RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr L Yu**

Respondents: **(1) Federal-Mogul Controlled Power Limited**
(2) Tenneco Inc

Heard at: **East London Hearing Centre (in public)**

On: **17, 18, 19, 20 and 24, 25 (in chambers) and 26 January 2023**

Before: **Employment Judge Moor**
Members: **Mrs S Jeary**
Mrs G Forrest

Representation
Claimant: in person
Respondents: Ms M Dalziel, solicitor

JUDGMENT having been sent to the parties on 30 January 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Issues

1. The Claimant is an experienced mechanical design engineer. He worked for the First Respondent, a company that undertakes research and development ('R&D') in the automotive industry. In 2020 the First Respondent terminated the Claimant's employment. The First Respondent says the reason was redundancy. The Claimant says that dismissal was age discrimination, or unfair because of 'whistleblowing', or unfair because he raised safety matters at work. He also claims that the Respondent subjected him to detriments influenced by his 'whistleblowing' or raising safety matters at work. He also argues that his later job applications were rejected because of age (directly or indirectly) or because he made allegations of discrimination. He brings other money claims. The Respondents deny the claims except as to holiday pay.

2. At a Preliminary Hearing on 1 June 2022 EJ Russell clarified the issues. At a Preliminary Hearing on 8 July 2022 EJ Drake struck out parts of the second claim. We further clarified the issues during the hearing. The final list of issues is attached at Appendix One.

3. Neither party had prepared evidence for the holiday pay claim. On the first day we ordered the parties to produce a calculation and the Respondents to produce documents. They did so. On the morning of the third day of the hearing the First Respondent formally conceded that the Claimant was owed 13 days' outstanding holiday pay. On the fifth day of the hearing the Respondent informed us that the gross amount they owed in holiday pay was £2,449.99. They agreed to pay this after deductions for National Insurance and tax.

4. After our ordering further disclosure on remedy, the Respondents conceded on the fifth day that the Claimant had mitigated his loss.

5. English is not the Claimant's first language. The Claimant is proficient in written English but his spoken English, while competent, is less confident. We took into account that he might become tired using a second language so intensively and in a different field. We thus allowed longer breaks in the morning and afternoon sessions. The judge assisted the Claimant where he may not have understood or where he was finding it difficult to express himself. We are satisfied that he had a fair opportunity of giving evidence, asking questions, and making submissions.

6. We thank both the Claimant and Ms Dalziel for their courteous and structured approach, ensuring the case was heard in a time proportionate to the issues.

Findings of Fact

7. Having heard the evidence of

    7.1. the Claimant,

    7.2. Mr Dunn, UK and Global HR Manager;

    7.3. Ms Lucey, HR Manager;

    7.4. Mrs Hutchinson, HR Manager;

    7.5. Mr Muncey, Mechanical Design Manager, the Claimant's former manager; and

    7.6. Mr Criddle, Director of Research and Development and Mr Muncey's manager;

    and having read the documents referred to in the evidence, we make the following findings of fact. In deciding the facts, we ask 'what was more likely to have occurred'. (Page numbers of the agreed bundle are referred to.)

8. The Claimant was 61 years' old when he was employed by the First Respondent as a Mechanical Design Engineer on 26 November 2018. His

employment terminated on 17 November 2020, when he was 63 years' old. He put himself in the age group 'over 50' and compared himself to those 'under 50'.

Salary

9. The First Respondent is ultimately owned by the Second Respondent, an American company. The Second Respondent did not employ the Claimant. The First Respondent had sister companies in the UK which had manufacturing plants in Bradford and Coventry. At the time of events, the First Respondent had one customer, Mercedes-AMG. The First Respondent undertakes R&D. The money required to pay for this activity did not come from the Second Respondent but from the UK sister companies and, to a much smaller extent, Mercedes-AMG. The $250m the Claimant referred to was the expected value of the business to the First Respondent from Mercedes-AMG over the 8 planned production years, yet to come.

10. The Claimant applied for the post through a recruitment agency who told him the salary for it was '£45K+'. The agent sent information to the First Respondent about the Claimant, stating '£45K+' for salary. This led the First Respondent to believe the Claimant was looking for a salary at £45,000 or above.

11. The Claimant alleges that Mr Criddle agreed £50,000 with him at interview on 31 October 2018; however, Mr Muncey wrote '£45K' on the interview sheet. Mr Muncey says and we accept that he wrote this at the time, as the amount sought by the Claimant. On 2 November 2018, the First Respondent offered the Claimant the post at £45,000. He tried to negotiate for a higher salary but was unsuccessful. He did not state in those email negotiations that Mr Criddle had promised him £50,000. We do not accept that Mr Criddle did so: it his highly likely the Claimant would have referred to such a promise and it is inconsistent with Mr Muncey's note made at the time.

12. Ms Lucey's evidence is that the post was advertised at £40K. We accept this because the figure is supported by her email at p340. We find, therefore, the Claimant was not offered a salary at the bottom of the range for the post.

13. The recruitment agent sent the First Respondent details about the Claimant, which did not include his age. He was interviewed by Mr Criddle and Mr Muncey. Both say they did not ask about age but could estimate it by appearance to the nearest decade. We do not consider age was a factor in the salary offered. The salary offered was based on what the agent and the Claimant had said he was prepared to accept.

14. There was no safety representative or safety committee at the Claimant's workplace and no recognised trade union.

15. Clause 14 of the contract between the parties states '*Information about the disciplinary rules and grievance procedure will be issued with the Staff Handbook upon commencement*.' The Claimant had not received this handbook when he signed the contract.

16. The grievance procedure is in the form of a so-called 'model' procedure, which is used where there is no trade union. Clause 4 states '*Should the*

employee still remain dissatisfied he or she may request that the grievance now be referred to ***the Site Manager or equivalent*** *who will give further consideration to the grievance. A decision will be given in writing as soon as reasonably practicable. The decision will be final.*' p354 (our emphasis)

17. Salary reviews at the First Respondent are normally complete by April in any calendar year. The Claimant did not receive a salary review in 2019. The First Respondent says this is because of a global policy that starters in quarter 4 in the previous year will not have their salary reviewed. While this policy is not written down, we accept that it existed from Ms Lucey's evidence about it and, in the Tribunal members' experience, such a policy is not unusual.

Start of Restructure

18. In late 2019 senior managers at the First Respondent first identified several posts as potentially redundant in a forthcoming restructure, including the Claimant's post. This was because of the need to save money by reducing headcount and looking to future needs. We accept Mr Criddle's evidence that the 'pandemic solidified' the reasons for the restructure.

19. The Town Hall meetings that the Respondent held with staff in the summer of 2020 prepared them for the restructure. The Claimant did not attend. Thus his view that the restructure was sudden is understandable from his point of view but not correct in fact. The restructure was delayed to some extent by the Covid lockdown: the First Respondent used the furlough scheme and a pay cut (see below) instead for short-term cost-saving. The company first made 5 people redundant in May 2020.

Mechatronics Role

20. In the 2019 restructure plan, the First Respondent identified a need for a Mechatronics Design Engineer, which it retained throughout the restructure. Its Task Force report identifyied mechatronics as a future priority. The First Respondent did not advertise internally or externally for this role until March 2021 due to a recruitment freeze. This probably prevented it from mitigating redundancies through redeployment.

21. Mechatronics is a portmanteau word combining electrical, electronic and mechanical design. We accept Mr Dunn's evidence that it has been an identified field since the mid 1990s. Mr Criddle described the First Respondent as recognising that '*the interfaces between hardware and electronics were a specialised skill-set in themselves and that previously they had not had good enough cross-functional work on this and they started looking for people'.*

22. Part of the mechatronics role is to liaise with staff in each specialism. It requires good communication skills. Mr Muncey genuinely did not consider the Claimant had demonstrated this and we agree, given their own disagreements on technical matters (see below).

23. The Claimant says his CV shows more than 5 years' experience in work that could be described as mechatronics. Mr Muncey accepted that some of the work in the Claimant's CV could be described as mechatronics but not to

the depth required. Mr Criddle did a line by line assessment of the Claimant's CV against the Mechatronics job role later in May 2021 and decided he did not have the necessary skill-set. Overall we accept these managers' opinions as genuine: on their reading of the Claimant's CV, they did not consider he had the depth of experience required. The very fact that it took the First Respondent from March 2021 until January 2023 to recruit someone to the post shows how difficult it was to recruit to the role suggesting they were looking for very particular in-depth experience and skills. We consider that, such was their need, if they had genuinely thought the Claimant was fitted for the role they would have placed him in it, as Mr Criddle acknowledged, despite the recruitment freeze. For these reasons we also find the mechatronics role was not the Claimant's old role dressed-up in a new job description.

24. In 2020 the Claimant did not receive a salary review. This is because no one in the company received a salary review (or increase) in 2020 because of the pandemic. Ms Lucey gave us reliable evidence about this. The Claimant has not identified anyone who got a review.

25. On 8 January 2020 the Claimant says he was denied 'promotion' to Test Manager. He accepts he did not apply for this post. We find it was probably advertised internally. A contractor applied for and got the job. The Claimant did not make any complaint about not being interviewed or promoted at the time. We are clear the First Respondent did not deny him this job or promotion: he just did not apply for it.

26. In 2020 the Claimant worked on thermal analyses of the Integrated Starter Generator ('ISG'). This was a product still being researched and developed. It was hoped ultimately to be manufactured for Mercedes-AMG hybrid cars. All agree the Second Respondent wanted to move into hybrid and electrical work and the ISG was therefore important. Mr Criddle says and we accept that Mercedes AMG was more involved than usual in the research and development phase. Testing was also being done at its plant. The First Respondent shared much information with Mercedes-AMG.

27. The Claimant's appraisal for 2019 shows that he worked on several different projects. This is unsurprising because the Task Force document from February 2019 shows he was a resource to be used by different parts of the team for his special skill set of computational fluid dynamics ('CFD'). The Claimant was thus not employed solely to work on the ISG.

28. The Claimant was passionate about the ISG work. The theory had been established for many years and he wished to be part of a team to bring it to market. It is obvious to us that the Claimant's disappointment about the loss of his job is particularly strong because of this passion.

29. At this stage in 2020 the ISG was still being developed and researched in a series of prototypes. It was by no means the finished product and was not in production. Mr Criddle's evidence, which we accept, was that they were about 2.5 years away from production. We find it is likely the Claimant knew this: he was a highly experienced mechanical design engineer and had worked in R&D. At the very least, he knew he was not identifying a problem in a product in manufacture. The emails show that for each discussion a

sample or protype number was given. We also consider the Claimant likely knew about the end-of-line test described by Mr Criddle. This is more thorough physical testing done at the production stage, literally after the finished product comes off the line.

30. On 19 February 2020 the customer asked Mr Criddle to investigate certain technical issues including heat dissipation power efficiency (p481 points 4 and 5). It was the Claimant's task to do the thermal analysis. Mr Criddle instructed the Claimant do a simulation at different power losses. The Claimant did so, using a relatively simple model and told him the result. The Claimant told us in his evidence that the simulation result matched the test result. In cross-examination the Claimant clarified that this information provided to Mr Criddle was not information that led Mr Criddle or the First Respondent to treat him badly. He did not rely therefore on this first alleged disclosure (issue 9(a) of the List of Issues).

Technical Discussions/Disputes

31. On several occasions in January to July 2020 the Claimant and Mr Muncey disagreed. Mr Muncey accepts that he likely shouted and banged the desk. The Claimant also acknowledged in the later grievance with Mrs Hutchinson that he understood that people were under pressure and that they had their own professional opinion and [sometimes] they just don't agree. He told her he did not '*know how to make a calm way to make my opinion across so sometimes it ends up as shouting'*. In saying this, we find he acknowledged the argument was not one-sided but heated between them.

    31.1. The Claimant summarises the reason for disagreement variously as Mr Muncey telling him to produce different calculations/inaccurate results/attempting to force him to change thermal conductivity/ attempting to force him to create false calculations.

    31.2. Mr Muncey disputes this. He recalls the disagreements as being about the Claimant's modelling results and their relationship to measured results.

32. It is important that we understood this, so we set out the evidence we have heard and what we find from it in some detail. Mr Muncey explained the Claimant's work was to design a simulation model. Mr Muncey also received data from physical tests, sometimes referred to as 'dyno' tests. He explained '*where we have measured data that will always trump model data'*. What then followed should have been a virtuous circle: where physical data from a real test, informed the model the Claimant was working on so that it could be developed more accurately; this in turn would provide more trustworthy data from the model for areas that could not be tested physically. In other words the development of the model to better reflect the reality. Mr Muncey therefore expected the Claimant to adjust his model as data from physical testing became available. Mr Muncey's frustration with the Claimant, and what led to arguments between them, was that the Claimant was not prepared to do this. Mr Muncey was clear in his evidence, which we accept, that he was asking him to reconcile the real data against the model. He was not asking him to fiddle the data or create inaccurate or false calculations. '*Mr Yu refused to understand the discrepancies…. The discussion I was*

trying to have [was] what changes he would make. It is complex model. He was a full time specialist. He was insistent that he did not need to change anything. I was suggesting he should change things and he took it personally. My memory is frustration at not understanding what his resistance to [this] normal engineering process was.' '*I was trying to get him to give a model closer to the test results we were getting'*. We accept Mr Muncey's evidence: he was a careful, clear, convincing witness. He conceded openly against himself that there had been several disagreements. He strongly denied any attempt to cover up the figures. Again, we accept this denial.

33. Mr Muncey's account is supported by examples of the email correspondence with the Claimant. These communications were professional and not at all angry, contrary to the Claimant's suggestion. Both engineers were engaged, with others, in a technical, problem-solving discussion. For example the Claimant was stating he was getting high temperatures from his model and Mr Muncey and others were asking him questions and suggesting the input of different parameters to his model to reconcile the physical data.

34. Because these emails are the disclosures alleged we set out what the Claimant wrote (p449-455).

35. The stator was the physical housing within which there was a rotor. All of the electric current went to the stator.

36. On 28 July 2020 the Claimant sent an email at p453 about the heat test data he had obtained on a simulation of the ISG. He stated:

> *'Hi Al [Mr Muncey] The 3D thermal analysis for the idle speed generation point used the power loss data from AMG C Gen 450V 180C.xlsx…. The results are as follows: Maximum stator temperature 386℃ Average stator temperature 256℃…'*

37. It is agreed that the average stator temperature of 256℃ is around 100 degrees over the safe limit.

38. In his response Mr Muncey said:

> 'that looks a bit high. The whole point of the thermistor is to try to keep the potting temperature under 180 degrees. What do you think the issue is? What data do you need to get closer to a steady state condition? What conditions do you propose to run next'.
>
> These are appropriate questions to ask about next steps. Mr Muncey's response cannot reasonably be read as angry. Nor can it reasonably read as suggesting the matter be covered up because he is proposing further steps in the work.

39. Mr Muncey also explained in his response: *'Currently the software limits the power if the thermistor gets to 165 degrees to try to stop the potting going over 180. …'* (This 15 degrees is called the 'offset'). He asked the Claimant to calibrate the max idle generating as modelled by Mr Evans as that was critical to the customer. '*Once we have a reasonable model for that then we*

can look into how the system works for transient events and see if the offset is safe for those events too.' Again this was a sensible professional approach to the next steps. We do not accept that it can reasonably be read as Mr Muncey asking the Claimant to change his numbers or provide inaccurate calculations or cover anything up. He was asking the Claimant to input other modelled data and then look at the offset. His response cannot be read as trying to cover up the issue. Indeed the Claimant's response at the time was, '*Yes I agree with you on this'*.

40. A thermistor restricts electricity flow as it gets hotter. At excessive temperatures it will cut the electricity off and acts therefore as a safety cut off.. Thermistors could not be put in the part of the ISG that would get hottest and therefore they had to be calibrated with a set off: a calculation of what temperature they would be at when the hotter part was at its limit. Mr Muncey and the Claimant were discussing thermistor positioning and the set off required for it. This exchange was therefore about achieving safety.

41. The emails show the Claimant ran the test with and without the 'housing' figures. On 6 August 2020 p449 he informed Mr Muncey that housing was a very important factor and that those temperatures came out at 300 and 209℃ respectively on this test. The Claimant did not say anything else but provided a colour simulation showing the temperatures.

42. Mr Muncey responded on the same day saying it was not quite what he was expecting and proposing more questions to try to resolve the problem. Again his answer, reasonably read, show he was engaging professionally with the Claimant in the solving of a problem and not at all angry. It did not suggest a fiddling of numbers nor that they should be covered up.

43. In his evidence Mr Muncey explained that *'a model saying the stator [the housing] was going to 300 degrees doesn't help because the stator is never going to get to 300 degrees. Several things will stop it. The thermistor is a safety cut off… the resistance gets higher. There is a top end of the power you can get out, a limit to that, and then that self-limits how much power goes in... The numbers where it is showing 300 [Celsius, there is] no way the machine could ever run. It was not useful modelling*.' He also pointed out that in the physical tests that had been done thus far there had been no metal melting, which is what would have happened had the Claimant's modelling been accurate. This account is supported by Mr Criddle's evidence. We accept it.

44. Mr Criddle told us and we accept that any significant heat problem would also be picked up in the end of line testing which is done once the product was ready to manufacture. It would never therefore be the case that a product with an excessive heat problem would be manufactured as this would be shown (if the modelling was accurate) in those physical tests. We find any reasonable engineer in the automotive field would know this

45. Another disagreement between the Claimant and Mr Muncey was about the mounting bush, made by a third party in a different plant. It was not a good fit. One argument was about how it was to be adjusted. Mr Muncey recalled they had a heated discussion over what he called basic trigonometry. Originally the bush was a cylinder. Mr Muncey wanted a lead-in chamfer (an

angled slope) to centre it. The Claimant was insistent on having a sharper angled slope. The Claimant is not suggesting that this was a safety matter or that his disclosures were to do with this disagreement. It was simply a difference of professional opinion.

46. In January 2020, Ms Lucey of HR working in the next office heard about an altercation between the Claimant and Mr Muncey. She went into the office and stopped it. She followed it up with both men in person and by email.

    46.1. In her email to the Claimant of 24 January 2020 she stated that it was inappropriate for such disagreements to take place in the open office. She suggested in future it should be in a private room or walk away. There were private rooms available.

    46.2. In her email to Mr Muncey she used the same wording and additionally reminded him as a manager he must act appropriately.

    46.3. Both accepted her emails. We do not agree that Ms Lucey told the Claimant to obey orders. In fact her email implicitly recognises he and Mr Muncey might continue to have disagreements: her point was not to have them the open office.

47. On 10 March 2020 the Claimant was moved from the ISG project to the TIGERS project. He was later moved back to work on the ISG. Mr Muncey explained that the Claimant was needed on the TIGERS project. Given our findings that the Claimant was required to work where needed, we see nothing surprising in this move. Nor was it disadvantageous to him.

48. On 20 March 2020 all were instructed to work from home where possible because of the pandemic. It was not possible, initially, for the Claimant to work from home because of his larger workstation. By 26 March 2020 emails show he received a laptop enabling him to log on from home remotely. He agreed later to hybrid working. His own email shows he was not the only person affected in this way.

49. On 15 April 2020 the Respondent sent the Claimant and all other employees at his level of salary a letter asking for a voluntary 10% pay cut (p436). The letter included the words: '*For the avoidance of doubt this is voluntary reduction for a limited period.'* Attached to it was a form employees were asked sign '*if you agree'*. The vast majority agreed but not all. In the same letter the First Respondent warned that there might be a 3-4 week period of furlough. Recipients of the letter were reassured that, if they were subsequently furloughed and had already agreed the 10% cut, then there would be no further furlough pay reduction. It is plain from the letter that it was not compulsory to take the pay cut. The Claimant agreed to it, albeit unwillingly. It was intended to last through quarters 3 and 4, but in fact ended in September 2020.

50. On 20 April 2020 the Claimant was put on furlough until the end of June 2020. Mr Criddle was asked to identify anyone he could lose for 6 weeks without direct impact on customer delivery. He chose around half a dozen of the team including older and younger members with different functions.

51. We accept Mr Dunn's evidence that, in May 2020, 5 other employees were made redundant.

52. On his return to work the Claimant complains now (but not at the time) about not being allowed to work from home. In our judgment the arrangements after he received the laptop were that he was allowed to work from home and do hybrid working if he wished.

53. We find that in July 2020 the Claimant was not stopped from doing professional training. The Claimant could access training slides. On the files for those slides it looked as if some were missing but these 'gaps' in the slide numbers simply reflected the different iterations of the course provided by SR over the years. We accept Mr Muncey's evidence that none were missing.

54. We do not accept the claim that, on about 6 August 2020, the Claimant told Mr Muncey and Mr Criddle that incorrect heat test results were being sent to the customer. At paragraph 63b of his statement, the Claimant say that Mr King, a project manager, told him the customer *knew* of the seriousness of the thermal problem. Yet in cross-examination the Claimant stated '*I talked with the project manager Mr King. I said this should be told to the customer. Mr King said if you tell them straight away you will be sacked next day. You can't do that.*' We find this oral evidence of the Claimant to be unreliable because it contradicts his written statement. Mr Criddle's evidence supports that the customer knew because it was very involved. He said they were always '*fully aware of our problems, warts and all*'.

55. A meeting of managers including Mr Dunn took place on 6 October 2020 to look at the delayed restructure. They agreed the second half of the restructure plan be implemented. The sister companies' income had much reduced because the Bradford plant had closed and the Coventry plant had seen a 40% reduction in sales. The cash was not there to support the headcount.

56. On 12 August 2020 the Claimant was removed from the low power connector work. This work was not connected with the thermal analyses he had been doing. It was the nature of the Claimant's role that he was moved around on different tasks.

57. The Claimant complains that, for a month from 17 August 2020 to 17 September 2020, Mr Muncey '*did not permit the test team to work on the Claimant's requirement or request for properly calibrated testing*'. Mr Muncey disputes this. He points out that there was always a queue for testing. Mr Criddle says it was not in Mr Muncey's gift to agree or block a test. We accept the managers' evidence that this was about priority for testing rather than any refusal to permit a test. This is corroborated in the Claimant's own 4 November email (the 'speak-up' complaint), which shows he knew they were waiting on tests which were not a high priority. We do not accept that testing was not permitted or prevented.

58. Mr Evans, in the age category below 50, worked in Coventry doing electro-magnetic effect modelling. He used software for this called JMAG. Mr Muncey accepts he may have asked Mr Evans to do a piece of work.

This was because Mr Evans was familiar with the JMAG software. We accept this explanation. The Claimant did not complain about this.

59. On 14 September 2020 senior managers sought to finalise the restructure. The plan continued to show the Claimant's role as potentially redundant.

60. Mr Criddle was consulted about who he could lose. He was reluctant to lose anyone but had to choose the least-worst option for his team. He agreed the Claimant should be selected because there was less work for him to do and the work that remained could be bought in from other companies. While Mr Criddle was aware of the difficult relationship between Mr Muncey and the Claimant, this did not influence his decision. We are equally clear that the results the Claimant was reporting in his modelling did not influence Mr Criddle's view because they were the subject of appropriate professional engagement by him.

61. During 15 to 19 October 2020 the Claimant exchanged emails with colleagues including Mr Muncey and Mr Criddle (p464-473). The sequence is as follows:

    61.1. A question came from the Quality Manager of Federal Mogul in Germany about rotor temperature.

    61.2. This was fed back to the Claimant who explained on 30 September 2020 that the rotor is not currently in the CFD model.

    61.3. By 15 October 2020 the Claimant provided the first lot of simulation results for this new rotor modelling. He said: '*maximum rotor temperature is 222℃. However power loss values have not been calibrated with a suitable thermal test. This is the reason for viewing the above conclusions as preliminary.*'

    61.4. On the same day Mr Criddle then asked the Claimant to put in a different power parameter and asked questions about the results. The Claimant agreed. Mr Evans got involved with electromagnetic modelling.

    61.5. On 19 October 2020 the Claimant sent an email to Mr Criddle copied to others, its subject, '*temperature of rotor while running a unit'*. Using the 1555W power input suggested by Mr Criddle, the Claimant said: *'the maximum rotor temperature is reduced by 23.6℃ to 198.7℃ … This time the total power loss is real from the test, so the temperatures may not be too far away from the reality. However, both of these two models have not been calibrated, unfortunately. The rotor temperature is estimated to be 18.7 deg higher than the 180℃ limit.'*

62. In his later 4 November 2020 email, the Claimant alleged the delay in Mr Criddle getting back to him from 19 October until 4 November 2020, p481, showed that there was likely to be a cover-up of the problem he was raising. Mr Criddle denies this. He said the Claimant's email of 19 October 2020 was '*the end of a discussion about adjusting the model and the temperature was gradually being brought down. When the Claimant referred to 197℃ for the rotor this was really not important. By October 2020 we had*

already released and [were] starting to build units for the customer to test. No materials in the rotor were at all temperature sensitive. Temperature sensitivity for the rotor existed for a short period of time in prototype laminations due to the glue element in the rotor (the glue being temperature sensitive). But by October/November 2020, heading into the winter test season, the glue was no longer present. We were using fully metal rotors. It might have been achieving that [temperature] but it was not a problem. I wouldn't have read the email as an alarm bell.' We accept this. We are clear that the lack of a speedy response would not have suggested to a reasonable engineer that there was a cover-up.

63. On 28 October 2020, the Claimant was warned that his post was at risk of redundancy and invited to a consultation meeting. At the meeting Mr Dunn explained the reasons for the restructure. He explained that the Claimant was in a pool of one given that he was the only mechanical design engineer. The Claimant said he was dissatisfied as he liked his job and felt he had a lot to offer.

64. The Claimant contends that there was not a true redundancy situation because he says, by October 2020, the companies' fortunes had improved. He points to the early ending of the voluntary pay cut at end of September 2020. We accept, however, Mr Dunn's account that they had not improved *sufficiently*: the Bradford plant was still closed and Coventry was behind in its earnings.

65. The Claimant compares himself to Mr Whatley and Ms Ting, departmental colleagues in the age group under 50 who were not selected for redundancy.

    65.1. Mr Whatley was a CAD engineer. Mr Muncey and Mr Criddle both state that he was indispensable. Without him the department could not function because he did the drawings. Mr Criddle was very clear that he would have opposed any proposed redundancy. We found their evidence to be compelling and accept it.

    65.2. Ms Ting was a graduate engineer doing noise vibration and harshness testing work ('NVH'). Mr Muncey said hers was also a unique skill set and of great interest to the customer. Her job required her to be on site for the testing and her knowledge of the testing would have been lost. We accept this work was specialised and accept the evidence that she was less easy to replace with a contractor.

66. On 4 November 2020 the Claimant sent a 'speak-up' complaint to senior managers Mr Dunn, Mr Stamper, MD, and Mr Herbst-Dederichs. In summary his concerns were that:

    66.1. the 29 September to 19 October emails, above, were 'an area of concern' that the customer should be informed about;

    66.2. the analysis on the thermistor position suggested that the 15 degree offset was not enough. '*The problem is we do not have reliable thermal test data to calibrate the power loss distribution model and CFD.* ***Currently we are still waiting for the thermal test to be***

scheduled. These jobs are well down the high priority list' (our emphasis);

66.3. his departure '*means no one will continue the thermal work that I lead for analysis, testing and power distribution estimate. Potentially the problem will be buried under the carpet. This is a cover-up and its purpose is to continue to receive funding from AMG without them knowing the truth*.'

66.4. '*Without further investigation and resolving the issue, the [ISG] rotor could get very hot in the engine bay during a long-distance drive. The insulation would break and further increase the power loss. The worst scenario would be coil insulation failure and the [ISG] eventually ceases to function or even causes spark and fire*.' He reminded the managers of the Boeing failures that killed people;

66.5. he suggested his manager had said *'leave it there, and there will be problems coming from another area that may change the situation';*

66.6. he alleged that he had been selected for redundancy because he was a risk to his [manager's] authority and '*that is why he wants to get rid of me so if any of the problems come to light he can blame me'.*

67. We pause to find that:

67.1. the thermistor issue was awaiting testing as the Claimant well knew and stated in this email;

67.2. his alarm in the second half of the letter about fire was premised on his speculation '*without further investigation and resolving*'. This was wholly unreasonable speculation given that research and development was the work of the First Respondent. It was also to unreasonably ignore the end of line testing that would very likely pick up any dangerous overheating if the thermistors did not cut off power sooner.

67.3. His suggestion that his manager had said '*leave it there'* etc was incorrect. He knew that his managers had engaged in a problem-solving approach to the heat issues he had raised, as exemplified in the emails we have set out.

67.4. He assumed Mr Muncey had selected him for redundancy. Mr Muncey was not involved in the decision.

68. On 5 November 2020 the Claimant spoke with Mr Dunn. The Claimant suggested protected characteristics had something to do with his redundancy. Although the Claimant was vague about this, Mr Dunn quite properly asked Mrs Hutchinson to consider it as part of the grievance.

69. On 11 November 2020 the Claimant attended a grievance meeting with Mrs Hutchinson.

69.1. He complained he was not aware of any announcement about redundancies.

69.2. He did not think his work had reduced. He thought the work he was doing was very important.

69.3. He said he did not want to put his grievance as discrimination. Mrs Hutchinson queried this with him a number of times, but he was clear p488-489. Although he did not give up his right to raise this argument in the future.

69.4. He said his main concern was whistleblowing. He connected what he saw as a sudden announcement about redundancy with the emails about overheating. He thought his concerns would be covered up.

69.5. He said that Mr Muncey had shouted at him several times but acknowledged his own part, as we have set out above.

70. Mrs Hutchinson investigated the grievance apart from the technical concerns. On 13 November 2020 she sent the Claimant her grievance outcome.

70.1. She said she could not find any connection between the redundancy and the alleged whistleblowing because his redundancy had been planned before he made any of the alleged disclosures.

70.2. She told him the technical points he raised were being handled separately.

70.3. She rejected the idea that the restructure was sudden. She pointed there had been Town Hall meetings by the MD in April and June explaining the steps the business was taking to reduce costs.

70.4. She investigated the conduct of Mr Muncey and discovered that Ms Lucey had intervened to set standards.

71. Mr Criddle was asked to investigate the technical side of the grievance.

71.1. We have set his points about the rotor out above.

71.2. Mr Criddle disputed the Claimant's new complaint of a potential cover up. He said, '*over my dead body'*. He said they would have to find someone else either within Tenneco or in some named other firms to do the work.

71.3. In relation to the allegation '*without further investigation and resolving the issue the RSG rotor could get very hot in the engine bay on a long distance drive,'* Mr Criddle said this was 'speculation' based on numbers for old material. He pointed out the many long distance drive tests and physical tests had not shown coil failures.

71.4. This report was not sent to the Claimant but fed back to him in the grievance appeal meeting (see later).

72. On 17 November 2020 a final meeting was held about redundancy with Mr Dunn. At the end of it the Claimant was handed a pre-prepared letter of termination for that day. He was paid in lieu of notice.

72.1. Mr Dunn explained in detail the problems at Coventry leading to the need to reduce cash.

72.2. Mr Dunn tried to illustrate costs saving by reference to the Claimant's salary. We accept he was not saying that individual salary size was a factor in selection.

73. We find in fact that the effective decision to select the Claimant for redundancy had been made by the 28 October 2020. The only thing that would alter it was if the Claimant said anything during consultation that the First Respondent had not thought about to avoid his redundancy. We rely on the many organisation charts from late 2019 in which the Claimant's post always appeared as one to lose. We rely on Mr Dunn having pre-prepared the letter and explaining he was waiting to see if, during the consultation, the Claimant could shift the selection away from him. (Mr Dunn did for example, delay the redundancy of one other at risk so that a project could be completed.)

74. Mr Criddle was chosen to hear the grievance appeal. He was the senior manager at the site with the necessary technical expertise to deal with the whistleblowing allegation. In his appeal letter of 3 December 2020, the Claimant had raised what he called 'new evidence' that Mrs Hutchinson thought Mr Criddle best able to deal with.

75. The alleged 'new evidence' concerned a tear down report that the Claimant said showed overheating concerning bearings. Despite a genuine and careful search in which Mr Criddle came back to the Claimant for more information, sought information from colleagues, as well as using a variety of relevant key words on the system, he could not identify any report along the lines described by the Claimant. Mr Criddle asked questions of relevant employees and none recalled such an incident. Mr Criddle set out the details of this investigation in his appeal outcome letter. He rejected with reasons we accept that rotor heat had anything to do with the closest tear down report he could find. He also rejected that the issue had been kept from the customer. The appeal was rejected.

76. On 7 January 2021, in a letter to the Claimant about his appeal against redundancy, Mr Stamper, MD, stated '*to the extent that you do still have issues concerning the product quality and/or the Company's transparency with the customer, then we would direct you to our Independent Ethics Line'* giving the number. The Claimant did not call the ethics hotline at any stage, whether before or after his employment. Such a call could have resulted in an independent investigation. This failure supports our conclusion (set out in more detail below) that the Claimant did not have a reasonable belief in the likelihood of passenger endangerment.

Later job Applications

77. In March 2021 the Claimant was rejected for the mechatronics role when it was advertised. He applied again and was rejected on 10 May 2021.

78. In both processes the First Respondent required a minimum of 5 years' experience and preferably 10 in 'electromechanical design' (p569, 597). The criterion of 'preferably 10 years' was not a cap on experience but a preference.

79. Given our findings above about his skill set and the specialised experience the First Respondent required, it is no surprise to us that the Claimant did not succeed in these applications. We accept that the First Respondent did not appoint the Claimant because of its genuine view that he lacked the necessary in-depth mechatronic experience.

80. It took until January 2023 for the First Respondent to recruit to the mechatronics position. This supports their evidence that they were looking for someone with a very particular skill set and experience.

81. We do not consider that the mechatronics role rejection therefore had anything to do with ACAS Early Conciliation which began on 6 February 2021. It cannot have had anything to do with the other protected acts which came after the first rejection.

Test Validation Engineer

82. We accept Mr Criddle's evidence that the Claimant does not have significant test validation engineering experience or skills. It is a unique skill set: test engineers develop a career in this area. While the Claimant disagreed, we find his CV shows insufficient depth of testing validation experience. It is no surprise to us that he was not appointed in June 2021. It had nothing to do with his ACAS Early Conciliation or bringing a discrimination claim.

Technical Project Manager

83. The technical project manager vacancy was for a much more senior position at a much higher salary.

84. We agree with Mr Criddle that the Claimant did not have specific project management skills. It is again no surprise to us that he was not appointed in April 2021. We find his rejection was not influenced by his protected acts.

Reasons for timing of claim

85. The Claimant was aware of the Equality Act before he was put at risk of redundancy. He knew that Employment Tribunals existed to hear age discrimination claims. He had sought advice from his local Citizens Advice about 2 months before he was put at risk of redundancy. He wanted to avoid confrontation.

Legal Principles

Detriment

86. To find a 'detriment' (under sections 27 and 39 of the Equality Act 2010 ('EQA') and section 47B of the Employment Rights Act 1996 ('ERA') we *'must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work'* see Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11 (paragraph 34). An unjustified sense of grievance cannot amount to 'detriment' but nor is it necessary to demonstrate some physical or economic consequence.

Public Interest Disclosure ('Whistleblowing') Claims

87. The Claimant must establish that:

    87.1. he has made a protected disclosure;

    87.2. he was subject to a subsequent detriment or dismissal; and

    87.3. the disclosure had a material influence on the detriment,

    87.4. and/or the disclosure was the sole or principal reason for dismissal.

What is a protected disclosure?

88. Legally, a worker is only protected if he makes certain types of disclosures in certain circumstances.

89. So far as is relevant to this case, section 43B(1) ERA provides that 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— (d)That the health or safety of any individual has been, is being, or is likely to be endangered;…(f)That information tending to show any matter falling within any one of the proceeding paragraphs has been or is likely to be deliberately concealed.*' We give paragraphs (d) and (f) the shorthand 'the wrongdoing' for ease of reference.

90. Depending on the context, we may analyse a particular communication in isolation or in connection with others.

91. The Claimant must show that he had a **reasonable belief** that **the disclosure** of information **tends to show** the wrongdoing. It is not enough that the Claimant had a belief that there is or is likely to be wrongdoing (Soh v Imperial College of Science, Technology and Medicine EAT 0350/14). The belief has to be that the disclosure tends to show this. In Kilraine v LB Wandsworth [2018] ICR 1850 in the Court of Appeal, Sales LJ held that the disclosure must have '*sufficient factual content and specificity such as is capable of tending to show'* the required wrongdoing or deliberate

concealment of the same. This is a matter '*for the evaluative judgment of the tribunal in the light of all the facts of the case*' (paras 35-36).

92. The phrase '*is likely to be*' has been interpreted as meaning more than a mere possibility or risk of future wrongdoing. In Kraus v Penna [2004] IRLR 260, paragraph 24 Cox J, the EAT held that the information disclosed should tend to show, in the Claimant's reasonable belief, that the wrongdoing was '*probable or more probable than not*'.

93. Further, the belief must be a reasonable belief. We apply an objective standard to what is reasonable and its application to the personal circumstances of the discloser.

    93.1. A whistle-blower must exercise some judgment on his own part consistent with the evidence and the resources available to him, Darnton v University of Surrey [2003] IRLR 615, EAT. So, a qualified medical professional is expected to look at all the material including the records before stating that the death of a patient during an operation was because something had gone wrong Korashi v Abertawe Bro Morgannwg University Health Board [2012] IRLR 4 at paragraph 62.

    93.2. However, the disclosure may still be a qualifying disclosure even if the information is incorrect, in that a belief may in some circumstances be a reasonable belief even if it is wrong.

Causation

94. As to whether the *detriment* was caused by the disclosure, section 47B will be infringed if the protected disclosure **materially influences (in the sense of being more than a trivial influence)** the employer's treatment of the whistle-blower', see Elias LJ in Fecitt v NHS Manchester [2012] ICR 372.

95. In automatic unfair dismissal cases the test for causation is more stringent. Section 103A ERA provides, '*An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if* ***the reason (or, if more than one, the principal reason****) for the dismissal is that the employee made a protected disclosure*.' (Our emphasis) The reason for a dismissal is the set of facts known to an employer or beliefs held by it, which cause it to dismiss. 'Principal reason' means more than a material influence on the reason but the main reason.

96. The Claimant does not have to show that the employer believed the disclosure was protected, only that the disclosure was the reason or principal reason, Beatt v Croydon Health Services NHS Trust (Brief 1073) 2017 ICR 1240 CA.

Age Discrimination

97. Under section 120 of the EQA the Tribunal has jurisdiction to determine a complaint relating to employment under Part 5.

98. The complaint here is that the Respondent discriminated against the Claimant; by dismissing him contrary to section 39; or in relation to the other alleged detriments set out in the list of issues.

99. The Claimant claims direct and indirect age discrimination. These are different types of discrimination and we explain them here.

Direct age discrimination

100. Direct discrimination, contrary to section 13 of the EQA, requires the Tribunal to find that the Claimant has been treated less favourably by the Respondent than it would have treated someone without the protected characteristic but whose circumstances are not materially different and because of age.

101. We must first decide whether the Claimant has shown facts from which we could properly find that the treatment was because he was in the age group over 50.

102. Section 23(1) EQA provides that '*on a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case.*' If someone in the same circumstances but without the same protected characteristic was treated differently, then that is a sign that the protected characteristic may have been the reason for the different treatment.

103. We remind ourselves that a difference in treatment and a difference in age, without more, will be insufficient and we must find 'something more' that enables us to properly conclude age was the reason.

104. If the Claimant does prove facts from which we could properly conclude age discrimination, then the burden shifts to the Respondent to provide an explanation for the treatment that has nothing whatsoever to do with age. In clear cases we can look to this 'reason why' question first but we remind ourselves that discrimination is rarely admitted and usually depends upon the drawing of inferences from the primary facts.

Indirect age discrimination

105. First, the Claimant must show the Respondent applies a policy criterion or practice. Here the Claimant relies on a criterion.

106. The criterion must disadvantage the age group that the Claimant is a part of in comparison to others, section 19(2)(b) EQA: '*it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it'.*

    106.1. On this we sometimes look for statistical evidence.

    106.2. We can also take judicial notice of the fact that some protected characteristics are more likely to be associated with particular disadvantages.

107. Then the Claimant must also show he personally is also put to 'that' disadvantage.

108. If the Claimant establishes these steps, then we must consider whether the Respondents can objectively justify the treatment. Baroness Hale in Homer prevails upon Tribunals to take a structured approach, paragraph 24 and Mummery in R (Elias) v SoS for Defence, paragraph 165. Mummery LJ suggested we ask 3 questions:

    108.1. Is the objective sufficiently important to justify limiting a fundamental right?

    108.2. Is the measure rationally connected to the objective?

    108.3. Are the means chosen [i.e. the criterion] reasonably necessary to achieve the objective? One question we can ask here is whether lesser measures would do.

Victimisation

109. Section 27 of the EA defines victimisation as follows:

    '*(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*

        (a) B does a protected act, or

        (b) A believes that B has done, or may do, a protected act.'

110. It is admitted here that the Claimant did protected acts. We must ask whether the detriments the Claimant alleges were because he did them.

Section 44 ERA: Health and Safety

111. Section 44(1)(c) ERA provides, so far as relevant that '*an employee 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 …being an employee at a place where there was no [employee safety] representative or safety committee he brought to his employer's attention by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.*

112. It is clear to us that the context of this section is about preventing or reducing risks to health and safety at work. That much is clear from section 44(1)(a) and from the structure of the section which references employee safety representatives and work safety committees. Thus, in our judgment, '*circumstances connected with work'* is to be interpreted as circumstances at the Claimant's work or connected with the Claimant's work that are harmful to his or other workers' health or safety.

Contractual Principles

113. The argument here must be that a separate document (the grievance procedure) was included in the contract by incorporation. We ask whether it

was intended by the parties that the relevant term/s would give rise to contractual rights enforceable by an individual employee, see Alexander v Standard Telephone and Cables Ltd (no 2) [1991] IRLR 286 HC.

Application of facts and law to the issues

Direct Age Discrimination

Issue 1(a) Between 31 October 2018 and 26 November 2018, did the Respondent offer the Claimant a salary at the bottom end of the range (£45,000 not £49,000)?

114. Our factual findings are that the Claimant was not offered a salary at the bottom end of the range. It was £5,000 higher than the salary originally advertised. This claim therefore fails.

115. In any event, the Claimant has not proved facts from which we could have properly concluded that the salary level was chosen for a reason to do with his being in the age group over 50. The Claimant argues that the First Respondent offered him a lower salary because of his age because it thought he had no option at his age but to take its offer. We do not accept this because the First Respondent did not offer the lowest salary, that which it advertised, but offered a higher salary, that which the Claimant had said he was prepared to accept.

116. In any event, the First Respondent has shown a reason that had nothing whatsoever to do with age. The reason the salary was offered at £45,000 was that this was what the Claimant had told it (via his agent and at interview) he was prepared to accept. The First Respondent did not offer less. His age was not a factor.

Issue 1(b) In April 2019, was the Claimant excluded from salary review?

117. The Claimant was excluded from the salary review but he has not shown any facts from which we could properly conclude the reason was age. He has not produced any evidence that other younger workers gained reviews.

118. In any event we find the Respondent has shown a reason that had nothing whatsoever to do with age: he did not get a salary review only because he was appointed in the 4th quarter of the previous year. The First Respondent applied its policy not to give a review, and would have applied the policy to anyone appointed in that quarter, therefore the treatment was not at all because of age. This claim therefore fails.

Issue 1(c) On 8 January 2020, was the Claimant denied promotion to Test Manager?

119. Our findings of fact are that the Claimant was not denied promotion to Test Manager. This claim therefore fails.

Issue 1(d) On 14 January 2020 the Claimant was excluded from salary review.

120. It is correct that the Claimant did not have a salary review but he has not proved facts from which we could properly conclude this was to do with his

age or age group. No one received a salary review in 2020. He has not shown any different treatment.

121. In any event we find the Respondent has shown a reason that had nothing whatsoever to do with age: the pandemic meant no salary reviews took place. Indeed many staff were asked to take a voluntary pay cut. This claim therefore fails.

Issue 1(e) On 22 January 2020 did Mr Muncey tell the Claimant that he had recorded some inaccurate calculations, shouted at him and punched the desk.

122. Mr Muncey did shout and bang the desk but the Claimant has not proved facts from which the Tribunal could properly conclude this behaviour was because of age.

    122.1. Mr Muncey did not shout at anyone else (whether older or younger).

    122.2. There is no evidence that Mr Whatley and Ms Ting acted like the Claimant in refusing to change modelling data in the light of physical tests results. They were not therefore appropriate comparators.

    122.3. There is no other fact from which we could properly draw an inference about age: indeed Mr Muncey was happy to employ the Claimant at 61 years of age. This does not suggest any unwitting prejudice in his mind against older workers.

123. In any event, the Respondent has shown a reason that had nothing whatsoever to do with age. Mr Muncey's behaviour was not because of age or because the Claimant had recorded inaccurate calculations but because of the profession disagreement we have described at length in our findings of fact. The Claimant did not wish to adjust his model to reconcile with data from physical trials. These disagreements were specific to the Claimant's resistance to Mr Muncey's approach, a standard engineering practice and nothing to do with age. This claim therefore fails.

Issue 1(f) 22 January 2020 and 24 January 2020, Ms Lucey criticised the Claimant for not obeying orders rather than dealing with his complaint about his manager's behaviour.

124. In our judgment Ms Lucey did not criticise the Claimant for not obeying orders. Her approach in intervening was exemplary and sensible. She treated both the Claimant and Mr Muncey in the same way and both accepted her intervention at the time. She did not treat the Claimant differently from Mr Muncey. The Claimant has not therefore proved facts from which we could properly conclude age was the reason for her intervention.

125. In any event, the First Respondent has shown a reason for her intervention that had nothing whatsoever to do with age. It was because of the public disagreements about which she had become aware. This claim therefore fails.

Issue 1(g) 20 March 2020, the Claimant was not allowed to work from home.

126. Our findings of fact are that there was a short delay of about a week before the Claimant was able to work from home, otherwise he was allowed to do so.

127. In respect of this short delay the matter is clear and we have gone straight to the 'reason why' question. The short delay was only because he had a large workstation that had to stay in the office. He was therefore waiting for a laptop to log-in from home. The delay was absolutely nothing to do with age but with the provision of necessary equipment for work. This claim therefore fails.

Issue1(h) From 15 April 2020, the Claimant was put on the Furlough Scheme rather than allowed to work from home.

128. The Claimant has not proved facts from which we could draw a conclusion that his age was the reason for his selection for furlough. We have found as a fact that Mr Criddle chose a range of younger and older employees. This claim therefore fails.

129. In any event, the reason was that the Claimant was one of several employees Mr Criddle felt he could do without for a short period.

130. It is now agreed the Claimant did not suffer a pay reduction of 20% - we deal with the 10% reduction below.

*Issue 1(i) On 17 **July** 2020, the Claimant was not allowed to do professional training.*

131. Our finding of fact is that Claimant was not denied the opportunity to do professional training. This claim therefore fails.

Issue 1(j) On 26 August 2020 did Mr Muncey choose a younger graduate to do a piece of work and become angry with the Claimant when challenge?

132. We have found that Mr Muncey did choose Mr Evans, a younger employee, to do a piece of work.

133. We have been able to go straight to the 'reason why' question here because it is clear from our findings of fact that the *only* reason Mr Muncey selected Mr Evans was because of his skill in the use of JMAG software. This claim therefore fails.

Issue 1(k) On 17 November 2020 the Claimant was selected for redundancy, the comparators are Mr Mathew Whatley and Ms Felicia Ting.

134. In our judgment, Mr Whatley and Ms Ting are not statutory comparators because they were not in the same (or not materially different) circumstances. This is because they had different roles to the Claimant. Mr Whatley's CAD work was indispensable. Ms Ting 's NVH work and the knowledge she had built up were different from the Claimant making her

less easy to replace with contractors. Thus, we do not draw any inference of age discrimination from their retention.

135. Otherwise the Claimant has not proved facts from which we could properly conclude the redundancy was because of age. We deal with the Claimant's points in turn:

135.1. While some companies seek volunteers, we cannot draw any inference from the fact that this employer did not. It is not a legal requirement. As this was a post-by-post restructure, asking for volunteers probably did not suit the First Respondent's aim.

135.2. We accept that, in normal circumstances, it would have been good practice to look at open vacancies to see whether there was any skill match that would suit redeployment. In this case there was a recruitment freeze which meant the First Respondent could not mitigate redundancies in this way. In any event, we have accepted Mr Criddle explanation that he would not have seen the Claimant as fitting the mechatronics post because of a lack of in-depth experience.

135.3. We have not been helped by either party's analysis of the age statistics because they include employees leaving for reasons other than redundancy. The question here is whether the selection for redundancy was influenced by age. If we were to look at other terminations they might be affected by age (by for example, younger workers looking elsewhere for advancement or by older workers choosing to retire).

135.4. Of the redundancy statistics we do have (p317-319): in 2020, 10 individuals were made redundant. Of these 5 were under 50 and 5 above 50 (p318). This is from a workforce of approximately 40 people. The average age of those made redundant in 2020 was 46.9 years old. These numbers do not suggest age was a factor, given the spread. We are told the age profile in 2019 was 44.46 years and in 2020 it was 45.55 years. These figures do not show us that the redundancy reduced the age profile at the business significantly enough from which to draw any inference.

136. In any event, we have found clearly that the reasons for selection were because of the Claimant's post not factors personal to him and the First Respondent's genuine view that his post could be removed as the 'least worst' option, with future work bought-in through contractors. Mr Whatley and Ms Ting were not as easy to remove. It was the post that the managers looked at rather than the person. We are satisfied therefore that the reason the Claimant was selected for redundancy was nothing whatsoever to do with age. This claim therefore fails.

Issue Being rejected for the following job applications:

~~*March 2021 – Mechatronics Design Engineer*~~

April 2021 – Technical Project Manager

May 2021 – Mechatronics Engineer

June 2021 – Test Validation Engineer

July 2021 – Senior Electromechanical Design Engineer

137. Given our findings of fact, again, we conclude the Claimant has not shown facts from which we could properly conclude he was less favourably treated because of age by any of these job rejections.

    137.1. While he had had done some work in the mechatronics field, it was not the in-depth work required by the Respondent. We take into account they were looking for a specialist, given how long they searched for one, from March 2021 until January 2023.

    137.2. He did not have the experience required by the Respondent in Test Validation.

    137.3. He did not have the experience required by the Respondent in project management.

138. In any event we find the reasons for the rejection of these posts were to do with skills and experience and not at all influenced by age.

139. These claims therefore fail.

Indirect Age Discrimination

Issue 2 Did the Respondent apply a provision criterion or practice of selecting employees for redundancy based upon salary?

140. We have decided individual salary was not in fact a criterion for selection. This was a misunderstanding of the example given by Mr Dunn at the consultation meeting. This issue therefore fails and we do not need to decide issues 3-5.

Issue 6 Did the Respondent apply a provision criterion or practice, namely of requiring a minimum of 5 years' and preferably of 10 years' experience for successful candidates to the roles in issue?

141. For the mechatronics role, the First Respondent applied a criterion of a minimum of 5 years' experience and preferably 10 years.

Issue 7 Did that put older workers at a particular disadvantage and was the Claimant himself put at that particular disadvantage?

142. We do not find that the criterion put older workers at a disadvantage because of the obvious fact that engineers will develop experience as they age. Mechatronics has been a discipline since the mid 1990s: it is not so

new therefore as to disadvantage older workers. If anything the experience required **benefited** older applicants. This claim therefore fails at this stage.

143. We understand why the Claimant may have been advised that such a criterion might be unlawful, but this would be an argument for a younger worker not someone in his age group.

144. Nor do we agree that the 10 year preference was a maximum or a cap. It is stated as a preference.

145. We therefore do not need to consider issue 8.

Protected Disclosure

Issue 9 Did the Claimant make all or any of the following protected disclosures? His case is that on each occasion he reasonably believed that the information provided tended to show a risk to the health and safety of an individual as there was a risk of the car engine overheating and, as such, that it was in the public interest

Issue 9(a) 24 February 2020 to Mr Criddle, repeated on 4 March 2020 and 6 March 2022 Mr Muncey: information about engine heat test data results.

146. We have found that there was no disclosure of information relied on by the Claimant on 24 February 2020. There was no protected disclosure in relation to Issue 9(a).

Issue 9(b) 28 July 2020 to Mr Muncey: information with regard to the heat test data results and that the engine could be over 100 degrees Celsius over the safe limit.

147. We consider the Claimant's emails at p453 and p449 referred to in our findings of fact. In both emails the Claimant plainly discloses information in the sense of facts about the high temperatures found in his modelling/simulation.

148. In our judgment, however, the Claimant cannot have reasonably believed that the information in these disclosures, whether read alone or read together, tended to show that the safety of future car passengers was likely to be endangered for the following reasons:

    148.1. There is no indication that the information he provides from his modelling presents a future safety concern.

    148.2. The information is in a sequence of emails in which a problem-solving approach is being followed. The Claimant could only have reasonably appreciated from this that he was raising a problem that was being worked on with a view to resolution.

    148.3. Given the context, the Claimant could not have reasonably believed that his statement about the higher temperatures he modelled tended to show likely future endangerment to passengers in a car. His modelling was of a prototype in development. The machine he was modelling was not about to be put into a car for purchase. It

was not even being manufactured. It was still being developed. The Claimant knew this and that the process he was involved in was a problem-solving research process.

148.4. The Claimant cannot have reasonably believed the information in his disclosures tended to show the likelihood of danger to passengers because the information was being given before the end-of-line testing which took place before anything was placed in a car.

148.5. Further, the Claimant could not have reasonably believed the temperatures he disclosed were likely to be reached in the real world because of the existence of the thermistor cut off, and that the physical testing so far had shown no melting metal. He was not yet clear about the thermistor set off because he was awaiting calibration testing not because it was wrong.

148.6. In all the circumstances it was not reasonable for the Claimant to believe that what he was saying about high temperatures in this modelling tended to show the probability that the safety of car users would be endangered.

149. Nor is there anything in the Claimant's disclosures which tends to show that such information is being or is likely to be concealed. The Claimant was simply giving his findings. He says nothing, states no facts in his disclosures, that would tend to show he believed the information was likely to be concealed. Nor in the email chain as a whole could he have believed his disclosures tended to show cover-up: Mr Muncey's responses could not be read in this way.

150. In our judgment these were not therefore protected disclosures.

Issue 9(c) 6 August 2020 orally to Mr Muncey and Mr Criddle: incorrect heat test results were being sent to the customer.

151. We have found there was no verbal disclosure to either Mr Criddle or Mr Muncey of this kind. Thus this issue fails.

Issue 9(d) 15 and 19 October 2020 to Mr Muncey, Mr Mayr, Mr King and Mr Criddle: information that the temperature results showed excessive heat.

152. We look at first at the disclosure on 15 October 2020 that the maximum rotor temperature was 222℃. In his email the Claimant explained that this result should be viewed as preliminary because power loss values had not been calibrated with a suitable thermal test.

153. We agree that this is a disclosure of information.

154. But we are clear that the Claimant could not have had a reasonable belief that what he wrote tended to show that it was likely that the safety of car passengers would be endangered for the following reasons:

154.1. He wrote that this figure should be seen as preliminary and further testing was required.

154.2. Again it was in a string of emails in which the engineers were asking questions and looking for solutions. It was not reasonable to believe that, despite this context of further research and development and real-world testing, this preliminary figure would likely stay the same.

154.3. For the same reasons as we give above, the Claimant knew these were preliminary results on a computer model of a prototype not a finished product that was about to be put in a car or even near production. He cannot have reasonably believed that what he wrote tended to show it was probable that safety in the future would be endangered: the whole context showed much work had yet to be done and problems solved before the product reached manufacture stage.

155. The Claimant's 19 October 2020 email showed a reduced maximum rotor temperature of 198.7℃. This was still 18.7 ℃ higher than the maximum. Again, this is a disclosure of information.

156. Again we are clear that the Claimant cannot have had a reasonable belief that what he wrote in this email tended to show that it was probable that car passengers would be endangered.

156.1. We refer to our reasoning above that he ought reasonably to have known that this was a prototype sample and further testing and problem solving was to take place; and

156.2. In this disclosure although he said the temperatures '*may not be too far away from* reality' he also acknowledged the lack of calibration for the models. Thus the temperatures were not at the level of finality that would lead a reasonable engineer to think it was probable that safety would be endangered.

157. Nor did these disclosures disclose information that tended to show that the likelihood of a person's safety being endangered was being or was likely to be concealed. Quite to the contrary: the disclosures were in a series of emails between engineers who were problem-solving in an open and questioning way. The Claimant did not write anything that suggested or tended to show concealment, never mind deliberate concealment.

158. If we read the two disclosures together, our judgment does not alter for the same reasons.

159. The Claimant relies on a delay in response *after* his 19 October 2020 email. While we do not agree with him that the delay was significant for the reasons Mr Criddle gave, in any event it is not relevant to what the Claimant's prior disclosures tended to show. The Claimant did not know about this alleged delay when he wrote the disclosures and it could not therefore have formed part of his reasoned belief.

160. In our judgment these were not therefore protected disclosures.

Issue 9(e) 4 November 2020: a speak-up complaint.

161. We can deal with this first by going straight to the question of causation. If the disclosure did not cause any of the matters complained about, then we do not need to consider whether it was protected or not.

162. Disclosure 9(e) was made *after* the Claimant had been notified of the risk redundancy but before the date of termination. Thus, the only decision it could, in theory, have caused is the final decision to make the Claimant redundant. But we have found that this decision had effectively been made by 28 October 2019 unless the Claimant said anything during the consultation to change Mr Dunn's mind. Mr Dunn was clear that the Claimant said nothing to change his mind. The 4 November 2020 letter did not cause or influence of any of the alleged detriments or dismissal because it came after all of them and the effective decision to select him for redundancy.

163. In any event, we do not find that the speak-up complaint was a protected disclosure for the following reasons:

    163.1. While the Claimant wrote that the customer should be informed about the area of concern in his 29 September and 19 October emails, this was not information but an assertion of what should happen in the future.

    163.2. The Claimant stated that his 29 September and 19 October emails about rotor heat were an area of concern. He said the analysis of the thermistor position suggested that 15 degrees was not enough of an offset. But he stated that they were awaiting test data for calibration. This was all information. But it did not tend to show that he had a reasonable belief in the probability that passengers would be endangered. All he has disclosed thus far is an area of concern upon which more testing was awaited.

    163.3. The Claimant then speculates in his speak-up complaint that his departure meant no one would continue the thermal work. This was unreasonable speculation: no one had led him to believe this and he cannot have reasonably believed it from the problem-solving approach taken in response his emails set out above. No reasonable engineer knowing the Respondents' business and engineering practice, would have speculated in this way. The First Respondent's business was R&D and they could buy-in such expertise. This was entirely normal engineering practice: the Claimant's CV shows he had been a consultant for some years. It was not the case that anyone had told him or led him to believe the heat work would stop. Nor does he disclose information to this effect in the speak-up email. He cannot have reasonably believed the information in his email tended to show his work would not be continued. This was an unreasonable assertion.

    163.4. The Claimant's further argument that *'without further investigation and resolving of the issue'* then the rotor could get hot on a long

distance drive and the worst case scenario was coil insulation failure and the ISG eventually ceasing to function or 'even … spark and fire.' He cannot have reasonable believed this tended to show probable endangerment. It is premised on the unreasonable speculation that there would be no 'further investigation'. He could not have reasonably believed this given the professional, problem-solving approach to his concerns in the email responses. In any event, his worst case scenario is not written as a probability but as an 'even' - a possibility.

163.5. The Claimant could not have reasonably believed his manager said 'leave it there' was information tending to show a deliberate cover-up because this was not in fact the approach of his manager and could not have been reasonably understood as such. It is clear in the relevant emails that his manager was searching for a solution. In any event, the statement in his email that about this 'leave it there' approach was not a statement that could be reasonably read as tending to show deliberate concealment, but a manager suggesting other matters might change the situation: in other words an alternative order to solving the problem.

163.6. Even if he could have reasonably believed Mr Muncey was the person who had selected him for redundancy (which was not in fact the case) this was not information tending to show that a person was probably going to be endangered or that this would be covered up rather it was a statement that if problems later came to light he would be blamed.

164. The belief must be that **the information in the disclosure tends to show** the required wrongdoing (our emphasis). For all of these reasons, in our judgment the Claimant did not have a reasonable belief that anything in his speak-up report tended to show that it was probable that health and safety of car passengers would be endangered or that there was a deliberate cover up of such information.

165. Thus we would have concluded, if it had been necessary, that the 4 November 2020 email was not a protected disclosure.

166. We are supported in our conclusions about the Claimant's belief because he did not raise a concern through the ethics hotline, which was the avenue for independent investigation.

Issue 10 Was the Claimant subjected to any of the following detriments and if so was that influenced by the disclosures?

a) 1 March 2020, Mr Muncey discredited the Claimant's test results and shouted at him.

b) 10 March 2020, the Claimant was removed from the ISG project and put on the TIGERS project.

c) 20 April 2020, being put on furlough.

d) 1 July 2020, not allowed to work from home.

e) 28 July 2020 and 6 August 2020, Mr Muncey did not accept the Claimant's results and told him to produce different calculations, shouted and punched the desk.

f) 12 August 2020, the Claimant was removed from the low power connector work and other tasks as set out at paragraph 2.15 of the particulars of claim table.

g) 17 August 2020 to 17 September 2020, Mr Muncey did not permit the test team to work on the Claimant's requirement or request for properly calibrated testing.

h) 28 October 2020, put at risk of redundancy.

167. We have decided that no protected disclosures were made therefore there is no need for us decide whether the Claimant was subject to detriments. Nevertheless, we do so for completeness.

168. Alleged Detriments a-d came before any of the disclosures of information. They cannot therefore have been influenced by them.

169. Alleged Detriment e: we have found that Mr Muncey's conduct here was not about the disclosures of high temperatures in the Claimant's modelling but the Claimant's resistance to Mr Muncey's guidance about reconciling the model with the dyno/real data. It was not therefore influenced by disclosures.

170. Alleged Detriment f: the removal from low power work was not a detriment in the legal sense. No reasonable worker in the Claimant's position can have felt disadvantaged by it because the Claimant's role was a roving one and it was usual to move him from task to task.

171. Alleged detriment g: it was not in Mr Muncey's power to grant tests. The Claimant himself knew, from what he wrote in his speak-up complaint, that they were waiting for tests to be done and there were other priorities. He knew therefore that the tests were in the queue. Mr Muncey had not refused or permitted the testing. On the facts therefore this was therefore not a detriment.

172. Alleged detriment h: the decision to put the Claimant at risk of redundancy was formed in late 2019, long before any of the alleged disclosures. We do not consider that it was influenced in any way by what he said or wrote later about high temperatures in his modelling. The First Respondent has provided logical and understandable reasons for selection, which we have accepted.

Section 103A was the dismissal automatically unfair

173. We have found the disclosures were not protected. Therefore this claim fails.

174. In any event, we would not have found that the sole or principal reason for the dismissal was the disclosures because the initial decision to select the Claimant for redundancy came long before any of them. The First Respondent's reasons for finalising the selection were not related to the disclosures: namely that his job could be done by contractors and it was the least-worst option to remove his post to reduce headcount.

Section 44 claims

Issues 11-13

175. Given our legal interpretation of section 44 ERA, this claim fails. This is because, even on his case, he was not bringing to his employer's attention circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety. We consider section 44 is directed at health and safety connected with his work, not beyond work.

Breach of Contract

Issue 15 Was the grievance procedure a contractual obligation?
Issue 16 If so, did the Respondent act in breach of it?

176. In closing submissions, the Claimant confirmed that his complaint about the breach of the grievance procedure was that Mr Criddle had been selected to hear the appeal and this was a breach of clause 4 of the contract.

177. Clause 4 of the procedure requires the appeal to be dealt with by the 'Site manager' or equivalent.

178. We have heard no evidence about who the Site manager was but we are clear that Mr Criddle falls within the definition of the 'equivalent' of site manager. This is because he was two levels senior to the Claimant and was the senior manager who had the necessary technical knowledge to deal with the complaint. We cannot see, in relation to the technical points, who else could have heard the appeal. We find the words 'equivalent' are designed to give the employer some leeway in cases like this one where particular technical expertise and knowledge is required to understand the grievance.

179. In those circumstances the First Respondent was not in breach of its grievance procedure.

180. We have therefore not had to decide whether the grievance procedure was contractual. The First Respondent appears to consider, through Ms Lucey, that such procedures can never be contractual. This is not the case. The First Respondent may wish to make it clear in its employment policies and contracts whether it intends the procedure to be contractual or not.

Holiday Pay

181. The First Respondent has now conceded the holiday pay claim and we have given judgment on it accordingly.

Unlawful Deduction of Wages

Issue 21 Was the deduction of 10% in wages in 2020 agreed or not? If it was agreed then it was not unlawful; if it was not agreed then it was unlawful.

182. It follows from our findings of fact that the 10% reduction in pay in 2020 was not compulsory but voluntary. The Claimant, albeit reluctantly, agreed it. The contract was varied by this agreement for the period of the reduction. There was therefore no unlawful deduction of wages because wages payable under the varied contract were paid. This claim therefore fails.

Victimisation section 27, 39 Equality Act 2010

Issue 22 protected acts.

183. It is agreed that the following were protected acts; starting ACAS early conciliation; the presentation of the first claim; a complaint on 9 June 2021

Issue 23 If so, was the rejection of the Claimant's job application/s below because of the protected act/acts:

Technical project manager rejected on 7 May 2021;

Mechatronics engineer application of 10 May 2021;

Test Validation Engineer rejected on 29 June 2021;

Senior Electromechanical design engineer, rejected on 12 July 2021.

184. It follows from our findings of fact that the victimisation claims fail because the rejections of the job applications were not because the Claimant had done the protected acts but because he was judged genuinely not to have the necessary skills or experience.

185. We dismiss all claims against the Second Respondent which did not employ the Claimant.

Employment Judge Moor

28 February 2023

APPENDIX ONE
FINAL LIST OF ISSUES

Less favourable treatment because of age

1. Did the Respondent treat the Claimant less favourably because of his age in the following ways?

    a) Between 31 October 2018 and 26 November 2018, the Respondent offered the Claimant a salary at the bottom end of the range (£45,000 not £49,000).

    b) April 2019, the Claimant was excluded from salary review.

    c) 8 January 2020, the Claimant was denied promotion to Test Manager.

    d) 14 January 2020 the Claimant was excluded from salary review.

    e) 22 January 2020 Mr Muncey told the Claimant that he had recorded some inaccurate calculations, shouted at him and punched the desk.

    f) 22January 2020 and 24 January 2020, Ms Lucey criticised the Claimant for not obeying orders rather than dealing with his complaint about his manager's behaviour.

    g) 20 March 2020, the Claimant was not allowed to work from home.

    h) From 15 April 2020, the Claimant was put on the Furlough Scheme rather than allowed to work from home ~~and therefore suffered a pay reduction of 20%.~~

    i) 17 **July** 2020, the Claimant was not allowed to do professional training.

    j) 26 August 2020, Mr Muncey chose a younger graduate to do a piece of work and became angry with the Claimant when challenged.

    k) 17 November 2020 the Claimant was selected for redundancy, the comparators are Mr Mathew Whatley and Ms Felicia Ting.

    l) Being rejected for the following job applications:

        ~~March 2021 – Mechatronics Design Engineer~~

        April 2021 – Technical Project Manager

        May 2021 – Mechatronics Engineer

June 2021 – Test Validation Engineer

July 2021 – Senior Electromechanical Design Engineer

Indirect Discrimination related to age

2. Did the Respondent apply a provision criterion or practice of selecting employees for redundancy based upon salary?

3. Did the PCP put older employees at one or more particular disadvantages when compared with younger employees? The Claimant will say that older employees tend to have higher pay.

4. Did the PCP put the Claimant at that disadvantage?

5. The Respondent does **not** rely upon a justification defence as it denies that there was any such PCP applied.

6. Did the Respondent apply a provision criterion or practice, namely of requiring a minimum of 5 years' and preferably of 10 years' experience for successful candidates to the roles in issue?

7. Did that put older workers at a particular disadvantage and was the Claimant himself put at that particular disadvantage? The Claimant will say that it did so in relation to the jobs set out above that he applied for (except the first which claim has been struck out).

8. If so, was it a proportionate means of achieving a legitimate aim? The Respondent's legitimate aim is to have competent mechatronics engineers in post. **It says the criteria were an appropriate and proportionate means of achieving that aim.**

Protected Disclosure - Detriment

9. Did the Claimant make all or any of the following protected disclosures? His case is that on each occasion he reasonably believed that the information provided tended to show a risk to the health and safety of an individual as there was a risk of the car engine overheating and, as such, that it was in the public interest.

    a) 24 February 2020 to Mr Criddle, repeated on 4 March 2020 and 6 March 2022 Mr Muncey: information about engine heat test data results.

    b) 28 July 2020 to Mr Muncey: information with regard to the heat test data results and that the engine could be over 100 degrees Celsius over the safe limit.

    c) 6 August 2020 orally to Mr Muncey and Mr Criddle: incorrect heat test results were being sent to the customer.

d) 15 and 19 October 2020 to Mr Muncey, Mr Mayr, Mr King and Mr Criddle: information that the temperature results showed excessive heat.

e) 4 November 2020: a speak-up complaint.

10. Was the Claimant subjected to any of the following detriments?

a) 1 March 2020, Mr Muncey discredited the Claimant's test results and shouted at him.

b) 10 March 2020, the Claimant was removed from the ISG project and put on the TIGERS project.

c) 20 April 2020, being put on furlough.

d) 1 July 2020, not allowed to work from home.

e) 28 July 2020 and 6 August 2020, Mr Muncey did not accept the Claimant's results and told him to produce different calculations, shouted and punched the desk.

f) 12 August 2020, the Claimant was removed from the low power connector work and other tasks as set out at paragraph 2.15 of the particulars of claim table.

g) 17 August 2020 to 17 September 2020, Mr Muncey did not permit the test team to work on the Claimant's requirement or request for properly calibrated testing.

h) 28 October 2020, put at risk of redundancy.

If so was the detriment influenced by the disclosure
If so, was the sole or principal reason the disclosure.
Section 44(1)(c) Employment Rights Act

11. Was there a safety representative or safety committee at the First Respondent;

12. If not, did the Claimant:

12.1. bring to the First Respondent's attention

12.2. by reasonable means

12.3. circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.

13. If subjected to any of those detriments, was it because of a protected disclosure(s) and/or his action under section 44(1)?

Protected Disclosure or section 44 – unfair dismissal

14. Was the sole or principal reason for dismissal the fact that the Claimant had made a protected disclosure(s) or his action under section 44(1)(c) reason above?

Breach of Contract

15. Was the grievance procedure a contractual obligation?

16. If so, did the Respondent act in breach of it?

Holiday Pay

17. It is agreed that the claimant was owed 13 days' outstanding holiday pay.

What does this payment amount to? ~~**the holiday year was the calendar year.**~~

18. How many days' paid holiday did the Claimant take in 2020 before termination?

19. How much was the Claimant's holiday entitlement (statutory/contractual) pro rata in 2020?

20. If the number in 17 is greater than the number in 16 – then the Claimant is owed payment for the difference.

Unlawful Deduction of Wages

21. Was the deduction of 10% in wages in 2020 agreed or not? If it was agreed then it was not unlawful; if it was not agreed then it was unlawful.

Victimisation section 27, 39 Equality Act 2010

22. Were the following protected acts?

    22.1. Starting ACAS early conciliation

    22.2. The presentation of the first claim

    22.3. A complaint on 9 June 2021

23. If so, was the rejection of the Claimant's job application/s below because of the protected act/acts:

    23.1. Technical project manager rejected on 7 May 2021;

    23.2. Mechatronics engineer application of 10 May 2021;

23.3. Test Validation Engineer rejected on 29 June 2021;

23.4. Senior Electromechanical design engineer, rejected on 12 July 2021.

Time Limits

24. Have the issues 1(a-j) in the age discrimination claim been brought beyond the primary time limit (3 months plus any time added on for ACAS Early Conciliation)?

25. If so, were any of them are conduct extending over a period ending within the primary time limit

26. If not, can the Claimant show that it just and equitable to extend time?

Remedy

27. If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the Claimant is awarded compensation and/or damages, will decide how much should be awarded.

28. Should there be any ACAS uplift in respect of any unreasonable failure to comply with the ACAS Code?