and we accept, that his doctor had advised him to remove himself from all aspects of work.
73. Mr Bale investigated the grievance by emailing some questions to the claimant to which he then replied. Mr Bale did not say in his witness statement what investigation he had carried out except for emailing the claimant. In the grievance outcome he said that he had interviewed "all attendees" at the meeting on 18 December 2020. Mr Bale was, in fact, one of those attendees. He also said he had spoken to Mr Hesketh about the other matters the claimant raised and to Mr Humble (the other recruiting manager) about the 'Grimes recruitment'. There were no notes of the grievance investigation and we have no reliable way of knowing what the investigation comprised of. Mr Bale's unconvincing explanation for the lack of notes was that he was not obliged to keep notes.
74. Mr Bale invited the claimant to a meeting on 26 February 2021 to hear the grievance outcome. The claimant asked for the outcome in writing and said "I look forward to receiving the outcome later today (or beforehand if convenient) and to us working together to put these issues behind us so I can be supported In my return to work".
75. Mr Bale sent the grievance outcome on 26 February and did not uphold any of the claimant's grievances, although he did recommend that the first

respondent should consider reviewing its grievance process to accommodate a remote process.

76. The claimant said that he believed that Mr Bale had failed to properly understand his grievance. We do not agree. Mr Bale has understood and ostensibly addressed the substance of the points the claimant raised. However, we do agree that Mr Bale has failed to demonstrate that he addressed this impartially or carried out any kind of adequate investigation.
77. We heard that there were two other directors in the company who were not related to sales. We did not hear any adequate explanation why they were unable to consider the claimant's grievance and we conclude that Mr Bale, having been a part of the meeting at which the claimant's dismissal was discussed on 18 December 2020, was not realistically capable of conducting an impartial investigation into that meeting and all the things that followed.
78. While, therefore, Mr Bale did understand and respond to the claimant's grievance, he did not properly investigate it or genuinely address it.
79. The claimant also alleges that Mr Bale made a finding that there was a number of specific unsolicited negative comments made to Mr Hesketh by channel partners. We have seen no evidence to support the assertion that there were complaints from multiple partners and the only example Mr Hesketh could give was the comments of Mr Lux. These appear to have been taken at face value despite the claimant's response and explanation. The negative comments, as reported by Mr Hesketh in the meeting on 3 February 2021, were:
- “But he feels that you never provide any added value to his account and that's why he avoids the calls and is elusive to speak to, because he never really gets anything from you. It's always 'I'll go and find out'. And as a channel account manager, who is the manager of a channel account manager, who's key partner is telling me that actually I'm not really getting any value out of my channel account manager, is pretty tough feedback for me...”
80. It was the claimant's evidence that he had limited authorisation so that he needed the first respondent's approval for certain matters that Mr Lux wanted – we heard about the branding of a SIM for example – and Mr Hesketh appeared to agree that the claimant would need authorisation for some things. His response was, however, that it could be given quickly. In our view, this is slightly disingenuous – there is an obvious difference between not needing authorisation, and needing authorisation but saying that would be available quickly. We also observe, again, that the deal that Mr Hesketh managed to secure with Mr Lux never came to fruition either. This, together with Mr Hesketh's earlier email to the claimant to the effect that dealing with Mr Lux was like herding cats, tends to suggest to us that any difficulties in communications between the claimant and Mr Lux were unlikely to be solely the fault of the claimant and that any negative feedback from Mr Lux ought to be considered with an open mind before being levelled at the claimant as a criticism.

81. We find, therefore, that Mr Bale had no good reason for including this criticism in the claimant's grievance outcome. The claimant said in his witness statement that he felt that Mr Bale had sought to cover Mr Hesketh's back in the grievance outcome and we agree.
82. The grievance outcome did not offer a right of appeal. However, the claimant had been informed at the outset of his grievance that he would have a chance to appeal and did actually appeal and we conclude that the failure to re-offer it in the grievance outcome was an oversight by the first respondent.
83. 26 February 2021 was a Friday and the claimant submitted his resignation and grievance appeal on Tuesday 2 March 2021. He set out in there the reasons for his resignation and said that

"I am shocked, appalled and saddened at the blatant manipulation and lies set out in the grievance report and believe this is only designed as a tick box exercise to make me look bad and to further a performance management process which should never have been carried out in the first place. I find the findings, lack of Investigation and breach of process to be a fundamental breach of trust and confidence"
84. He then set out a number of specific concerns, which were
 - a. Age discrimination with reference to the alleged comments of Mr Hesketh in December about Mr Grimes, and a failure by Mr Bale to look into it.
 - b. The absence of any investigative material by Mr Bale
 - c. Effectively that the PIP process was a sham
 - d. That the performance process would now resume
 - e. That his SAR had been ignored – we conclude that the claimant had not had a response to this by then
 - f. The grievance was not treated sufficiently seriously and is in breach of the ACAS code
 - g. The failure to offer a right of appeal against the grievance outcome
85. That email was sent to Mr Bartek. His response was that he needed a couple of days to review and respond and he asked when the claimant wanted his last day to be. We have not seen any further response from Mr Bartek. The appeal was passed to an external HR consultant, Ms Ormond, to conduct the appeal and she contacted the claimant on 9 March 2021. The appeal process was conducted remotely and Ms Ormond did undertake some investigations. She spoke to Mr Bale and received further written evidence from Mr Hesketh. Ms Ormond did not uphold the appeal except to say that Mr Bale had not complied with the SAR on time, but had done by the time of the appeal outcome and that the claimant had not been offered a right of appeal in the grievance outcome letter but had appealed in any event and had been told about it at the start.

86. We make no further findings about the grievance appeal as it does not form part of the claimant's claim. We find that the claimant's last date of employment was 2 March 2021.
87. In respect of the SAR specifically, it is clear that Mr Bale made a decision to withhold the meeting invitation for the 18 December 2020 meeting. It is obvious, in our view, that this invitation was included in the scope of the documents that the claimant was requesting and we find that the reason it was withheld was because it was incriminating for the respondent. The inference that we would draw from this deliberate withholding of the document, that it incriminates the respondent, adds further weight to our conclusion that Mr Hesketh, Mr Bale and Mr Bartek had resolved to dismiss the claimant at that meeting on 18 December 2020.
88. Finally, in respect of the timing of the claim against Mr Hesketh, we have heard no evidence from the claimant about the reasons for the delay in making his claim against Mr Hesketh nor why time ought to be extended if necessary.

Law and conclusions

Unfair dismissal

89. The first respondent has not pleaded a potentially fair reason for dismissal. The sole question for us therefore is whether the claimant was dismissed or resigned.
90. Section 95 of the Employment Rights Act 1996 sets out the circumstances in which an employee is dismissed, and s 95(1)(c) says that this includes circumstances where "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".
91. In *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761 the Court of Appeal confirmed that questions of constructive dismissal should be determined according to the terms of the contractual relationship and not in accordance with a test of 'reasonable conduct by the employer'.
92. In *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462, [1997] ICR 606 it was held that contracts of employment include the following implied term:

"The employer shall not without reasonable [or] proper cause conduct itself in a manner calculated and (or) likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."
93. The question for the tribunal to determine is therefore whether the respondent without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee, thereby breaching its contract of employment with the claimant.
94. Even if the respondent's conduct does amount to a breach of the implied term of mutual trust and confidence, a claim for constructive dismissal will

fail if the claimant affirms the contract despite the breach or waives the breach. However, if there is a further incident of conduct which is capable of amounting to a final straw, that may revive earlier breaches unless the final act relied on is entirely innocuous (*London Borough Of Waltham Forest v Omilaju*).

95. The claimant relies on the following acts as amounting cumulatively to a breach of the implied term:
- a. Seeking to dismiss him as indicated in its calendar invite of 18 December 2021
 - b. Subjecting the claimant to a PIP/performance management?
 - c. Seeking to dismiss the claimant through performance management?
 - d. Making the comments ,“how old is Murray?”[answer], “Yes he did look old”...‘wanted someone younger for the role”... about Mr Grimes to the claimant?
 - e. Telling the claimant to report to the second respondent during the grievance process?
 - f. Responding to a SAR by refusing any documents relating to the 18 December meeting.
 - g. Committing failures in the grievance process as set out in allegations 37 (i) to v(ii) in the claimant’s claim form?
 - h. Using comments such as "high energy", energetic and youthful to describe desirable colleagues or candidates?
 - i. Applying to him a practise of dismissing colleagues who do not fit with its brand image:
 - j. the last straw being the mismanagement of the grievance - the outcome being dated 26 February 2021.
96. We have found that the respondent did seek to dismiss the claimant at the meeting on 18 December and thereafter subjected the claimant to a PIP process with the intention of dismissing him. This is conduct likely to destroy or seriously damage the relationship of confidence and trust between the claimant and the first respondent. These are both capable of being undertaken with reasonable and proper cause – it is common for employers to undertake performance management processes. However, we have found that the respondent has demonstrated no basis for deciding to dismiss the claimant and then subsequently implementing the capability process. In our view, the first respondent was caught off guard by the claimant being off sick and did not have time to dismiss him before he accrued 2 years service.
97. The resulting capability process was therefore with the intention of dismissing the claimant and without any objective evidence of any basis for

it. Consequently, the first respondent did not have reasonable and proper cause for undertaking it.

98. We have found that Mr Hesketh did not make the comments as alleged about Mr Grimes. The comments Mr Hesketh did make on or around 4 December 2002 are not capable, of themselves, of destroying the relationship of confidence and trust.
99. Mr Bale's actions of telling the claimant to continue to report to Mr Hesketh when he was the subject of the grievance and refusing to provide the information about the meeting on 18 December under the SAR was conduct capable of destroying the relationship of confidence and trust when taken with other acts. Requesting the claimant to continue to report to Mr Hesketh demonstrated a lack of consideration for how the allegations the claimant was making had impacted on the claimant, and gave the appearance of not taking them seriously. Mr Bale did not have reasonable and proper cause for this course of action.
100. Mr Bale deliberately refused to give the claimant the data requested because it would incriminate the first respondent. There was no proper basis for this refusal and was conduct capable of breaching the implied term.
101. In respect of the grievance, the following allegations are made by the claimant:
102. Mr Bale has failed to understand the grievance. The Claimant does not object to performance issues being discussed if they exist. The issue is they do not exist.
 - a. Mr Bale failed to understand the Claimant's position that this was being used to remove him.
 - b. Mr Bale was not an appropriate person to hear the grievance as he attended the meeting of 18 December 2021.
 - c. Mr Bale fails to address the issue of trust and confidence i.e., the final ground.
 - d. Mr Bale fails to put the allegations of age discrimination to the Second Respondent or investigate further, asserting there was no discrimination
 - e. Mr Bale finds there are "a number of specific unsolicited negative comments given to the [Second Respondent] by channel partners" (plural). This is not true.
 - f. The Claimant was not given the offer of an appeal
103. We have found that Mr Bale did understand the complaints the claimant was making. However, he was not an appropriate person to hear the grievance as we have found – he was clearly an interested party. Mr Bale did not explicitly address the issue of trust and confidence, but that could

reasonably be seen as a catch all term for the specific allegations made. We consider that he did address this in addressing the substantive issues.

104. The next issue – that Mr Bale did not put the allegations of discrimination to the claimant or investigate further. We have found that there is no evidence of any investigation. We certainly do not think Mr Bale investigated the grievance properly - it was in our view no more than a rubber stamping exercise.
105. We do not think Mr Hesketh's comments – namely high energy, energetic and youthful – were, by themselves taken in isolation, sufficient to destroy or seriously damage the relationship of confidence and trust between employer and employee. However, they chipped away at the relationship from the claimant's perspective and in the entirety of the circumstances it was reasonable for him to feel that way.
106. We have heard nothing about the first respondent's alleged practice of dismissing colleagues who do not fit with the brand image, and we find there was not one.
107. Overall, the way in which the first respondent dealt with the grievance was more than an innocuous event. It was a final straw capable, together with the earlier events as discussed, of destroying the trust and confidence between the claimant and the first respondent Mr Bale was obviously predetermined in his opinion, the investigation was not thorough or evidenced and we think it was intended merely to rubber stamp Mr Hesketh's decision and to facilitate the resumption of the capability process.
108. To the extent that the claimant had affirmed the contract or waived the breach earlier – by returning to work after discovering the meeting invitation, or by expressing a desire to get back to work in his email about the grievance – the earlier breaches were revived by this grievance outcome.
109. In our judgment, therefore, cumulatively the first respondent's acts amount to a repudiatory breach of contract and the claimant was dismissed in accordance with s 95(1)(c) of the Employment Rights Act 1996 and his claim for unfair dismissal is successful.

Wrongful dismissal

110. As is apparent from our conclusions in respect of unfair dismissal, the claimant was dismissed in breach of contract. He was not given any notice. He is entitled to be compensated for a failure to give him the appropriate notice which is the greater of two weeks (in accordance with section 86 Employment Rights act 1996) or his contractual notice.

Direct age discrimination

111. Section 13 of the Equality Act 2010 provides:

- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

- (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim
112. By virtue of section 5 of the Equality Act 2010, age is a protected characteristic. The respondents have not pleaded a legitimate aim.
113. Section 23 (1) provides
- (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.
114. The claimant has not identified a comparator in this case, but relies on a hypothetical comparator. In deciding the appropriate comparator, it is appropriate to have regard to the acts complained of to identify the relevant characteristics of the comparator. In cases where the acts complained of are inherently linked to the protected characteristic, it may not be strictly necessary to construct a comparator.
115. Section 136 provides
- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
116. We refer to the case of *Igen Ltd v Wong* [2005] IRLR 258. That case says that the tribunal must consider all the evidence before us to determine whether the claimant has proved facts from which we could conclude that the respondent has committed the discriminatory acts complained of. We are entitled at that stage to take account of all the evidence but must initially disregard the respondent's explanation.
117. If we are satisfied that the claimant has proven such facts, it is then for the respondent to prove that the treatment suffered by the claimant was in no sense whatsoever on the grounds of his age.
118. The acts complained of as direct discrimination are
- a. Seek to dismiss him as indicated in its calendar invite of 18 December 2021
 - b. Subject the claimant to a PIP/performance management?
 - c. Seek to dismiss the claimant through performance management?
 - d. Dismiss him (by its discriminatory and harassing conduct - see also below) – In response to which the claimant was entitled to resign)?

119. In respect of the first three, we found that these acts did occur. We also found that the claimant was dismissed for the reasons set out previously in respect of the unfair dismissal claim.
120. We consider whether there are facts from which we could conclude that these acts were because of the claimant's age. Addressing the first 3 acts first. For the reasons set out, these are all part of a continuing act. There was a decision to dismiss the claimant and then this was implemented through the performance process, the respondents having missed their chance to dismiss the claimant within 2 years.
121. The claimant said this was because of his age and he refers to the comments of Mr Hesketh as evidence of this: "high energy, energetic and youthful". We think there is evidence from which we could conclude that these acts were because of the claimant's age.
122. The claimant was subject to detrimental treatment as we have described. He was replaced, initially, by at least one younger person doing the same job, as far as we can tell. Mr Hesketh referred to wanting to change the dynamics of the team, and he wanted a more diverse workforce. In our view, the evidence about this is enough to reverse the burden of proof – we could conclude that, whether consciously or unconsciously, Mr Hesketh perceived the claimant as undynamic and he associated more dynamic people with the characteristics of younger people. There is more than *just* detrimental treatment and a difference in characteristics. The comments of Mr Hesketh taken with his conduct towards the claimant generally are sufficient to make that link.
123. It is well documented that discrimination can be unconscious or insidious – it does not have to be deliberate or malicious.
124. The burden then shifts to the first respondent to prove that these detriments were in no way at all because of the claimant's age. The respondents say the claimant was underperforming. They have failed to produce any compelling evidence to objectively justify that. They have therefore failed to show any good reason for the detriments, or, even if the claimant's performance was part of the reason, they have been unable to produce any evidence to separate their perceptions of the claimant's performance from their perception of his age as evidenced by Mr Hesketh's comments.
125. For these reasons, the claimant's claim in respect of these three allegations is successful.
126. The final allegation of discrimination is also successful. In our view, everything that we have set out as the basis of the claimant's dismissal is tainted by age discrimination. It may be the case that Mr Bale did not deliberately decide to not address the claimant's grievance properly because of his age, but we have found that his reason was to support the decision of the first respondent that the claimant's services should be dispensed with. This suggestion came from Mr Hesketh and was based on his view of the claimant which, we have found, was tainted by discrimination. That is enough to reverse the burden of proof in accordance with section 136 and *Igen*. Mr Bale has not shown that the failures in the

grievance process were in no way connected with the claimant's age and we find that the claimant's constructive dismissal was also an act of direct discrimination.

Harassment

127. S 26 Equality Act 2010 says, as far as is relevant,

- (1) A person (A) harasses another (B) if—
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.

128. Subsection 5 lists the relevant protected characteristics, and they include age.

129. In *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336, the EAT analysed this provision. There are a number of elements to this provision

- (1) The unwanted conduct. Did the respondent engage in unwanted conduct? This is a subjective test
- (2) The purpose or effect of that conduct: Did the conduct in question either:
 - (a) have the purpose or
 - (b) have the effectof either
 - (i) violating the claimant's dignity or
 - (ii) creating an adverse environment for him? (We will refer to (i) and (ii) as 'the proscribed consequences'.)
- (3) The grounds for the conduct. Was that conduct on the grounds of the claimant's age?

130. If the conduct had the effect of violating the claimant's conduct or creating an adverse environment, was it reasonable for the claimant to have felt that way. It is clear from subsection 4 that all the circumstances must be considered. In *Richmond Pharmacology*, it was said that
- "...if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if [he] did genuinely feel [his] dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt [his] dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt".*
131. The EAT cautioned against encouraging a culture of hypersensitivity. It will also be necessary to consider the purpose of the comments or actions to determine the context.
132. In respect of whether the conduct was on the grounds of a protected characteristic, the causal link required by "related to" is a less strict test than for direct discrimination and whether conduct is related to age is a question for the Tribunal to determine on the facts before it.
133. Finally, in *Weeks v Newham College of Further education* UKEAT/0630/11/ZT it was held that an environment means a state of affairs although it can be created by a single incident where the effects are of longer duration.
134. The claimant relies on the following incidents as acts of harassment related to age:
- a. Mr Hesketh making the comments, "how old is Murray?"[answer], 'Yes he did look old'..."wanted someone younger for the role"...about Mr Grimes to the claimant?
 - b. Subject the claimant to a PIP/performance management?
 - c. Seek to dismiss the claimant through performance management?
 - d. Tell the claimant to report to the second respondent during the grievance process?
 - e. Respond to a SAR by refusing any documents relating to the 18 December meeting
 - f. Commit failures in the grievance process as set out in allegations 37 (i) to v(ii) of the claim form?
 - g. Use comments such as "high energy", energetic and youthful to describe desirable colleagues or candidates?

135. In respect of these allegations, we find as follows.
136. Mr Hesketh did not make the Grimes comments as alleged and that claim fails.
137. The claimant was subjected to a PIP/performance management process with the intention of dismissing the claimant. In our view, this was degrading and humiliating for the claimant. This is clear from his reactions at the time. Further, it was obviously reasonable for the claimant to feel like this. We have found that there was no objectively identifiable basis for these processes. For the same reasons as we have set out in relation to the claim of direct discrimination, this was related to the claimant's age and those two claims of harassment are successful.
138. The claimant was told to continue reporting to Mr Hesketh during the grievance. This was offensive to the claimant and in our view reasonably created a hostile environment for him. For similar reasons as for the previous acts we find this was related to the claimant's age – it is all part and parcel of the plan to dismiss the claimant and the claimant perceived, correctly, we have found, that Mr Hesketh's decision to start the ball rolling with the planned dismissal was discriminatory. There are facts from which we could conclude that Mr Bale's decision was related to the claimant's age in so far as it was part of the reason to dismiss him, and he has shown no good reason for deciding to leave the claimant's line management with Mr Hesketh. The first respondent has failed to show that the decision was in no way related to the claimant's age and that claim also succeeds.
139. We find that the withholding of the SAR documents was not harassment. It did not reasonably in our view create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. We accept that it was frustrating for the claimant, but we do not think this crosses the hurdle into harassment.
140. In respect of the grievance failures, we refer to our earlier findings that "Mr Bale was obviously predetermined in his opinion, the investigation was not thorough or evidenced and we think it was intended merely to rubber stamp Mr Hesketh's decision and to facilitate the resumption of the capability process". In our view this did create a hostile and humiliating environment for the claimant and it was reasonable to do so. We have found that Mr Bale's grievance was effectively a rubber stamp. It is wholly dismissive of the claimant's complaints.
141. We also, for the reasons set out in respect of the other allegations, find that this was an inherent part of the process to dismiss the claimant and consequently related to his age. This claim succeeds.
142. Finally, in respect of the comments such as "high energy, energetic and youthful. We find that if these comments did cause the proscribed effect for the claimant, it was not reasonable for them to do so. They were not aimed intentionally at the claimant and while the claimant was sensitive about them, they did not cross the line into harassment.

143. Subject to below, the claimant's claims of harassment as identified are successful.
144. There are two other matters remaining to consider.
145. Firstly, pursuant to s 212 Equality Act 2010, acts of harassment cannot also amount to a detriment for the purposes of direct discrimination. This means that the acts of harassment that we have upheld that are also direct discrimination are upheld only as harassment. This applies to the allegations of discrimination that the respondent(s)
- a. Subjected C to a PIP/performance management process; and
 - b. Sought to dismiss C thorough the Pip/performance process.
146. These succeed as claims of harassment only.
147. Finally, all the claims against Mr Hesketh are out of time. The last allegation made against Mr Hesketh was the performance management meeting on 3 February 2021. All other acts thereafter were the acts of either Mr Bale or the respondent as employer, including the constructive dismissal.
148. The claimant started Early Conciliation against Mr Hesketh on 31 May 2021 and presented his claim on 21 June 2021. Early Conciliation was required to be started by 2 May 2021 at the latest and, absent Early Conciliation, that was the date on which a claim should have been brought. It was brought 7 weeks' later.
149. S 123 EQA provides
- (1) [Subject to [sections 140A and [section] 140B],] proceedings on a complaint within section 120 may not be brought after the end of—
 - (a) the period of 3 months starting with the date of the act to which the complaint relates, or
 - (b) such other period as the employment tribunal thinks just and equitable.
150. In *Robertson v Bexley community Centre T/a leisure link* (2003) Lord Justice Auld said "*it is also important to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule*".
151. In *British Coal Corporation v Keeble and ors* 1997 IRLR 336, EAT it was held that the tribunal is required consider the following matters: the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular:

- a. the length of, and reasons for, the delay;
- b. the extent to which the cogency of the evidence is likely to be affected by the delay;
- c. the extent to which the party sued has cooperated with any requests for information;
- d. the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and
- e. the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

152. Although *Keeble* is not a checklist, it is a useful guide. In this case, the claimant has given no explanation at all for the delay in bringing his claim against Mr Hesketh. Further, as the first respondent is vicariously liable for the acts of Mr Hesketh and has not sought to rely on the statutory defence, there is no prejudice to the claimant in not extending time. In our judgment, the claimant has not shown any good reason why time should be extended against the second respondent and all the claims against the second respondent are dismissed for want of jurisdiction.

Remedy

153. At the conclusion of the hearing all remedy matters were agreed except for one issue.

154. The claimant asked for aggravated damages on the basis of the way the grievance was dealt with and the deliberate withholding of the invitation to the 18 December meeting.

155. Aggravated damages are awarded as an increase in injury to feelings award to reflect the extent to which aggravating features of the discrimination have increased the impact of the discrimination on the claimant. The three broad categories of acts that could give rise to an award of aggravated damages (as referred to in the Employment Tribunal Remedies Handbook 2022-23 (General Editor Benjamin Gray, Littleton Chambers)) are

“Where the act is done in an exceptionally upsetting way: Underhill P in Commissioner of Police of the Metropolis v Shaw UKEAT/0125/11/ZT cites the phrase ‘high-handed, malicious, insulting or oppressive’ behaviour; ● Motive: discriminatory conduct that is evidently based on prejudice or animosity or which is spiteful or vindictive or intended to wound is likely to cause more distress than if done without such a motive – for example as a result of ignorance or insensitivity. Naturally, the claimant has to be aware of the motive in question; and ● Subsequent conduct: for example, conducting the trial in an unnecessarily oppressive manner, failing to apologise, or failing to treat the complaint with the requisite seriousness. (Bungay & Anor v Saini & Ors UKEAT/0331/10 and Zaiwalla & Co v Walia[2002] UKEAT/451/00)”

156. We are mindful of the need to avoid double counting between aggravated damages and injury to feelings. The claimant has been awarded the full amount that he claimed by way of injury to feelings and his claim has been upheld, in respect of those two matters, as pleaded. In our view, therefore, the claimant has already accounted for the particular acts of the respondent in placing his own value on the injury to his feelings and it would not be appropriate for us to further increase the injury to feelings award. We do not, therefore, make any additional award for aggravated damages.

1803304/2021

Employment Judge **Miller**

Date: 25 January 2023

REASONS SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

Appendix – list of issues

1. Time limits

- 1.1 The claimant has ACAS certificates (14-4-21; 26 — 5- 21) for the first respondent: and (31-5-21; 2- 6 — 21) for the second respondent.
- 1.2 The unfair dismissal complaint is presented in time against the first respondent
- 1.3 The Equality Act complaints against the first respondent require the Tribunal to consider whether acts before 15 January 2021 amounted to conduct extending over a period; or whether to give a just and equitable extension.
- 1.4 All claims against the second respondent are potentially out of time on the pleaded case; the Tribunal will have to decide whether to grant a just and equitable extension.

2. Direct age discrimination (Equality Act 2010 section 13)

- 2.1 The claimant's age group is the over fifties and he compares herself with people in the age group thirties and forties
- 2.2 Did the first and second respondent do the following things:
 - 2.2.1 Seek to dismiss him as indicated in its calendar invite of 18 December 2021
 - 2.2.2 Subject the claimant to a PIP/performance management?
 - 2.2.3 Seek to dismiss the claimant through performance management?
 - 2.2.4 Dismiss him (by its discriminatory and harassing conduct - see also below) – In response to which the claimant was entitled to resign)?
- 2.3 Did the respondent's treatment amount to a detriment (if found to be harassment these allegations cannot also be direct discrimination -- see Section 212)?
- 2.4 Was that less favourable treatment than the respondent would have afforded to a colleague in their thirties or forties?
- 2.5 If so, was the decision to seek to dismiss him (the calendar invite), subject the claimant to a PIP/performance management/seek to dismiss him through performance management materially influenced by his age?

2.6 [The respondent does not plead a legitimate aim/justification defence]

3. Indirect discrimination (Equality Act 2010 section 19)

[Withdrawn at the start of the hearing]

4. Harassment related to age (Equality Act 2010 section 26)

- 4.1 Did the respondents do the following things:

- 4.1.1 Make the comments, "how old is Murray?"[answer], "Yes he did look old"... "wanted someone younger for the role"... about Mr Grimes to the claimant? R2 and R1
 - 4.1.2 Subject the claimant to a PIP/performance management? R2 and R1
 - 4.1.3 Seek to dismiss the claimant through performance management? R2 and R1
 - 4.1.4 Tell the claimant to report to the second respondent during the grievance process? R1
 - 4.1.5 Respond to a SAR by refusing any documents relating to the 18 December meeting: R1
 - 4.1.6 Commit failures in the grievance process as set out in allegations 37 (I) to (vii)? R1
 - 4.1.7 Use comments such as "high energy", energetic and youthful to describe desirable colleagues or candidates? R1 and R2
- 4.2 If so, was that unwanted conduct?
- 4.3 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- 4.4 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect

Remedy for discrimination

- 5.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
- 5.2 What financial losses has the discrimination caused the claimant?
- 5.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
- 5.4 If not, for what period of loss should the claimant be compensated?
- 5.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
- 5.6 Should interest be awarded? How much?

Unfair dismissal

- 6.1 Did the respondent do the following things: [the claimant has pleaded no express terms which he claims were breached]
 - 6.1.1 Seek to dismiss him as indicated in its calendar invite of 18 December 2021
 - 6.1.2 Subject the claimant to a PIP/performance management?
 - 6.1.3 Seek to dismiss the claimant through performance management?
 - 6.1.4 Make the comments, "how old is Murray?"[answer], "Yes he did look old"... "wanted someone younger for the role"... about Mr Grimes to the claimant? R2 and R1
 - 6.1.5 Tell the claimant to report to the second respondent during the grievance process? R1
 - 6.1.6 Respond to a SAR by refusing any documents relating to the 18 December meeting:

R1

6.1.7 Commit failures in the grievance process as set out in allegations 37 (i) to v(ii)? R1

6.1.8 Use comments such as "high energy", energetic and youthful to describe desirable colleagues or candidates? R1 and R2

6.1.9 Apply to him a practice of dismissing colleagues who do not fit with its brand image:

6.1.10 The last straw being the mismanagement of the grievance - the outcome letter was dated 26 February 2021 from Mr Bale and this appears to be the last pleaded matter.

6.2 Did any conduct above breach the implied term of trust and confidence? Was the respondent's conduct without reasonable and proper cause? Was it calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent?

6.2.1 Did the claimant resign in response to the breach?

6.3 If a dismissal is proven. the respondent does not assert a fair reason for dismissal.

Remedy for unfair dismissal

7.1 The Tribunal may address financial remedy in the Equality Act case If it succeeds — if not - compensatory award - The Tribunal will decide:

7.1.1 What financial losses has the dismissal caused the claimant?

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

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

7.1.4 Do losses exceed the cap, in which case apply the cap.

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

Wrongful dismissal/Notice pay

8.1 Was the claimant dismissed as above?

8.2 To what damages is he entitled (he asserts two weeks' notice pay)