EMPLOYMENT TRIBUNALS

Claimant: Mr J True

Respondent: James Taylor Construction Ltd

Heard at: Watford Employment Tribunal
(In person)

On: **11 and 12 January 2023**

Before: Employment Judge Quill; Mr R Jewell; Mr N Boustred

Appearances

For the claimant: In person
For the respondent: Mr F Hussain, solicitor

JUDGMENT

1. The complaints of direct discrimination because of age were not brought within the time limit set out in section 123(1)(a) of the Equality Act 2010 and it is not just and equitable to grant an extension. The tribunal therefore has no jurisdiction to consider those complaints and they are dismissed.

2. The Claimant did not make a protected disclosure, as alleged in paragraph 16 of the list of issues.

3. The complaint of detriment on the ground that the Claimant has made a protected disclosure is not well-founded and is dismissed.

4. The Claimant was dismissed by reason of redundancy. The dismissal was not unfair. The complaint of unfair dismissal is not well-founded and is dismissed.

5. Therefore, all the complaints before the tribunal have been dismissed.

REASONS

Introduction

1. Judgment and reasons were given orally, and written reasons were requested.

2. The Claimant is a former employee of the Respondent.

The Claims and The Issues

3. The list of issues (for liability) had previously been agreed as per pages 43 and 44 of the bundle, paragraphs 5 to 18 of EJ Warren's summary following preliminary hearing of 13 April 2022.

4. Both parties confirmed on Day 1 that the list of issues was still accurate as far as each of them was concerned.

Time

5. Were Mr True's complaints of age discrimination presented within the time limits set out at Section 123 of the Equality Act 2010 ("EqA")? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act or conduct extending over a period or a series of similar acts; and that if the complaint is out of time, whether it is just and equitable to extend time.

6. Given the date the claim form was presented and the dates of Early Conciliation, any complaint about something that happened before 11 November 2019 is potentially out of time, so that the Tribunal may not have jurisdiction to deal with it.

Unfair Dismissal

7. What was the principal reason for dismissal and was it a potentially fair one in accordance with Sections 98(1) and 98(2) of the Employment Rights Act 1996 ("ERA")? The Respondent asserts that the reason for dismissal was redundancy.

8. If so, was the dismissal fair or unfair in accordance with the ERA s.98(4) and in particular, did the Respondent in all respects act within the so called band of reasonable responses? Mr True says that his dismissal was unfair for the following reasons:

8.1 . There was not a genuine redundancy situation;
8.2. There was insufficient consultation;
8.3. The Respondent's refusal to allow him to work from the new location of Kingston-Upon-Thames on adjusted hours, was unreasonable; and
8.4. The real reason for his dismissal was that he had refused to work at Kingston-Upon-Thames on the hours stipulated by the Respondent.

Direct Age Discrimination

9. Mr True was aged 68 at the relevant times and compares himself to a hypothetical comparator who would have been aged less than 60, but otherwise in the same circumstances that he was in.

10. Mr True relies upon the following as allegations amounting to direct age discrimination. Each are comments he says were made by the Respondent's Construction Director at the time, Mr Martin Shotton, on numerous occasions but for example, whilst visiting a customer who had complained at Kilburn Road and another customer in Hampstead. He cannot remember the customer's names or the precise dates but he says the incidents would have occurred in 2019 before Mr Shotton left the Respondent's employment (the date of which is uncertain):
    10.1. "Never guess how old this old git is?"
    10.2. "This old git has got an 8 year old child"',
    10.3. "Can you believe he is almost 70?" and
    10.4. "There is life in the old git yet".

11. Mr True says that the last occasion on which such remarks were made were when visiting a Canadian female customer at Kilburn. He cannot recall the date.

12. Mr True says that these remarks were repeated on numerous unspecified occasions by sub-contractors, because they had heard Mr Shotton making them.

13. If such remarks were made, did that amount to less favourable treatment, i.e. did the Respondent treat Mr True as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? That is, a person aged under the age of 60 in the same circumstances as Mr True.

14. If so, was this because of Mr True's age?

15. If so, has the Respondent shown that the treatment was a proportionate means of achieving a legitimate aim? I did not raise the question of justification with Mr Coath; it seems to me inherently unlikely if the Tribunal were to find that these remarks were made by Mr Shotton, that they could be justified in the sense anticipated by s.13(2) EqA2010.

Protected Interest Disclosure

16. Did Mr True make a disclosure to the Contracts Manager at Kilburn Road, (the name of whom he cannot recall) orally, (he cannot remember the date) that the lack of fire breaks in the block of flats the Respondent had built at that location amounted to a breach of building regulations?

17. If so, does that disclosure amount to a protected disclosure in accordance with s.43B ERA?

18. If so, did the Respondent subject Mr True to a detriment, namely transferring him to Kingston-Upon-Thames on the ground that he had made such a protected disclosure?

5. During the discussion about the list of issues, the Claimant confirmed that he was not disputing the Respondent's position that Martin Shotton left the Respondent's employment on 31 May 2019, and was not alleging that any of the remarks (10.1 to 10.4 from list) were made after that date.

6. During his evidence, he confirmed that he was not alleging that Mr Shotton had any involvement of the events of September and October 2019 which led to his dismissal.

7. During the discussion about the list of issues, the Claimant suggested that he had come to believe that when the Respondent told him he was going to have to work in Kingston, this was possibly connected to his age, and was an attempt to force him out of the business. We told him that an allegation that such allegations were not included in the list of issues (or claim form or further and better particulars) as alleged breaches of the Equality Act 2010 and so he would need to make an application to amend if he wished to pursue those arguments as alleged breaches of the Equality Act 2010. We told him that he was free to rely on those arguments in support of his unfair dismissal claim. There was no application to amend.

8. It was clarified and confirmed in paragraph 19 of the case management summary that the Claimant was not alleging harassment as per section 26 EQA or that he was dismissed because of the (alleged) protected disclosure.

The Hearing and The Evidence

9. We had received an electronic bundle, which was not paginated. We also received a paginated paper bundle which was slightly different. It contained no additional documents, but some pages had been removed.

   9.1. One of the documents that had been removed was the Respondent's amended Grounds of Resistance. Mr Hussain confirmed that that was simply an error, and the Respondent was not seeking permission to withdraw the amended version and revert to the original version. We were satisfied that the Claimant had received the amended version on 25 May 2022, when it was sent to the Tribunal and the Claimant. We were also satisfied it had been included in the electronic version of the bundle. We arranged for the Claimant to have a hard copy of this document, so that he could cross-examine the witnesses about it if he wished to do so.

   9.2. Subject to that, the paper version of the bundle (84 pages) was treated as agreed. It included no evidence from the Claimant about income since leaving the Respondent, since he had not disclosed any evidence. We agreed that could be dealt with at remedy stage if necessary.

10. The Claimant gave evidence. He had not produced a witness statement in the format that is usually used. However, he relied on the contents of his email (subject heading "statement") to the Respondent dated 21 December 2022. He swore to the accuracy of that document. Given that it omitted reference to certain matters that were relevant as per the list of issues, he also swore to the accuracy of his email of 11 October 2020 (supplying further information about the claim in response to the Tribunal's order) which was at pages 31 and 32 of bundle. We treated both items combined as

his evidence in chief. He answered questions on oath from the Respondent's representative and panel.

11. The Respondent had produced written witness statements from Mr Sandwith and Mr Coath. Each of them attended, swore to the accuracy of the document, and answered questions on oath.

The Findings of Fact

12. The Claimant's dates of employment were from 5 October 2015 to 15 November 2019. His employment was terminated by a letter sent to him dated 18 October 2019.

Commencement of employment and place of work and duties

13. The Claimant received a letter dated 18 September 2015 (50) which offered him the " position of Aftercare Manager" with the Respondent, to start from 5 October 2015. He accepted the offer on the basis of what was set out in the letter, and signed the letter on 21 September 2015 to demonstrate acceptance.

14. He was not given any other document, such as a separate written contract or written job description.

15. Paragraph 10 of the letter stated that the Claimant was agreeing to opt out of the 48 hour per week limit in the Working Time Regulations 1998. The letter said that sickness absence had to be notified by 9am. The letter did not expressly say anything about place of work, but included:

> 2. Car allowance of £4,000 per annum.
>
> 3. Mileage allowance for business journeys to be completed. (Excluding home to work) and submitted monthly. This will be reimbursed at the following rates
> ...
> .
> 5. The office hours are 8.00am - 5.30pm Monday to Friday; however, due to the nature of the post, to meet dead lines some additional working hours will be required from time to time.

16. The Respondent is a construction company. As well as having a head office, at any given time it potentially carries out work at various construction sites.

17. What is common ground between the parties is that, while his formal title was "Aftercare Manager", in practice, the Claimant performed several roles from time to time. These included, amongst other things, site manager and contract manager.

18. The locations of the Respondent's construction sites change over time as existing projects come to an end and new ones start. It is common ground that the Claimant spent many of his working hours at one or other of the sites. It is also common ground that the sites at which the Claimant performed some duties over the 4 years

of his employment included sites in Harrow, Holborn, East Sheen, Teddington, Earlsfield, Putney, Kilburn, Tooting, Slough. The Claimant lives in Bishops Stortford in Hertfordshire.

19. What is hotly disputed, however, is that:

19.1. According to the Claimant, his normal place of work was the office in Hatfield. His contract required him to be at that office by 8am to 5.30pm. For the times when he was required on site, he was not contractually obliged to reach the site any earlier than he would have got there by leaving the office just after 8am or to leave it any later than he would leave in order to get back to the office for 5.30pm.

19.2. According to the Respondent, his role was primarily site-based, and his work location at any given time was the site to which he had been allocated for that period. According to the Respondent, the reference to "office hours" in the offer letter was not a reference to the Claimant's own working hours. Rather he was supposed to be working "site hours". So starting work when the construction work on the site started in the morning, and not leaving until that work finished.

20. The Claimant's line manager when he joined was Martin Shotton, Construction Director. Mr Shotton's employment ended on 31 May 2019.

21. We accept the Claimant's evidence that Mr Shotton told the Claimant that, when he was working at a site, there was no need for him to come into the office first, and then journey from there to the site.

22. We do not accept the Claimant's evidence that, every day, or almost every day, he came into the office either in the mornings, to receive instructions from a colleague, Michelle, and/or in the evenings, to report back to Michelle. When he was challenged about his claims, he expressly accepted that a lot of the time, Michelle sent him his morning instructions by text or email, and he went straight to the site. He did not expressly concede that his evening communications with her were usually also remote, but he did say that he thought it was reasonable that he did not go back to the office in the evenings if the travel time would be such that he did not arrive there until after 5.30pm.

23. The Claimant was never disciplined by Mr Shotton for the hours that he worked. Under Mr Shotton, we accept that the Claimant arrived on the site in the morning, often before 8am, but no later than 8am, and then worked without a break, leaving at 3.30pm, 3.45pm, or 4pm, depending on location. Mr Shotton did not require the Claimant to attend the office often, and the Claimant did not attend the office often. Usually travelled straight from home to the site, and then went directly home from the site, without visiting the office. Some days, he did attend the office, when that was required, but that was the exception rather than the rule.

24. As after care manager, his duties included management and resolution of post construction defects up to the end of the Defects Liability Period, which was usually

12 months from completion of a development. Where he became aware of some minor and inexpensive issue, he was authorised to instruct a contractor to remedy the matter, even if that incurred a few hundred pounds of costs for the Respondent. However, if there was any more serious issue, and/or one that might involve more than a few hundred pounds to rectify, it was the Claimant's obligation to report the matter to a Contract Manager or some other appropriate person within the company in order for them to authorise remedial work.

25. At the time of the Claimant joining the Respondent, the construction team had approximately 18 employees. It had a Construction Director, Surveying Director, Estimator, Three architects, Five site managers, Two surveyors, Two contracts managers, a project coordinator, two labourers

26. In 2015, it had just completed the construction and sale of 36 apartments which required the skills of a full-time aftercare manager. It also had several live construction sites which were due to complete in 2016 and 2017, and those projects also required full-time after care manager.

27. The turnover in 2016 was £31m falling to £18m in 2017 and then £8m in each of 2018 and 2019.

28. By September 2019, the head count had reduced to 8, being a "Construction, Commercial and Technical Director" (Andy Sandwith), one project manager, one assistant site manager, one contracts manager, one surveyor, one project coordinator and one labourer, and After Care Manager (the Claimant).

<u>Mr Shotton and comments about the Claimant's age</u>

29. The Claimant liked Mr Shotton and got on well with him.

30. The Claimant did not raise any grievance about Mr Shotton during his employment. Mr Shotton left the Respondent on 31 May 2019, and the Claimant left several months later, in November 2019.

31. As part of their duties, the Claimant and Mr Shotton would occasionally visit customers together. According to the Claimant's evidence to the tribunal (and according to what he said at the preliminary hearing on 13 April 2022), on these occasions, Mr Shotton made comments as set out in the list of issues, namely:

    "Never guess how old this old git is?"
    "This old git has got an 8 year old child"',
    "Can you believe he is almost 70?" and
    "There is life in the old git yet".

32. During his employment, the claimant did not make any complaint to the Respondent about these alleged comments. They were not referred to in his claim form,

presented on 13 March 2020. His email of 11 October 2020, included the following comment:

> My age (then 68) was regularly highlighted verbally to other contractors and home buyers in an unacceptable way

33. This was in response to an order from the Tribunal that, by 21 September 2020, he should provide full details of the alleged less favourable treatment, including details of who was responsible, and the dates.

34. It was only at the preliminary hearing on 13 April 2022 (so more than two years after claim was issued) that he identified the specific remarks mentioned above, and identified Mr Shotton as the alleged perpetrator.

35. We are satisfied that the Respondent made no effort to track Mr Shotton down after 13 April, to ask him to supply comments on the allegations, or be a witness. Since they made no efforts, we cannot assess whether they would have been able to trace him or not. We accept that Mr Sandwith had no contact details from him. However, Mr Coath, or someone else within the Respondent, would have been able to obtain last known address and phone number from files, although there is no guarantee that these would still be correct.

36. The Respondent has provided no evidence to contradict the Claimant's assertions that the comments were made by Mr Shotton, or that they were echoed by others who heard Mr Shotton make them.

37. The Claimant is vague about dates, but says it was frequent, and he did ask Mr Shotton to stop.

38. One reason he gave for not complaining to the Respondent is that he got on well with Mr Shotton. Another is that he feared retaliation based on what (he believes) happened to Mr Cousins.

39. He also told us that he accepted the comments were made in jest, and in a good-humoured way. He said that, to some extent, they could be regarded as complimentary, though they became irritating due to the frequency.

40. It seems likely that, if the Claimant had visited the "Canadian female customer at Kilburn" (mentioned in paragraph 12 of the list of issues) on Mr Shotton's last day of employment, then the Claimant would have remembered that it was Mr Shotton's last day of employment.

<u>Mr Cousins</u>

41. Mr Cousins worked for the Respondent. We do not have his exact age, but he had a discussion with Mr Coath about wishing to reduce his hours and to start retirement gradually.

42. Around 1 April 2019, he made a complaint which suggested that the Respondent (and Mr Shotton in particular) had forced him to reduce his hours. Mr Coath rejected the complaint.

43. Mr Cousins was required to attend the site in Kingston because of issues which had arisen at the site and because the Respondent decided he could address those issues more promptly if he was on site. We do not find that there was any connection between Mr Cousin's complaint and the move to Kingston. We do not find that the Respondent was seeking to get rid of Mr Cousins because of age.

44. Mr Cousins has not attended to give evidence of alleged bullying, and the Claimant did not have specific details of the complaint. In any event, as the Claimant accepts, the Claimant does not allege that Mr Shotton bullied the Claimant.

45. The fact that Mr Cousins made a complaint to the Respondent in April 2019 (and the way that was dealt with) was not the reason the Claimant did not complain to the Respondent about Mr Shotton. The Claimant and Mr Shotton had worked together for several years, and if the Claimant was going to complain about Mr Shotton (assuming that he was regularly making the remarks which the Claimant referred to in his evidence) then the Claimant would have done so prior to April 2019.

<u>Alleged discussions about fire breaks</u>

46. We accept that, in relation to the Kilburn site, there was a discussion between the Cladding Contractor and the Contract Manager and that the Claimant was present.

47. We accept it was some time in September 2019, not long before 19 September 2019.

48. We accept that, as of the date of this hearing, in January 2023, the Claimant's genuine opinion about what was said is that:

48.1. The cladding contractor said that the Respondent had failed to comply with building regulations, and had failed to place fire breaks (appropriately or at all) in the building, so as to compartmentalise/protect the separate dwellings in the event of fire.

48.2. The Contract Manager asked the cladding contractor to leave that out of the report.

48.3. The cladding contractor refused to leave it out of the report, but stated or implied that it was up to the Respondent whether it took any action to remedy the issue.

49. It is not necessary for us to decide whether the Claimant's understanding and recollection of the conversation is accurate, because we are not persuaded that the Claimant himself said anything to the Contract Manager about the issue. In saying this, we take into account that the Respondent has not called the Contract Manager as a witness. However:

49.1. If the Claimant was genuinely concerned about the issue, we think it likely that he would have put something in writing (to cover his own back, and/or to try to ensure it was rectified).

49.2. If the Claimant was genuinely concerned about the issue, we think it likely that he would have spoken to more senior employees than just the Contract Manager.

49.3. If the Claimant had genuinely made remarks about the need for the Respondent to take some action and had, at the time (as he has later claimed) thought it suspicious that (on his case) a couple of days later he was told to move from Kilburn to Kingston, then he would have said that at the time in the exchanges of emails in September 2019 and October 2019 (which are discussed below).

50. Not only did the Claimant not say anything about the alleged disclosure in contemporaneous emails in late 2019, he also made no mention of it at all, expressly or by implication, in the claim form in 11 March 2020.

51. The first time it was raised was on 11 October 2020 email to the Tribunal which said:

> My professional recommendations for the Kilburn Road project relating to safety concerns with the fire breaks which should have been installed under the building's cladding, were ignored and I was told i had to transfer project. These concerns were also echoed in the Cladding Contractor's recommendation report to the Company, which to my knowledge have yet to be implemented. The Company are even now still conducting remedial works on this project due to the poor standard of build, which I had notified them time and again about during my employment. I believe the basis for my transfer, given that it meant the Company would have incurred hundreds of thousands of pounds of additional cost, was based on the need to remove anyone who could flag this to the NHBC (Building Regulators) rather than a need for my skills in Kingston.

52. However, in oral evidence, the Claimant said that he did not contact NHBC about this issue because, when he had contacted NHBC about other issues, they had not been interested.

53. For completeness, it is the Respondent's claim that there was no report from the cladding contractor and that it complied with building regulations, and received sign off.

Discussions about Kingston in September 2019

54. In around August and September 2019, Mr Sandwith (the Construction, Commercial and Technical Director) began to think that it was no longer a requirement to have a full-time after-care manager. The claimant at this time was working temporarily in Kingston. He was not working there as After-care Manager, but rather he was covering for an absent colleague in the role of Finishing Foreman.

55. On 19 September 2019, Mr Sandwith phoned the claimant to discuss potentially moving him to Kingston on a longer term basis, still in the role of Finishing Foreman. Mr Sandwith explained that part of the reason for this was that there was potentially no ongoing need for full-time after-care manager. Both sides agree that the conversation became heated. Both sides agree that the claimant said that he did not think that he could work at Kingston all of the time, or at least, not starting at 7:30 AM or 8 AM and not working until 5 PM on the site. Both sides agree that the possibility of the claimant's employment being terminated if he would not go along with the proposed arrangement was discussed.

56. The following day, Mr Sandwith sent the email which is at page 52 of the bundle. He said that the discussion had got off on the wrong foot and he wanted to address that.

56.1. 19 September 2019 was a Thursday and this email was sent on Friday, 20 September. He referred to having told the claimant to go to Kingston the following Monday. He said there were two reasons for this. Firstly, that he wanted the claimant's skills in ensuring finishing the houses on the project and secondly that he believed there was no significant after-care work needed in the immediate future.

56.2. He acknowledged the claimant's objections for not wanting to travel so far, but stated that it was only intended that the work at Kingston would be temporary and that, once the claimant had done some initial handover of houses to purchases, then it was hoped that new work would have come in and new projects, and that the claimant could move to an alternative site closer to his home.

56.3. We accept that as per this contemporaneous email, the claimant had mentioned the possibility of resignation the previous day. We also accept that part of Mr Sandwith's reasons for sending this email (and also leaving a voicemail message for the claimant) was that he wanted to talk claimant out of resigning and to do the proposed work in Kingston instead.

57. A further discussion took place on Wednesday, 25 September 2019 and the email trail between pages 54 and 53 of the bundle early on 26 September 2019, contains Mr Sandwith's and the claimant's versions of what was said.

57.1. The claimant asserted that he was only required to be in the office (and therefore not on site between the eight hours of 8 AM to 5:30 PM). By implication, he was asserting he should not have to be at Kingston for those hours.

57.2. The claimant also asserted that there was a lot of after-care work at other locations which he listed in his email of 10:14 AM.

57.3. In the third paragraph of his 10:39 AM reply, Mr Sandwith commented on the other work which the claimant said was still required at those other sites and explained

why in his opinion it was shortly to come to an end, and why it did not, in any event, require the services of a full-time after-care manager.

57.4. Mr Sandwith also denied saying that the claimant would be dismissed if he refused to accept the working Kingston but rather that refusal to accept the working Kingston on the basis which had been discussed, would require the respondent to formally commence redundancy process.

57.5. He also asserted that the claimant's job (and my implication his contract) required the Claimant to work on site rather than in the office.

Redundancy Consultation

58. Later the same day, the letter dated 26 September (page 55 of the bundle) was sent to the claimant. It was headed risk of redundancy notice. It said that the claimant was in a pool of one because he was the only after-care manager and the respondent had assessed that it did not require such a post. The claimant was invited to a meeting on 4 October to discuss. He was told that he could bring a companion.

59. We accept that the email on pages 56 and 57 of the bundle, sent on 4 October 2019, contains Mr Sandwith's genuine contemporaneous recollection of what had been said in the meeting earlier that day. There was no immediate response from the claimant contradicting anything said in the email.

59.1. Amongst other things, the claimant was told that the respondent was reaching a situation where it would no longer be able to justify the full-time requirement for defects or after-care manager.

59.2. It said in an attempt to offer to avoid redundancy they had offered him alternative position of finishing manager at Kingston with a view to moving to an alternative construction project as one came on stream. He was also told that he would be picking up defects work on an ad hoc basis at other locations.

59.3. The minutes noted that the claimant was referring to a change of circumstances. "Change of circumstances" is a phrase which the claimant had himself used at the time and again subsequently. The specific change of circumstances related to childcare and the claimant's assertion that because of childcare responsibilities. He could not leave home until after 7 AM and he had to be home by 6:30 PM Monday to Friday.

59.4. The respondent said that it would try to alleviate that in the future by finding somewhere for him to work closer to home, but said that at present Kingston was the only location.

59.5. It was noted that the claimant had said that if it would consider making a reduction in his working hours, then he might be amenable to change in his contract. The claimant is also recorded as having said that he could not be obliged to have to work site hours. In other words, he was asserting his contract did not require him to do so, and that he was refusing (by implication, at least) to do so.

59.6. The respondent said that it was willing to offer the claimant a new contract for both finishing foreman role and site manager role.

60. In the 4 October email, Mr Sandwith added that, after the meeting had ended, he had discussed the matter with the Chief Executive. As a result, another alternative was offered. The Respondent said that, to take account of the claimant's childcare requirements, there could be a temporary variation in hours such that the claimant could have the start and finish times that he was seeking Monday to Friday, but would work on Saturday mornings to make up the hours.

61. The email finished by asking the claimant to review the record of the meeting and the offer made and to respond in writing the following week to see if consensus could be reached, or if there was no other option than to begin the redundancy process.

62. The claimant replied on 10 October to ask for details of the redundancy package and a draft copy of the proposed new contract.

63. Mr Sandwith replied the same day (page 58). He gave details of the redundancy package and also said that the only other position open at this time was finishing/site manager at Kingston, until project closer to home became available. It said this was anticipated to be Maynard house in Hatfield. The email said that the only amendment to the contract was to reflect the change in job title. It also said that the claimant would be compensated for travel to Kingston. Mr Sandwith asked for the claimant to consider and respond.

64. On 14 October (pages 60 and 61), the claimant replied to say that he was still seeking a copy of the proposed job description for the new role, and he asked some specific questions about it, including about notice, probationary period, et cetera.

65. 35 minutes later, Mr Sandwith replied answering all of those questions.

65.1. He said there would be continuity of employment, and that notice period, holiday entitlement and other benefits would be the same, and that the only change to his contract would be to change the job title. There was to be no reduction in pay.

65.2. In terms of details of the job description, the first paragraph of his email explained what duties would be and also asserted that the claimant was familiar with those duties having carried out that work for the respondent previously.

65.3. The claimant had also asked about his health and safety qualifications being out of date and Mr Sandwith said that he would look into that.

65.4. His email finished by saying “if there are any questions, please call me to discuss”. It said that hopefully the respondent had now provided the claimant with sufficient information to make a decision or, if he had any other option that the claimant wished to be considered, then he could advise the respondent accordingly.

66. On 15 October, the claimant replied only in relation to the issue about health and safety certificates and the site manager's certificate. He said that these had expired and he wanted those to be resolved.

67. On 17 October, as per page 66 of the bundle, at 12:49 PM, the claimant emailed Mr Sandwith to say that the change of role to site manager/finishing manager, working initially at Kingston, was not acceptable.

67.1. The claimant said that the Respondent’s offer would mean that he was expected to work six days per week and the travelling was unreasonable. He said that he believed that he could stay at Kilburn instead for at least three months.

67.2. In the email, he said that before the respondent made him redundant, it was necessary and appropriate for the respondent to pay for the training that he would need for his courses so that his certificates could be updated.

67.3. He also asserted that the details of the duties of site manager finishing manager had been vague and repeated his request for details of the job description as well as a job description for the after-care manager post.

68. At 1700 on 18 of October, Mr Sandwith replied to say that he had already supplied the reasons for making the position redundant and had already supplied details of the alternative role. He noted that the claimant had said that he would not accept it, and said that the claimant had not provided any suggestions for an alternative role.

69. The claimant replied again at 1737 on 18 October. He asserted that there was other work within the respondent that could be given to him (being the same work he had mentioned previously, and being a suggestion to which the Respondent had already responded). In response to Mr Sandwith’s comment that the claimant had not come up with any suggestions, he suggested that the respondent make him redundant after they pay for his certification and that he was willing to come back and work on a self-employed basis in the future.

70. The email response to that 1737 email was not sent until Monday 21 October (so after the dismissal letter was sent, but before it was received by the Claimant). Amongst other things, the respondent agreed with the claimant that it would pay for his certification. (As an aside, that payment has not actually happened as yet. The

Respondent's witnesses said in the course of their evidence that the respondent remains willing to pay for it once the claimant supplies the invoices. As things stand, the claimant has since obtained the certificates at his own expense and has not been reimbursed. This is not one of the claims before us.)

Termination of employment

71. The dismissal letter dated 18 October 2019 was sent (pages 64 and 65 of the bundle).

71.1. The letter said that the claimant had the right to appeal against the decision to make him redundant by appealing by 1 November 2019. The claimant did not, in fact, appeal.

71.2. The letter asserted that the reason for the dismissal was redundancy and it explained that his last day of employment was to be 15 November 2019 and that he would get statutory redundancy pay and he would get a payment in lieu of holiday.

72. For some reason, the letter, which was sent by post, was not received until 6 November 2019. On receipt, the Claimant asked again about the courses he had been promised, and Mr Sandwith confirmed the offer stood, and the Claimant should book himself on.

73. After dismissing the claimant, the respondent has not taken on a replacement. In other words, it has not taken on a full-time after-care manager. The after-care work that the claimant did is now split between several different employees doing it on an ad hoc basis.

74. The work at the Hatfield site which had been discussed in the contemporaneous correspondence did eventually start at, but not until several weeks after the termination of the claimant's employment.

The Law

75. The burden of proof provisions are codified in s.136 Equality Act 2010 ("EQA") and s.136 is applicable to all of the contraventions of EQA which are alleged in these proceedings.

> **136 Burden of proof**
>
> (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.

76. It is a two stage approach.

76.1. At the first stage, the Tribunal considers whether the Tribunal has found facts - having assessed the totality of the evidence presented by either side and drawn any appropriate factual inferences from that evidence - from which the Tribunal could potentially conclude - in the absence of an adequate explanation - that a contravention has occurred.

76.2. At this first stage it is not sufficient for the claimant to simply prove that the alleged treatment did occur. There has to be some evidential basis from which the Tribunal could reasonably infer that there was a contravention of the act. The Tribunal can and should look at all the relevant facts and circumstances when considering this part of the burden of proof test.

76.3. If the claimant succeeds at the first stage then that means the burden of proof is shifted to the respondent and the claim is to be upheld unless the respondent proves the contravention did not occur.

77. In Efobi v Royal Mail Neutral citation: [2021] UKSC 33, the Supreme Court made clear that the changes to the wording of the burden of proof provision in EQA compared to the wording in earlier legislation do not represent a change in the law. Thus when assessing the evidence in a case and considering the burden of proof provisions, the Tribunal can have regard to the guidance given by the Court of Appeal in, for example, Igen v Wong Neutral citation: [2005] EWCA Civ 142 and Madarassy v Nomura International Neutral citation: [2007] EWCA Civ 33.

78. The burden of proof does not shift simply because, for example, the claimant proves that there was difference in treatment between him and somebody who was under 60. Those things only indicate the possibility of discrimination. They are not sufficient in themselves to shift the burden of proof, something more is needed.

79. It does not necessarily have to be a great deal more and it could in an appropriate case be a non-response from a respondent or an evasive or untruthful answer from an important witness.

Time Limits for EQA

80. Section 123 of EQA 2010 states (in part)

(1) Subject to sections 140A and 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.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

81. In applying Section 123(3)(a) EQA, the tribunal must consider all relevant circumstances and decide whether there was an act extending over a period or else there was a succession of unconnected or isolated specific acts. If it is the latter, time runs from the date when each specific act was committed

82. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. That being said, time limits are there for a reason and the default position is to enforce them unless there is a good reason to extend. However, that does not mean that the lack of a good reason for presenting the claim in time is fatal to the extension request. On the contrary, the lack of a good reason for presenting the claim in time is just one of the factors which a tribunal can take into account, and it might possibly be outweighed by other factors.

83. The Tribunal has a broad discretion to extend time when there is a good reason for so doing. Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike s 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it is wrong to interpret it as if it contains such a list. A tribunal can consider the list of factors specified in s 33(3) of the Limitation Act 1980, but if it does so, should only treat those as a guide, and not as something which restricts its discretion. The factors that may helpfully be considered include, but are not limited to: the length of, and the reasons for, the delay on the part of the claimant; the extent to which, because of the delay, the evidence is likely to be less cogent than if the action had been brought within the time limit specified in Section 123; the conduct of the respondent after the cause of action arose, including the extent (if any) to which it responded to requests for information or documents and whether it contributed to the time limit being missed; any specific reasons that, because of the delay, the Respondent is less able to defend itself.

84. Ultimately it is a balancing exercise, balancing the prejudice to the claimant if the extension is refused against the prejudice to the respondent if the extension is granted.

<u>Direct Discrimination</u>

85. Direct discrimination is defined in s.13 EQA.

13 Direct discrimination

> (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.

86. There are two questions: whether the respondent has treated the claimant less favourably than it treated others ("the less favourable treatment question") and whether the respondent has done so because of the protected characteristic ("the reason why question").

87. When considering the "reason why question" for the treatment we have found to have occurred, we must analyse both the conscious and sub-conscious mental processes and motivations of the decision makers which led to the respondent's various acts, omissions and decisions.

Unfair Dismissal

88. Part X of the Employment Rights Act 1996 ("ERA") contains provisions relating to an employee's right (specified in section 94) not to be unfairly dismissed.

89. Section 98 ERA states, in part:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

90. Provided the respondent persuades the tribunal that it has met the requirements of subsection 98(1), then the dismissal is potentially fair, which means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) ERA 1996. In considering this general reasonableness, taking into account the respondent's size and administrative resources, the tribunal's analysis includes the question of whether the respondent carried out a reasonable process prior to making its decisions.

Employer's "reason" for dismissal

91. As mentioned, (what is now) section 98(1) ERA requires the Respondent to show the "reason" (or "principal reason") for the dismissal. The Court of Appeal discussed the meaning of the word "reason" in this context in Abernethy v Mott, Hay and Anderson [1974] I.C.R. 323

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

92. It is the actual thought processes of the person (or group) taking the decision to dismiss that have to be analysed, and the tribunal must make findings of fact about what set of facts/beliefs caused that person (or those persons) to decide to dismiss the Claimant. This is the analysis required by section 98(1)(a), and it is separate and distinct from what is required by section 98(1)(b).

Redundancy

93. Section 139 ERA states in part

> (1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
>
> (a) the fact that his employer has ceased or intends to cease—
>
> (i) to carry on the business for the purposes of which the employee was employed by him, or
>
> (ii) to carry on that business in the place where the employee was so employed, or
>
> (b) the fact that the requirements of that business—
>
> (i) for employees to carry out work of a particular kind, or
>
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.
>
> (2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

94. Within subsection 139(1), there are 4 states of affairs described: (a)(i); (a)(ii); (b)(i) and (b)(ii). These are sometimes called "redundancy situations", though the phrase does not appear in the legislation. In an unfair dismissal case, where the employer is relying on "redundancy" as the fair reason for dismissal, it is for the employer to demonstrate that (at least) one of these states of affairs existed. (ie that there was a "redundancy situation" as it is sometimes called). That is a question of fact for the tribunal to determine on the evidence. If there was such a state of affairs, then, as made clear by the House of Lords in Murray v Foyle Meats Ltd [1999] ICR 827, the tribunal has to go on to decide if the dismissal was, in the words of section 139(1), "wholly or mainly attributable to" the existence of that state of affairs. Again, in an unfair dismissal case, because of section 98(1) ERA, it is for the employer to satisfy the tribunal that that was the case. The issue is one of causation. Was the "redundancy situation" the reason that the employer decided to terminate the contract of employment.

95. The latter step is a crucial part of the reasoning. It is not merely sufficient for the tribunal to be satisfied that a redundancy situation existed. The reason in the Abernethy sense must be determined. See, for example, Kellog Brown and Root (UK) Ltd v Fitton & Ewer UKEAT/0205/16/BA UKEAT/0206/16 at para 24. In that case, the reason was found to be not the closure of a work location (though that would have been a redundancy situation) but the employees refusal to move to a new work location. Thus, the dismissal was not "wholly or mainly attributable" to the redundancy situation, and the correct label for the dismissal reason was not "redundancy".

96. When making a decision about what was the employer's reason for the dismissal, it is entirely irrelevant why the redundancy situation existed, and whether the employer could have done anything to avoid it. If those points come into the unfair dismissal considerations at all, then they might be considered as part of section 98(4).

97. More generally, as regards fairness of a redundancy dismissal, Williams v. Compair Maxam Ltd [1982] IRLR 83 set out guidance which is still relevant. Tribunal must remember that it is guidance, and does not replace the wording of section 98(4). where Browne-Wilkinson J

97.1. The employer should give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment, either with the Respondent, with an associated employer, or elsewhere.

97.2. The employer should consult (usually with representatives) as to the best means by which the desired management result can be achieved fairly and with as little

hardship to the employees as possible. In particular, the employer should seek to agree the selection criteria with the representatives, and be willing to continue to engage about the processes for applying those selection criteria

97.3. The employer should seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

97.4. The employer should seek to ensure that the selection is made fairly in accordance with these criteria and consider any representations representatives as to errors or unfairness in the selection.

97.5. The employer should consider whether it is possible to offer alternative employment instead of dismissing an employee

98. The nature of fair consultation was considered in R v. British Coal Corporation and Secretary of State for Trade and Industry ex parte Price and others [1994] IRLR 72 at [24]:

> It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in R v Gwent County Council ex parte Bryant, reported, as far as I know, only at [1988] Crown Office Digest p.19, when he said:
>
> *Fair consultation means:*
>
> *(a) consultation when the proposals are still at a formative stage;*
>
> *(b) adequate information on which to respond;*
>
> *(c) adequate time in which to respond;*
>
> *(d) conscientious consideration by an authority of the response to consultation*.

99. In Compair Maxam, it was emphasised that

> The purpose of having, so far as possible, objective criteria is to ensure that redundancy is not used as a pretext for getting rid of employees who some manager wishes to get rid of for quite other reasons, e.g. for union activities or by reason of personal dislike.

100. In Teixeira v Zaika Restaurant Limited Neutral Citation Number: [2022] EAT 171, having referred to that passage of Compair Maxam, the EAT added (paragraph 21) that as well as the risk of the lack of objective criteria being used to get rid of an employee, a pool of one could be used that way as well, and therefore tribunals should examine a decision to choose a pool of one with worldly-wise care.

101. In the same case, the EAT pointed out that it was established by Capita Hartshead Ltd v Byard [2012] ICR 1256 that the tribunal must not substitute its own views, for

that of the employer, on the issue of the appropriate pool from which the employee to be dismissed might be selected. That applies even if the pool consists of just one person.

102. The importance of consultation where there is a potentially going to be a pool of one was recently discussed in Mogane v Bradford Teaching Hospitals NHS Foundation Trust [2022] EAT 139. There should generally be consultation before the pool is finalised in any event, but that is potentially even more important in circumstances in which the selection of the pool means that the claimant is effectively certain to be dismissed as redundant.

103. When deciding on whether the dismissal was fair or unfair, the tribunal's analysis might include (amongst other things): whether the Respondent has relevant policies and procedures? if so have they been followed? has it followed the same method and processes as in previous similar exercises? if not, what was there a reason for acting differently this time? was there an urgent need to act quickly to save the business?

104. There is no single uniform process for redundancies that must be followed by every single employer. It is the reasonableness of the employer's decisions (and specifically whether they were outside the band of reasonable responses) that is relevant.

Protected Disclosure

105. There are three requirements that need to be satisfied for the definition of protected disclosure in section 43A ERA to be met. There needs to have been a disclosure within the meaning of the act. That disclosure has to be a qualifying disclosure. It must be made by the worker in a manner which is set out at sections 43C through 43H.

106. The disclosure must contain information and there must be sufficient information in the disclosure for it to qualify under section 43B(1).

> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

107. There are five questions for the tribunal to consider when deciding if the disclosure qualifies under section 43B(1): firstly, that the disclosure has been made and it contains certain information; secondly that the employee actually believed that the disclosure tended to show one of the things (a) to (f); thirdly that the employee's belief was reasonable on that point; fourthly that the employee actually believed that the disclosure was being made in the public interest; and fifthly that such a belief was reasonable.

108. In terms of looking at the employee's beliefs, we look at the employee's actual subjective belief and that is what we analyse in order to decide both what he in this case the employee did believe and also to decide if that subjective belief was reasonable or not. In relation to public interest part of the criteria as per Chesterton Global Limited v Nurmohamed [2017] EWCA Civ 979. The question for the Tribunal is whether the worker believed at the time that they were making the disclosure that the disclosure was in the public interest and whether that belief was reasonable.

109. While the worker must have a genuine and reasonable belief that the disclosure is in the public interest, this does not have to be the worker's motivation for making the disclosure. The expression "in the public interest" is deliberately not defined in the legislation, because it is left for the Tribunal to decide. As discussed in that case, the mere fact alone that someone other than the claimant was also affected by alleged wrongdoing is not enough in itself to mean that the Tribunal is bound to find that the disclosure was made in the public interest. On the other hand, the mere fact alone that no one outside the employer's staff was affected does not mean that the disclosure cannot have been made in the public interest. The Tribunal must look at all the circumstances.

Protected Disclosure Detriment

110. S.47B of the Employment Rights Act 1996 deals with protected disclosures and the right not to be subjected to detriments.

47B.— Protected disclosures.

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a) from doing that thing, or

(b) from doing anything of that description.

111. As per s.48(2) ERA, it is for the employer to show the ground on which any act or deliberate failure to act was done.

112. A detriment is something that a reasonable worker in the claimant's position would, or might consider, to be to their disadvantage in circumstances which they have to work. Something can be a detriment even if there are no physical or economic consequences for the claimant but an unjustified sense of grievance is not a detriment – see Shamoon v Royal Ulster Constabulary.

Analysis and Conclusions

Protected Disclosure

113. It is convenient to start with the protected disclosure issue and because the claimant's case is that that was the immediate trigger for the respondent telling him to move to Kingston, which led in turn to the termination of his employment.

114. Similarly, the claimant also suggests that the fact that he was told to be on site by 7:30 AM or 8 AM and that his job title was potentially going to change was because he made a protected disclosure.

115. As stated in the findings of fact, we accept the claimant's evidence on oath that, as far as he is concerned, the cladding contractor said that the respondent was in breach of a fire safety requirement and that the breach was sufficiently serious that the respondent was in breach of building regulations.

116. We accept that fire regulations relate to health and safety. We accept that compliance with building regulations and fire regulations are important obligations for the Respondent to comply with, and that disclosure of breaches of these is in the public interest.

117. However, for the reasons stated in the findings of findings of fact, we do not accept that the claimant said anything to the contract manager about the alleged breaches of legal obligations or health and safety requirements. The claimant was merely present when a third party mentioned these things to the contract manager.

118. Even on the claimant's own case, he has no reason to specific reason to believe that Mr Coath or Mr Sandwith were told by the contract manager that the claimant was concerned about the fire break issue; rather he merely infers that the proposed transfer to Kingston was in some way connected to the fire break issue because it happened such a short time afterwards.

119. However, the claimant worked at many different sites over the course of the four years of his employment with the respondent. Furthermore, the claimant accepts that he was already on a temporary secondment at Kingston at the time. There was nothing surprising or suspicious about the Claimant's being told that he was being allocated to work at a particular site, or that that site was in Kingston. He had worked at several other locations in South London, and the Respondent only had a limited number of sites at any given time. Nor was it out of the ordinary for the Claimant to be told that he would be doing duties other than aftercare manager. He had done similar duties in the past and, indeed, was already in a temporary secondment doing the duties of Finishing Foreman.

120. Our finding is that there was no protected disclosure. The claimant's own evidence about exactly what he claims to have said to the contract manager (and when) was very vague and imprecise.

121. However, even if we were wrong about that (that is, even if there had been a protected disclosure by the Claimant), it would have been our finding that the Respondent had shown that there was no connection between the alleged protected disclosure and the "transfer" to Kingston. Mr Sandwith and Mr Coath each said on oath, and we accept, that they were not aware at the time, and are still not aware now, of any issue regarding breach of fire regulations/building regulations. In other words, apart from what the Claimant has said in the course of this litigation, neither the cladding contractor, the contract manager or the Claimant, or anyone else had said anything (orally or in writing) to either of them about the development in Kilburn allegedly not having (sufficient) fire breaks, or similar problems (or about the Claimant believing, or alleging, there were such problems).

122. The reasons for asking the claimant to move to Kingston on a more regular basis (as opposed to the short-term temporary secondment) are as set out in the respondent's witness evidence and Mr Sandwith's contemporaneous email of 20 September 2019. In other words, the Respondent did require somebody with his skills at Kingston and they did not require a full-time after-care manager at any of their sites at that time.

123. We also accept that (as the Respondent made clear at the time) it was the genuine intention that it was to be a short term arrangement and that if work became available at another site (for example, Hatfield) in the future, then the claimant could relocate to a site closer to home. However, at the time that they told him to work in Kingston - in September 2019 - that was the most appropriate location for him (in the Respondent's opinion) simply for business reasons it had nothing to do with the alleged building regulations failures at Kilburn.

124. Although described in the litigation as a "transfer" to Kingston, we are satisfied that requiring the Claimant to work at the site in Kingston was not a variation of his contract. His contract was not varied each time he went to a new site. Rather, his contract was such that he could be told by the Respondent which site he was required to work at from time to time. On the Claimant's own evidence, he was told by Michelle where he would be working. We rejected his argument that he usually went physically to the office and received his instructions in person from Michelle daily. (As mentioned in the findings of fact, during cross-examination, he conceded that he did not go to the office each morning). However, on his own account, it was the Respondent who told him where he would be working. We have found that there periods when, on the Respondent's instructions, the Claimant was based at a particular site regularly for an extended period of time, and travelled directly between home and that site each day, without visiting the office (other than when he specifically needed to do something, or meet someone, in the office).

125. That being said, even though the "transfer" to Kingston was not a breach of, or variation of, the Claimant's contract, then that would not have prevented its being a detriment. It was more inconvenient to the Claimant, and he made the Respondent aware of that.

126. However, given that we have found that there was no protected disclosure (and that the Respondent has satisfied us of the reasons for the discussions about Kingston), the complaint of detriment on the grounds of protected disclosure fails.

<u>Unfair Dismissal</u>

127. It was Mr Sandwith's genuine opinion that the requirement for a full-time after-care manager had ceased. The claimant was the only person in that role.

128. As the claimant himself accepts he had not acted as full-time after-care manager throughout the entirety of the four years but rather had been doing other duties from time to time, including spells site manager, at least two different locations. There had not been enough work during the four years for the Claimant to operate solely as a full-time after care manager.

129. The main problem with Kingston, as far as the claimant was concerned was the travel time, coupled with his child care responsibilities. As he said at the time and said again in this hearing, because of a recent change in his circumstances connected to child care, he could not leave home until later than 7am, and had to be back by 6.30pm.

130. We accept it was Mr Sandwith's genuine opinion that the claimant should have been working at the sites on so-called "site hours" (starting when the contractors started work and not finishing until the contractors finished). We accept it was Mr Sandwith's genuine opinion that if Mr Shotton had not enforced that requirement, then that was

Mr Shotton's business, but that Mr Sandwith believed that the respondent had the right to enforce that requirement and that is what he wanted to do.

131. It seems to us that had the claimant been willing to move to Kingston on the terms proposed by Mr Sandwith then the matter would potentially have proceeded informally. However, the claimant insisted that he could not be forced to move to Kingston on those terms, and that led to the communications firstly of 20 September, but then in more detail (following the discussion on the 25th), the correspondence of 26 September which put the claimant on notice that he was at risk of redundancy.

132. Mr Sandwith genuinely believed that this was an appropriate route to follow.

133. Mr Sandwith was genuinely willing to listen to what the claimant had to say. He had not formed a closed intention prior to 4 October meeting that he would reject whatever arguments the claimant came up with. Ultimately, Mr Sandwith did not agree with the claimant that the claimant should be allocated do work at sites other than Kingston, and he gave the claimant reasons for that opinion.

134. The respondent did not agree to the claimant's requests to start late and finish early just Monday to Friday (on the same pay) but did make the alternative suggestion of starting late and finishing early Monday to Friday making the hours up on a Saturday. The claimant said at the time (and said during this hearing) that that was not an acceptable solution to because he still had childcare on Saturday. However, he did not come back with further alternatives, such as, for example, suggesting that he temporarily reduce pay for reduced hours Monday to Friday.

135. Furthermore, although the Claimant argued that there was enough aftercare/defects work that he could be allocated to at the other sites, he did not argue against the selection pool. He did not propose that any other employee be dismissed, and he be allocated their job, and he did not propose a selection pool to include other roles, as well as his own.

136. At the time, the claimant's queries were more focused on the health and safety certificates and payment for those, and on the redundancy package.

137. By the time of the respondent's 18 October 2019 dismissal letter, it had consulted the claimant with (in our opinion) a genuinely open mind. It was not unreasonable for it to conclude that there was no further consultation necessary given that the claimant had rejected the offer of alternative work as Finishing Foreman/Site Manager.

138. The process potentially started on the wrong foot around 19 September. However, prior to the dismissal decision made on 18 October, the respondent had followed a fair procedure, including meeting the claimant, taking his points into account, offering a temporary variation of hours, and answering the queries he had raised subsequently in writing.

139. The claimant had the right to appeal and chose not to do so.

140. The Respondent did not come up with redundancy as a sham excuse to dismiss the Claimant and did not come up with a pool of one as a sham device to dismiss the Claimant. It had genuinely come to the view that the specific role of "after care manager" was not required; however, it was not arguing that therefore the Claimant (as the only person in that role) would be automatically selected for dismissal. It was arguing that the Claimant could remain as an employee, but not as "after care manager".

141. In our opinion, this was a dismissal by reason of redundancy because the Respondent had a reduced need for a full-time after-care manager (it no longer required any) and the Claimant was dismissed for that reason.

142. It is our decision that the Claimant's contract allowed the Respondent to allocate him to different sites from time to time. However, if, contrary to our decision on that point, he did have a contract which required him only to work in the office (and/or on sites near to his home) then the dismissal was still by reason of redundancy, because the Respondent had a reduced requirement for such work at such places.

143. The Claimant argues that the dismissal was because of his refusal to move to Kingston on the stipulated hours, and/or that the hours he was told he had to work on site at Kingston were unreasonable. However, the termination of his contract as aftercare manager was because the Respondent no longer required that role. We are not persuaded by the Claimant's argument that that his After Care Manager contract only required him to arrive for work at the site at the time he would notionally have arrived at the site if he left the office at from 8am. We are not persuaded by the Claimant's argument that his After Care Manager contract only required him to stay to work at the site until the time at which he would notionally have left the site if he was to hypothetically arrive back at the office at 5.30pm. However, even taking account of the Claimant's argument that those were the hours Mr Shotton had been content with, those were not the hours he was being offered for the alternative work of Finishing Foreman / Site Manager. The Respondent has not argued that the Claimant's refusal of the work was so unreasonable that it did not have to pay him redundancy pay. However, it is not the case that the Respondent's offer of the alternative work, on such hours, was unreasonable. The dismissal reason was still redundancy even though it is true that, had the Claimant not rejected the alternative work then he would not have been dismissed.

144. The respondent did not require anybody to work full-time doing after care at the other sites, but did require somebody to work (as Finishing Foreman) at Kingston. The Respondent made reasonable efforts to find alternative work for the claimant. The only alternative work was the work which it offered to him. That was work as Finishing Foreman / Site Manager, and the initial work location was going to be in Kington, but subject to the Respondent's ability to instruct him to work at other sites

in the future (which, as they had said, was a power they would exercise in his favour when a site closer to his home became “live”).

145. In all the circumstances, the dismissal was a fair one.

Direct Age Discrimination

146. As we said in the findings of fact, the latest time on which any of those comments could have been made was 31 May 2019. Even assuming the comments were made, it is likely that the last such comment would have been earlier than the last day of his employment. In any event, even considering hypothetical possibility of one of those alleged comments being made on 31 May 2019, the latest date for the claimant to lodge a claim was 30 August 2019.

147. There was no continuing act after 31 May 2019, even on the claimant's own case. Furthermore, Mr Shotton had no involvement with the Claimant’s dismissal.

148. In fact, the Claimant presented his claim on 11 March 2020. He was therefore more than seven months out of time. The early conciliation period does not help him by extending the time because that early conciliation did not start until after the time limit had expired.

149. Although it is not fatal to a request for an extension of time that there was no good reason for the delay, if there was no good reason for failing to submit the claim in time, that is one of the factors for us to take into account when exercising our discretion.

150. As stated in the findings of fact, nothing prevented the claimant bringing a grievance had he wanted to do so. We rejected the argument that anything about the treatment of Mr Cousins deterred the claimant from bringing a grievance.

151. Our decision is that the actual reason for the claimant not bring a grievance previously was that he did not wish to do so because he was on good terms with Mr Shotton. He was not so seriously concerned by these comments that he thought that any formal action by the respondent was required.

152. It is our decision that the only reason the claimant has mentioned these allegations later on is only because he was dismissed in circumstances which he considers were unfair. In other words, he considers that it was unfair that the respondent (in his view) ignored his childcare responsibilities and sought to insist on his working at Kingston. Were it not for those events, the claimant would not have brought the age discrimination allegations.

153. The first time that it was clarified what the specific allegations were was 13 April 2022. This was almost 3 years after Mr Shotton had left the respondent's employment. The Respondent had no reason to try to contact Mr Shotton to ask him questions before 13 April 2022 because (i) it had not been said previously that he

was the alleged perpetrator and (ii) no specific comments or incidents had been identified earlier. (Even on 13 April, and during this hearing, the specificity is simply as set out in the list of issues).

154. Although the respondent not provided us with a good reason for not doing more to try to contact Mr Shotton, we do accept that:

154.1. even had they tried to contact him there is no guarantee that they would have succeeded;

154.2. even had they successfully contacted him, there is no guarantee that Mr Shotton would have been cooperative

154.3. even had he been willing to recount everything he could remember, there is no guarantee that he would have had an accurate memory about specific conversations between three and seven years previously. In particular, he would not necessarily be able to remember whether the alleged remarks were made at all or, if so, in what context.

155. There would be no contemporaneous documents in relation to these allegations (that is, comments allegedly made orally on customer premises), and therefore the recollection of witnesses and their ability to give oral testimony would be of vital importance.

156. Our finding is that the respondent been significantly prejudiced by the delay in bringing the allegations, because the only relevant evidence it might have been able to collate is from Mr Shotton, and the delay significantly hampered the likelihood that it could have obtained reliable evidence to assist its defence.

157. If we were to grant an extension of time, we do not think that the claimant would be significantly prejudiced, given that - in our view - he was not intending to make any complaints of age discrimination had he not been dismissed. On his own account he does not suggest that Mr Shotton had any involvement in that dismissal and the (alleged) remarks made by Shotton (10.1 to 10.4 of the list of issues) were an entirely separate matter to the dismissal or the instruction to go to Kingston.

158. For those reasons, it is not just and equitable to extend time.

Employment Judge Quill

Date: 13 January 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

11 February 2023

NG - FOR EMPLOYMENT TRIBUNALS