EMPLOYMENT TRIBUNALS

Claimant: Mr J Baker

Respondent: Securitas Security (UK) Ltd

Heard at: Bristol Employment Tribunal

On: 6th – 9th February 2023

Before: Employment Judge Lambert
Mrs D England
Mrs L Fellows

Representation:

Claimant: Mr S Baker, Claimant's son

Respondent: Mr O'Dair, counsel

JUDGMENT

1. The complaint of breach of contract arising from a failure to pay notice pay is well-founded and is upheld. The parties agreed the sum outstanding and being owed to the Claimant as **£2,245.67**.

2. The claim of unfair dismissal fails and is dismissed.

3. The claims of age discrimination based on:

    (i) direct discrimination (except for dismissal); and

    (ii) harassment,

    were found to have been raised outside the relevant time limit. The Tribunal did not consider it was just and equitable to extend time for presenting these claims outside of the relevant time limit. The Tribunal lacks jurisdiction to hear these claims and these claims fail.

4. The claim for direct discrimination arising out of the dismissal is in time and the Tribunal did have jurisdiction to hear this claim, but, the Tribunal found that the dismissal was not because of the Claimant's age. This claim fails and is dismissed.

REASONS

5. All page references in this judgment are references to pages contained within the trial bundle, discussed below. The headings are included to assist the reader but do not form part of the judgment. Any wording in [square brackets] has been inserted by the Tribunal to assist with the understanding of any quote.

6. The Claimant, Mr Baker, presented a Claim Form on 10th May 2021 complaining of unfair dismissal; breach of contract for failing to pay contractual notice pay; failure to pay a statutory redundancy payment; and age discrimination. The latter claim was brought on the basis of a direct age discrimination claim and also harassment because of his age. This was recorded under case number 1401848/2021.

7. In its Response Form, the Respondent accepted that the Claimant was its employee, but resisted all of his complaints. The Respondent contended that the reason for dismissal was for a potentially fair reason, namely, some other substantial reason capable of justifying a fair dismissal. It said the dismissal was as a consequence of one of its major customers, Airbus, withdrawing the Claimant's security badge, which had the effect that the Claimant could not work at the Airbus site in Filton. The Respondent engaged in a search for alternative employment which the Claimant did not meaningfully engage in. When no alternative employment was identified, and after following a fair process, it dismissed the Claimant. Its position is that the dismissal was fair overall.

8. The Respondent denied the age discrimination claims were properly particularised and contended that they had been raised outside of the relevant time limits, so that the Tribunal lacked jurisdiction to hear them. It accepted that the allegation that the dismissal was tainted by age discrimination was within time, but the reason for dismissal was due to some other substantial reason unconnected with the Claimant's age.

9. A significant motivation for the Claimant pursuing these proceedings appeared to be his understandable desire to *"clear his name".* For this reason, the Tribunal considers it important to state at the outset of this judgment that the Claimant was <u>not</u> dismissed for gross misconduct relating to allegations of theft. This was made clear at the outset of the proceedings by the Respondent. Allegations of theft were raised against the Claimant. The Respondent investigated these and determined that the allegations were <u>not</u> proven against the Claimant and he was not dismissed for any allegations relating to theft.

The Hearing

<u>Trial Bundle</u>

10. The hearing took place in person at Bristol Civil Justice Centre and was heard over 4 days. A provisional timetable for the hearing was created by EJ Roper at a Preliminary Hearing (by telephone) on 11th July 2022. This provided for one hour's reading time for the Tribunal panel, with a further four hours set aside on day 1 for the Claimant's evidence. Day 2 would be split by concluding the Claimant's evidence and hearing the Respondent's evidence. Day 3 would involve two hours concluding the Respondent's evidence and one hour for closing submissions. The afternoon of day 3 and all of day 4 would be set aside for panel deliberation, delivering judgment and to deal with compensation, if appropriate.

11. As the case unfolded, day 1 was lost to dealing with preliminary matters and issues over the trial bundle. It was apparent to the Tribunal panel when it adjourned to read the statements and key documentation that page references were not correct. It transpired that the Claimant had a separate 200+ page bundle in addition to the trial bundle prepared by the Respondent of some 448 pages. It should be noted that the Case Management Orders placed a maximum of 300 pages for the trial bundle. No application was made to increase this total. These issues were resolved with the representatives reviewing the various documents and agreeing that a further 43 pages should be added to the existing bundle, which became 491 pages in total.

12. As the hearing progressed, it also became apparent that this trial bundle had not been collated with the due care one could expect, with a number of drafts of the same document appearing and the parties referring to different travelling drafts. As an example, the dismissal letter dated 18th January 2021 appeared at pages 363 – 364. However, an earlier draft of this letter dated 12th January 2021, appeared at pages 357 – 358. Both were used in cross examination until the duplication was noted. This was relevant to the calculation of the correct date of when notice was given to the Claimant. A key document appeared at pages 260 – 261. This was the disciplinary outcome letter. The panel noted when it was taken to this document that it appeared to be a draft but we were informed that this was the correct version. During the cross examination of Mrs Baker, a witness for the Claimant, it became apparent that this was not the correct letter and important sections that were contained in the final version that had been sent to the Claimant were not within the letter in the trial bundle. The Claimant was able to adduce the correct version and this was added to the bundle as pages 261a – 261b. In short, the drafts did not need to appear in the trial bundle at all.

13. The panel did not consider that this was a deliberate attempt to provide misleading documentation before us, but accepted that these were examples of tardiness on the Respondent's part in collating the final trial bundle. This was surprising to the Tribunal bearing in mind the size of the Respondent's undertaking and the administrative resources that are available to it. We asked Mr O'Dair to pass on our concerns in this regard to his instructing solicitors as considerable time was wasted dealing with these issues.

Witnesses

14. Mr Baker was represented by his son, Mr S Baker.

15. The Respondent was represented by counsel, Mr O'Dair.

16. The Claimant gave evidence himself and called 1 additional witness, his wife, Mrs Baker. He supplied a witness statement for himself (C1); Mrs Baker (C2); and Mr Afrika (C3). Mr Afrika did not appear to give evidence. The Tribunal accepted Mr Afrika's witness statement in evidence but explained to the Claimant at the outset of the hearing that it would decide how much weight to attach to the statement due to the inability of the Respondent to test the evidence via cross examination.

17. The Respondent called 4 witnesses: Mr Ian Wookey, National Operations Manager (R1); Ms Leigh Dyer, HR Business Partner for the South (R2); Mr Paul Hardiman, who at the material time was the Respondent's National Account Director for Airbus Operations and Defence and Space Limited (R3); and Mr Gary Keating, National Account Manager (R4).

18. The panel read these statements, the documents referred to within those statements and documents it was directed to within cross examination.

The Claims

19. The claims were identified at a Preliminary Hearing before EJ Roper on 11th July 2022 (pages 421 – 434). The issues as set out in the Order from that Preliminary Hearing are:

    19.1 unfair dismissal pursuant to sections 94 and 98(4) of the Employment Rights Act 1996 *("the ERA")*;

    19.2 entitlement to a statutory redundancy payment under section 164 of the ERA;

    19.3 discrimination because of age pursuant to section 13, 26 and 39 of the Equality Act 2010 *("the EqA")*; and

    19.4 breach of contract (relating to failure to pay notice pay) pursuant to the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994.

    <u>Statutory Redundancy Pay</u>

20. The Claimant's claim for a statutory redundancy payment was withdrawn at a preliminary hearing on 11th July 2022 and was dismissed by a judgment issued that day.

    <u>Notice Pay</u>

21. In relation to the notice pay claim, the Respondent contended that the Claimant had been notified on 22nd December 2020 by his line manager, Mr Simon Godwin, in a meeting on that day that his employment was being terminated. It provided the Claimant with 12 weeks' notice, which it said was paid. This set the effective

date of termination as 16th March 2021. It said that this was confirmed in writing to the Claimant on 18th January 2021.

22. At the outset of the hearing, Mr O'Dair, counsel for the Respondent, quite properly informed the Tribunal that this information was not correct. The Respondent accepted, despite the position advanced in its Response Form, that the Claimant had not in fact attended a meeting with Mr Godwin on 22nd December 2020. Therefore, the earliest the Claimant became aware that his employment was being terminated was upon receipt by email of the letter of 18th January 2021 confirming his dismissal.

23. It was accepted by both parties that the Claimant had received payment until 16th March 2021 and that this was the effective date of termination. The Respondent acknowledged that the Claimant was owed monies for 12 weeks' pay from 18th January 2021, less the monies it had paid until 16th March 2021. The parties agreed this sum as £2,245.67 gross and judgment was made on this basis.

The Issues

24 The issues which were discussed, identified and recorded at the Preliminary Hearing on 11th July 2022 as matters which the Tribunal would be required to determine would be limited to:

Unfair Dismissal

25 What was the reason for dismissal? The Respondent asserts that it was for a reason related to the Loss of Customer Approval *("LOCA")*/third party pressure, that is some other substantial reason such as to justify dismissal, which is a potentially fair reason for dismissal under section 98(2) of the ERA.

26 Did the Respondent act reasonably in all the circumstances in treating the LOCA/third party pressure as a sufficient reason to dismiss the Claimant? The Tribunal will need to decide, in particular, whether:

26.1 Did the Respondent adequately investigate the third party's request to remove the Claimant;

26.2 Did the Respondent challenge the third party's request to avoid dismissal;

26.3 Did the Respondent consider and offer alternative employment?

26.4 Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

26.5 Did the Respondent adopt a fair procedure?

26.6 The burden of proof is neutral on this point, but it helps to understand the Claimant's challenges to the fairness of the dismissal in advance and they are said to be:

26.6.1 The Claimant made a request for written information on 30th July 2021 provided by Hannah, Tim and Slaw, stating they witnessed the Claimant "fiddling" with the brown paper bags at the post, and the Respondent did not provide those documents until January 2022;

26.6.2 The Respondent withheld information whilst deceiving the Claimant with the Claimant's job on the line;

26.6.3 The Claimant's solicitor and the Claimant made numerous requests for information detailing whether Mr Wookey had training to complete the type of investigation into the Claimant, and whether this training was in date;

26.6.4 The Claimant was being dismissed for unsubstantiated allegations of theft;

26.6.5 The investigation into the allegations of theft was "shoddy" and "biased";

26.6.6 The investigation was not carried out in a proper and professional manner;

26.6.7 The Claimant had been scapegoated for other mistakes;

26.6.8 The Claimant was not made redundant and given a redundancy payment;

26.6.9 Mr Wookey admitted there was not sufficient evidence to accuse the Claimant of theft; and

26.6.10 Mr Wookey admitted that it was possible that an error could have been made by Elior.

26.7 If the Respondent did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

26.8 If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct, including his failure to apply for alternative roles? This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged.

Age Discrimination

Jurisdiction: Time Limit

27 Were the discrimination complaints made within the time limit in Section 123 of the EqA?

27.1 Was the claim made to the Tribunal within three months (plus the Early Conciliation *("EC")* extension) of the act or omission to which the complaint relates?

27.2 If not, was the conduct extending over a period?

27.3 If so, was the claim made to the Tribunal within three months (plus the EC extension) of the end of that period?

27.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

27.4.1 Why were the complaints not made to the Tribunal in time?

27.4.2 In any event, is it just and equitable in all the circumstances to extend time?

Direct Age Discrimination

28 The Claimant was born on 18th May 1954. The Claimant was 66 years old at the material time and compares himself with people in the Under 50s age group.

29 Did the Respondent do the following things:

29.1 The Claimant and his colleague Darren Painter (who was similar to the Claimant and a long service employee) who were on "older contracts" were dismissed and made redundant respectively, whilst the two new employees on newer contracts and paid less remained on site and in the business;

29.2 The Claimant's manager, Mr Godwin, failed to put the Claimant on any courses to progress the Claimant as an employee, while younger employees were put on courses;

29.3 The Claimant was dismissed rather than being put on statutory sick pay; and

29.4 Dismissing the Claimant because of his age (which is an allegation advanced under both Sections 13 and 39(2)(c) EqA).

30 Was this less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated, known as the Claimant's comparator. There must be no material difference between the circumstances of this comparator and those of the Claimant. The comparator can be an actual person or a hypothetical comparator.

31 If the Claimant did suffer less favourable treatment above, was this because of age? Is the Respondent able to prove that it was for a non-discriminatory reason unconnected to the protected characteristic in question?

32 Was the treatment a proportionate means of achieving a legitimate aim?

Harassment

33 Did the Respondent do the following things:

33.1 On 1st September 2020, Leigh Dyer told the Claimant that staff on the Claimant's contract would have to reapply for their jobs, and this would require new and intense training. The Claimant was asked: *"how he would cope with the training and enquired whether he would prefer one of the other jobs"*;

33.2 On unspecified dates in the last two years Mr Wookey asked the Claimant in a courteous but *"banterous"* manner *"why you haven't retired and how he was still there"*;

33.3 On an unspecified date in the last two years Mr Wookey told the Claimant when the Claimant was arriving for a night shift and Ian was leaving, that the Claimant *"shouldn't be doing nights at his age"*.

34 If so, was this unwanted conduct?

35 Did it relate to the Claimant's protected characteristic, namely age?

36 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

37 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Findings of Fact

38 We make the following findings of fact based on the balance of probabilities.

39 The Claimant was employed by the Respondent as a Watch Manager, providing security services on site at one of the Respondent's major customers, Airbus. His employment started with another employer, Serco, and his employment was eventually transferred to the Respondent via a series of TUPE transfers. From the commencement of his employment on 1st April 1996, the Claimant worked at the Airbus site in Filton, Bristol.

40 It was accepted in evidence that the Serco terms which the Claimant was employed under were generally more favourable than the Securitas terms, with

better holidays and sickness entitlements. The Claimant remained entitled to the Serco terms due to the TUPE transfers.

41 Until the events in June 2020, the Claimant had never had a disciplinary process applied to him, had a clear disciplinary record and was considered by the Respondent to be an excellent employee.

42 The Respondent provided security services to Airbus Operations Limited at Airbus's site in Filton, Bristol under a contract for services. Clause 19.11 of that contract (p.116) provides:

> *"The Purchaser [Airbus] is entitled to refuse the issue of security badges and to withdraw issued security badges without giving reason. [Airbus] shall be entitled, without giving any reason, to ask the Service Provider [Respondent] to immediately remove from Site an employee… of the [Respondent] and to replace such employee… so as to cause minimum disruption to the provision of the Security Services and at no extra cost to [Airbus]."*
>
> *Words contained in [square brackets] represent the Tribunal's amendments.*

43 This permitted Airbus to refuse or to withdraw security badges from any of the Respondent's employees, without giving any reason. Without a security badge, it was not possible to gain entry onto Airbus's site. In practical terms, this meant that if Airbus exercised this right, then the Respondent would have to remove the employee from site. This is not an unusual provision to be included within contracts of this type and the Respondent had a dedicated policy that it had introduced to cater for this situation, called Loss of Customer Approval *("LOCA")* policy (p. 58 – 61).

44 The Respondent's LOCA policy provides:

> *"The majority of our employees interact with our customers on a regular basis or are based on customer sites, given this we can receive requests from our customers to remove an employee from their site/sites permanently either through misconduct, performance or some other reason unknown to us…*
>
> *Securitas will always endeavour to protect employees from unlawful discrimination and also to ensure that natural justice is applied, specifically when responding to a customer request for the removal of an employee."*

<u>Events Leading Up To The Disciplinary Hearing</u>

45 On 26th June 2020, the Claimant was working at the Airbus site. Catering services at the Airbus site was provided by another company, Elior. An employee of Elior, Maxine Harman, came to the gate house where the Claimant was working to request whether the Respondent's staff could attend the canteen and lock the building when a maintenance contractor had completed works in that area. The Claimant agreed to this request as a courtesy to Ms Harman as it allowed her to finish early.

46 Later in the day, around 11.30am, Ms Harman returned to the gate house and delivered 3 brown paper bags containing various food items, such as chocolate,

biscuits and other items. This was a gift for locking up the canteen and building. It was said that these were "out of date" food items from the canteen.

47 At or around 3.40pm, the Claimant attended the canteen to lock it and set the alarm. Before leaving the gate house, the Claimant says he opened one of the bags and took out two items and placed them in his pocket. On the drive over to the building, the Claimant placed some Kit Kats in the van he was driving because they had melted. He kept on him some biscuits that he had taken from the brown bag.

48 The Claimant attended at the canteen area and was eating a biscuit. At some point, Mr Jonathan Higgins, Catering Manager employed by Elior, who was in or near to the canteen, approached the Claimant. He was concerned that the Claimant was eating a biscuit that appeared to have been taken from the canteen. The Claimant explained to Mr Higgins that he was eating a biscuit that had been given to him by Ms Harman.

49 The Claimant left the building and drove back to the gate house. On the journey back, he was stopped by Mr Luke Houlden, Head of Site Security – Filton, Airbus. Mr Houlden noticed that the Claimant was not wearing his seatbelt. During the discussion, the Claimant explained that he thought Mr Houlden wanted to speak to him about his earlier conversation with Mr Higgins. During this discussion, Mr Higgins appeared and had a conversation with Mr Houlden. It was clear Mr Higgins felt that the Claimant had stolen food items from the canteen.

50 Mr Houlden spoke to the Claimant about this issue. The Claimant explained about the gifts from Ms Harman and confirmed that the brown bags remained at the gate house. The Claimant invited both Mr Houlden and Mr Higgins to view the brown bags. They followed the Claimant to the gate house. There were three other employees of the Respondent in the gate house, Hannah McKenzie, Tim Worlock and Slawomir Tokarczyk. They all confirmed the Claimant's version of events in relation to Ms Harman delivering the brown bags containing food items to the gate house.

51 During the discussion, Mr Houlden appeared to have seen the Claimant "fiddling with" the brown bags. Mr Houlden contacted the Claimant's line manager, Simon Godwin, and Mr Godwin met with the Claimant soon afterwards.

52 Mr Godwin interviewed the Claimant and notes were taken and signed by the Claimant and Mr Godwin (p. 198 – 200). The notes indicate this meeting took place at 16:56 on 26th June 2020. During this interview, the Claimant admitted to eating a biscuit within the canteen area. He was also shown a photograph Mr Godwin had taken of a ginger biscuit and two Kit Kats. Mr Godwin confirmed that he would speak with Ms McKenzie, Mr Worlock and Mr Tokarczyk to confirm if these items were in the brown bags they had received from Ms Harman.

53 Mr Godwin then interviewed Ms McKenzie. Notes were taken and signed by Ms McKenzie (p.201). The notes confirmed that the meeting took place between 17:20 and 17:28. During the interview Ms McKenzie confirmed that not all of the

items within the bags were the same although they were similar. In her bag, she had a soft drink, Kit Kat, Mars bar, Twix and a bag of crisps. In response to a specific question from Mr Godwin, Ms McKenzie confirmed that she had a Kit Kat in her own bag.

54 Mr Worlock was also interviewed by Mr Godwin. Notes were taken and signed (p.202) and the notes confirmed that the meeting took place between 17:35 and 17:50. Mr Worlock confirmed that the items contained within the three bags were not identical. The bags all had Mars bars and Twixes, two of the bags had biscuits and one had a Kit Kat.

55 Shortly after this interview, the Claimant was suspended from his duties on full pay. A letter from Paul Hardiman, National Account Director, dated 26th June 2020 (p.195) confirmed his suspension due to an allegation of theft.

56 Mr Houlden sent an email to Mr Godwin on 27th June 2020 (p.203 - 205) setting out his version of events. Within the email he states that he was in a vehicle leaving site when he noticed the Claimant was driving a vehicle and was not wearing seatbelt. Mr Houlden pulled in and waited for the Claimant. At this time, Mr Higgins drove by and informed Mr Houlden that he suspected that the Claimant had stolen confectionery from the canteen.

57 Mr Houlden confronted the Claimant about this. A search was carried out of the vehicle the Claimant was using and Mr Houlden discovered one packet of partially eaten Costa biscuits, one packet of empty Costa biscuits and two Kit Kats. The Claimant explained that he had been given the items by Ms Harman. Mr Houlden attended the gate house and was shown the three brown bags. At this time, Mr Higgins was leaving site through the main gate. Mr Houlden asked Mr Higgins if Elior had an employee called “Moon”. Mr Higgins replied that it did and this was a reference to Ms Harman. He responded that he would turn his vehicle around and come into the gate house to discuss whether Ms Harman would have provided the biscuits and Kit Kats to the Claimant. Mr Houlden records that during this period he noticed the Claimant fiddling with the bags. Mr Higgins said that Ms Harman would not have given away the biscuits or the Kit Kat bars.

58 Mr Houlden and Mr Higgins then left the gate house to attend at the canteen. Mr Houlden noticed that a light was on and a fridge alarm was going off. Mr Houlden was shown where the Costa biscuits and Kit Kats were stored. Mr Houlden inspected the biscuits and all were “in date”. He also noticed that all of the Kit Kats had a distinctive manufacturing mark and date “09 2020 93551012 02:36 L1”.

59 Mr Houlden was then shown where the out of date stock was kept and provided with a list of it. Mr Houlden states that Mr Higgins then used his mobile phone to contact Ms Harman. The conversation was conducted using the speaker function so Mr Houlden could hear the conversation. Mr Houlden states that Ms Harman confirmed that she did not include Costa biscuits or Kit Kats within the three brown bags.

60 Mr Houlden records that he then checked the vehicle the Claimant had been driving and noted that the manufacturing dates on the Kit Kats within the vehicle were the same as the ones within the canteen. These Kit Kats were also in date. Similarly, the Costa biscuit wrappers were also in date and of the same date as the ones in the canteen. Mr Higgins provided his version of events via an email to Mr Houlden on 27th June 2020 (p.210). Mr Houlden forwarded this to Mr Godwin. Ms Harman provided her version of events within an email to Mr Higgins dated 28th June 2020 (p.212). Within this email she notes that:

> *"…I let them have 3 x bags of just out-of-date drinks, chocolate bars and crisps."*

61 By letter dated 13th July 2020 (p.219), the Respondent required the Claimant to attend a disciplinary hearing arranged for 15th July 2020 at 13:30. The letter included a copy of the Respondent's Disciplinary Policy; the investigation notes for 26th June 2020 and 7th July 2020; statements from Mr Houlden, Mr Higgins and Ms Harman and the photographs referred to. The hearing was to be chaired by Mr Ian Wookey. The Claimant was required to answer three allegations of gross misconduct:

(i) breach of health and safety for failing to wear a seat belt;

(ii) theft, you stole 2 Kit Kats and 1 packet of biscuits from the canteen; and

(iii) failure to perform duties to an acceptable standard by failing to notice a fridge alarm activating and not turning off all the lighting.

62 This letter advised the Claimant that if he wanted to refer to any other documentation then he would need to provide such documentation not later than 48 hours before the hearing. The Claimant took issue with the scheduled date because the letter was sent by post and he received it on 15th July 2020, the day of the hearing. This meant he would have no opportunity to provide any information. With some justification, the Claimant considered the process was being rushed.

63 The Respondent provided a new date for the Disciplinary Hearing, which took place on 17th July 2020. The Claimant was accompanied by Mr Stanley Afrika, a fellow employee and union official. Notes of the hearing appeared at pages 221 – 227. The Claimant admitted to not wearing a seat belt; denied theft and the failure to perform his duties to an acceptable standard.

64 Mr Wookey identified some of the discrepancies between the evidence of Ms McKenzie and Mr Worlock against the evidence of Ms Harman and Mr Higgins. After listening to the Claimant's explanation, he decided to adjourn the hearing to carry out further investigations himself.

65 After the hearing, Mr Wookey carried out further investigations by emailing Mr Higgins, Mr Worlock, Ms McKenzie and Mr Tokarczyk and raising further questions. These were responded to and attached to a letter dated 24th July 2020 (p.251) to the Claimant, requiring him to attend a hearing on 28th July 2020. This hearing went ahead on 30th July 2020.

66 By letter dated 31st July 2020 (p.260 – 261) Mr Wookey provided an outcome where he upheld allegation 1; that the Claimant had failed to wear a seatbelt and issued a written warning. He did not uphold allegations 2 (theft) or 3 (failure to perform duties properly). In the Tribunal's view, he was right to do so because of the considerable discrepancies within the evidence he was evaluating.

67 The outcome letter contained within the trial bundle was unsigned and had information missing. There was no rationale explaining why allegations 2 and 3 were not upheld. There was simply no mention of them within this letter. This was at odds with the Claimant's evidence who took exception to what had been written by Mr Wookey. This caused some confusion at the hearing because it was not clear what elements of this letter that the Claimant was challenging. This issue was eventually resolved when the Claimant adduced the actual outcome letter which included text about Allegations 2 and 3. This document was added to the bundle at pages 261a and 261b.

68 However, even the correct version of the outcome letter (p.261a and 261b) had issues, in that it did not confirm an outcome for allegation 3; that the Claimant had failed to perform duties to an acceptable standard by failing to notice a fridge alarm activating and not turning off all the lighting.

69 Another issue that vexed the Claimant was a point discussed at this hearing. Mr Wookey mentioned (p.253) that within the updated statements of Ms McKenzie, Mr Worlock and Mr Tokarczyk *"They confirmed you were fiddling with the bags".* We have reviewed the updated statements of these individuals and could not see a reference to this point. The Claimant was upset that his work colleagues would mention this because he felt it was not accurate. He asked for the statements where his work colleagues stated this as fact but, as far as we are aware, they were not provided to the Claimant until some months afterwards, when the decision to dismiss had purportedly been taken. The actual statements provided did not support the assertion from Mr Wookey that his work colleagues all confirmed that the Claimant was fiddling with the bags. This added to his distress as he felt his work colleagues thought he had tampered with evidence.

70 During cross examination, Mr Wookey accepted that substantial parts of his statement were inaccurate.

71 At paragraph 11, he states:

> *"By email dated the 29 June 2020 07:37, from Luke Houlden, I received an attached email…"*

72 At paragraph 12, he states:

> *"By email dated 29 June 2020 Luke Houlden wrote to me attaching an email…."*

73 At paragraph 13, he states:

> *"…I contacted Ben Austin of HR… informing him of my investigations, the information and the conclusions that I had reached."*

74 At paragraph 14 he states:

> *"I met with the Claimant on the 26 June 2020. That meeting is recorded…"*

75 At paragraph 15, he states:

> *"I called the above named people alter that day at around 17.20…"*

76 At paragraph 16, he states:

> *"I called Tim Warlock [sic], Security officer who was also interviewed that day at 17.35…."*

77 None of this evidence was in fact true. Mr Wookey accepted in cross examination that he was not on site at this time. He accepted that this statement had been put together as an amalgamation of the evidence that Mr Godwin may have provided and Mr Wookey's evidence. Mr Godwin was not called as a witness and as a consequence of this cross examination we applied little to no weight to Mr Wookey's evidence. Where there was a difference in statements between those of the Claimant and that of Mr Wookey, we accepted the Claimant's evidence.

LOCA Policy

78 On 31st July 2020, Mr Houlden sent an email to Mr Hardiman, Mr Wookey and others with the heading "Allegation of Theft" (p.262). Within this email, Mr Houlden refers to the contract between Airbus and the Respondent and clause 19.11 (set out at paragraph 37 above) and exercising Airbus's right to withdraw the Claimant's security badge. The reason provided for the exercise of this right (although technically Airbus need not have done so) was that:

> *"Airbus is of the view that, in light of the trusted position held by [the Claimant] at the time, any level of trust which had existed between [the Claimant] and Airbus has eroded to a point that is not consistent with his continued access to any Airbus assets."*

79 By letter dated 7th August 2020, Mr Godwin informed the Claimant that Airbus requested the withdrawal of his security badge (p.273). This letter was a follow up to a discussion that Mr Godwin held with the Claimant on 4th August 2020. The Claimant was told not to attend the Airbus site and required to attend a meeting on 10th August 2020. The purpose of this meeting was to discuss the matter with the Claimant with a view to holding a discussion with Airbus to see if it would reconsider its position in relation to the withdrawal of the Claimant's security badge. This was in accordance with the Respondent's LOCA policy (p.58 – 61).

80 The Claimant emailed Mr Hardiman on 6th August 2020 (p.271) raising an issue against the decision to issue a written warning. He subsequently confirmed this should be treated as an appeal.

81 The LOCA meeting arranged for 10th August 2020 did not go ahead because the Claimant contacted Mr Godwin to confirm he was not fit enough to attend. He supplied a doctor's note confirming this. Mr Godwin sent a further letter dated

25th August 2020 (p.282) requiring the Claimant to attend a re-scheduled LOCA meeting to 1st September 2020. The Claimant had supplied a further sick note to the Respondent on 25th August 2020 confirming he would not be well until 7th September 2020. There is an email dated 3rd September 2020 (p.291) from Ben Austin, HR & TUPE Advisor for the Respondent, to Mr Godwin stating:

> *"It may well be that we need to look at sending him to Occupational Health to determine if he is well enough to attend a meeting."*

82 In evidence, the Respondent accepted that at no point was the Claimant referred to Occupational Health. Ms Dyer for the Respondent confirmed that she would have expected the Claimant to have been referred to Occupational Health in the light of the length of his sickness absence and was disappointed that this had not happened.

Transformation Restructure

83 On 1st September 2020, the Respondent announced a restructure of its operations at Filton. This restructure affected several positions, including that of Watch Manager, the position held by the Claimant. In short, the Claimant could apply for one of two new roles but it would require additional upskilling and to recognise this, the individuals would receive a discretionary payment of £3,300. Ms Dyer contacted the Claimant by telephone to advise him of this restructure. The Claimant was required to attend a meeting on 11th September 2020 to discuss the restructure.

84 This meeting went ahead on 11th September 2020 which was attended by the Claimant, Mr Wookey and Ms Dyer. Notes of this meeting appeared at p. 292 – 295. During the meeting, the Claimant provided his thoughts about wishing to sit down with Mr Houlden and have a discussion with him directly about why his security badge was being withdrawn. This was a reference to matters being dealt with under the LOCA policy. There was also a discussion about the restructure and new roles that may be available. Importantly, these notes record that the Claimant was informed:

> *"You're currently going through a LOCA and is subject to that and Airbus' request to have you removed but dealt with by Simon. This is a slightly [un]usual situation…"*

85 On 14th September 2020, Mr Godwin wrote to the Claimant requiring him to attend a LOCA meeting on 21st September 2020 (p.299). This meeting did not go ahead due to the Claimant's being unwell.

86 On 15th September 2020, Ms Dyer sent an email to the Claimant (p.301) attaching the notes of the consultation meeting on 11th September 2020. This email stated:

> *"As confirmed by Ian, this consultation process is subject to the loss of customer approval/site removal which is being managed by Simon Godwin."*

87 By letter dated 2nd October 2020 (p.311-312) the Respondent confirmed the discussion at the first consultation meeting and made arrangements for the second consultation meeting under the Transformation Restructure exercise. This letter states that:

> *"Redundancy remains an option for those who do not wish to pursue any of the abovementioned opportunities/options."*

88 Pausing there: it is understandable why the Claimant felt that he could opt for redundancy because the letter confirms this. However, on the next page of the same letter, it states:

> *"As discussed during your 1st 1 to 1 consultation, these proposed changes are also subject to the outcome of the on-going Loss of Customer Approval, which is in process, however, has yet to be concluded due to being signed off by your G.P."*

89 In the Tribunal's view, this made the position clear that the redundancy option was not available unless and until the LOCA process was completed.

90 The second consultation took place on 7th October 2020. This was chaired by Mr Wookey, with Ms Dyer attending. The Claimant attended along with Mr Afrika. The notes of this meeting appeared at p.326 – 329. In evidence, the Claimant confirmed that he was struggling to come to terms with the decision of Airbus to withdraw his security badge and that he felt that the LOCA process was being applied because he had committed theft. This was not the case because the Respondent had found that the allegation of theft was not proven. The Claimant felt that his name had been tarnished by these events and he wanted the opportunity to clear his name. As confirmed at the outset of this judgment and discussed in paragraph 61 above, the Claimant was never disciplined for theft because the Respondent found that this allegation was not proven.

91 At this meeting, it was explained to him that it was to discuss the Transformation Restructure. The Claimant accepted that he was provided with lists of alternative vacancies for other roles at other locations where the Respondent had customers. The notes record that Mr Afrika specifically asked whether the Claimant could take redundancy. This was an option offered to others, including Mr Painter, a work colleague of the Claimant's who was also employed as a Watch Manager. The notes indicate Ms Dyer saying that if the Claimant had not had his security badge withdrawn and was not subject to the LOCA policy then he could. However, due to his circumstances, the LOCA process has to be concluded.

92 The Tribunal found that Mr Painter had requested voluntary redundancy and this was agreed to by the Respondent. The Claimant considered that the difference in treatment, where he was not permitted to leave on voluntary redundancy terms as compared to Mr Painter who was permitted, was because of his age. For reasons set out below, the Tribunal found that a material difference between Mr Painter's situation and those applying to the Claimant, was that Airbus had not

withdrawn Mr Painter's security badge. He remained an employee entitled to work at the Airbus site at the time of his dismissal on grounds of redundancy.

93 A further attempt was made by the Respondent to hold a LOCA meeting with the Claimant on 22nd October 2020. The requirement to attend was set out in a letter to the Claimant dated 13th October 2020 (p.331). This letter invited the Claimant to provide written submissions if he preferred. The Claimant did not attend this meeting but he did provide written submissions via an email dated 21st October 2020 (p.457). This was the third time that the Claimant had not attended a LOCA meeting, whilst during this period, he was able to attend two consultation meetings for the transformation process.

94 Mr Godwin sent an email to Mr Houlden on 3rd November 2020 (p.336) attaching notes of a meeting held on 22nd October 2020. The Respondent said that the notes being referred to, was a document appearing at p.335. This was a letter which appeared to be drafted by Mr Godwin, addressed to Airbus Security Management and making reference to the Respondent's attempts to meet with the Claimant on three separate occasions. Within this document, Mr Godwin makes submissions on behalf of the Claimant as to why Airbus should reconsider its decision to withdraw the Claimant's security badge. It refers to the Claimant's long service, the fact that Mr Godwin has known the Claimant for about 21 years; the allegation of theft was not proven and the Claimant was of good character, a strong member of the team and has always conducted his duties with a professional approach.

95 This email was responded to by Mr Houlden on 5th November 2020 (p.336) confirming that his earlier instruction stood. The Claimant's security badge was withdrawn. In the light of this email, Mr Godwin requested the Claimant to attend a further meeting under the LOCA policy on 12th November 2020 (p.338). On 11th November 2020, the Claimant contacted Mr Godwin to explain that he would not be attending the meeting on 12th November 2020 as he was not well enough. The Claimant asked whether his wife could attend in his in place, but this request was refused by the Respondent.

96 The Claimant sent an email to Mr Godwin dated 11th November 2020 (p.341-342). The content of this email was directed at the theft allegation with the Claimant reiterating points he had made about the process and his views on the allegation. The meeting on 12th November did not proceed.

97 Within the bundle there were no less than 4 letters from Mr Godwin to the Claimant requesting him to attend a further meeting under the LOCA policy. These were dated 25th November 2020, 26th November 2020, 11th December 2020 and 15th December 2020 contained dates for the meeting as 4th December 2020, 17th December 2020 and 22nd December 2020 see p.348, 350, 353 and 354. The last letter was the relevant one.

98 The Claimant supplied a letter from his G.P. dated 22nd December 2020 (p.463 – which, curiously, was not included within the Respondent's bundle). This states:

> *"He is not fit for work and this includes any meetings with work that he is asked to attend. Frequent contacts with requests to attend work are hindering his recovery and I would [be] grateful if these could be stopped."*

99 It is clear that Mr Godwin had this letter on 22nd December 2020 because he confirmed this in a WhatsApp message to the Claimant (p.464). Mr Godwin was not called to give evidence to explain whether he took this GP note into account before, purportedly, taking the decision on this day to dismiss the Claimant.

100 It is clear that the Claimant was communicating with Mr Godwin via WhatsApp as late as 30th December 2020 (p.464). As set out in paragraphs 21 to 23 of this judgment, discussing notice pay, the Respondent's original case was that the Claimant attended a meeting on 22nd December 2020 where he was informed that he was being dismissed. This was clarified at the outset of the hearing where it was acknowledged that the Claimant did not attend this meeting.

101 This matter was further complicated by 2 letters appearing within the trial bundle purporting to be the dismissal letter, one dated 12th January 2021 (p.357) and the other dated 18th January 2021 (p.363). We were initially taken to the letter at p.357 by the Respondent in cross examination before it was corrected and reference was made to the later letter dated 18th January 2021.

102 In evidence, it was accepted by the Claimant and the Respondent that the letter dated 18th January 2021 was the correct version. This letter states that the letter of 15th December 2020 (p.353) arranging a meeting under the LOCA policy for 22nd December 2020 were correct. In this letter, it states:

> *"This letter is notice of termination of your employment which started from the last date of the meeting dated 22nd December 2020 and is a 12 week notice period."*

103 The reason given for termination within this letter is some other substantial reason. The Claimant was advised of his right to appeal this decision. The Claimant exercised this right via an email to Mr Keating dated 25th January 2021 (p.365). Mr Keating wrote to the Claimant by letter dated 29th January 2021 arranging for the appeal to take place on 5th February 2021.

104 Mr Keating wrote to the Claimant by letter dated 5th March 2021 (p.375-377) confirming the rejection of the Claimant's appeal.

105 On 15th March 2021, Mr Hardiman emailed the Claimant and set out details of their conversation on 12th March 2021 (p.378).

Unfair Dismissal: Relevant Law

106 It is for the Respondent to establish the reason for dismissal and that it is one that falls within Sections 98(1) or 98(2) of the ERA. In this case the Respondent says that the reason for dismissal is for some other substantial reason of a kind such as to justify the dismissal.

107 It says the dismissal was because it had to respond to Airbus's contractual right to withdraw the Claimant's security badge, meaning he could not work at the Airbus

site. This is often referred to as a third party pressure dismissal because the dismissal is being orchestrated by a third party, in this case, Airbus. Such a dismissal can fall within Section 98(1): **Scott Packing and Warehousing Co Ltd v Paterson** [1978] IRLR 166. Where the employer wishes to rely upon third party pressure, it must lead sufficient evidence to discharge the onus resting upon it: **Grootcon (UK) Ltd v Keld** [1984] IRLR 302.

108 A reason for dismissal is the facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employer: **Abernethy v Mott, Hay and Anderson** [1974] ICR 323, CA.

109 Section 98(4) of the ERA poses a single question, namely whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the Claimant. This requires the Tribunal to apply an objective standard to the reasonableness of the investigation, the procedure adopted and the decision itself. In considering whether an employer adopted a fair procedure, the range of reasonable responses test applies: **Sainsbury plc v Hitt** [2003] ICR 111, CA. The fairness of a process adopted which results in dismissal must be assessed overall.

110 The Tribunal must take as the starting point the words of section 98(4). It must determine whether in the particular circumstances the decision to dismiss was within the band of reasonable responses which a reasonable might have adopted. In assessing the reasonableness of the response, it must do so by reference to the objective standard of the hypothetical reasonable employer: **Tayeh v Barchester Healthcare Ltd** [2013] IRLR 387, CA @ para 49. Importantly, the Tribunal must not substitute its own view as to what was the right of action.

Unfair Dismissal: Conclusion

Reason For Dismissal: Section 98(1)

111 The Tribunal was satisfied from the facts as found above that the reason for the Claimant's dismissal was for some other substantial reason capable of justifying a fair dismissal, due to the LOCA reason. This is a potentially fair reason in accordance with Section 98(1) of the ERA.

112 We were satisfied that Mr Houlden had formed the view that he did not want the Claimant to continue working at the Airbus site. Whatever his thoughts on what the Claimant may or may not have done, the simple fact is that Airbus had an unrestricted contractual right to reject or withdraw security badges in relation to any of the Respondent's employees who worked at its site in Filton. Mr Houlden, acting on behalf of Airbus, exercised this right. When the Respondent made representations to him about changing this decision, he held firm and reiterated his position that the Claimant's security badge was withdrawn.

113 Both the Claimant's and the Respondent's evidence confirmed that Mr Houlden was someone who knew his own mind and once made up, he was not likely to change it. Mr Wookey gave evidence that after he issued his outcome letter on

31st July 2020, issuing the Claimant with a written warning for failing to wear a seatbelt, that his relationship with Airbus became difficult over the next few months. He said that it was not coincidental that Mr Houlden's instruction to withdraw the security badge for the Claimant was sent in an email dated 31st July 2020 (p.262) shortly after Mr Houlden became aware of Mr Wookey's decision.

114 Upon receipt of the instruction from Airbus to withdraw the Claimant's security badge, the Respondent was in a difficult position. It complied with its LOCA policy by seeking representations from the Claimant in order to attempt to overturn Airbus's decision.

115 The Claimant suggested that the true reason was that the Respondent wanted to avoid offering him a redundancy payment and effectively the LOCA reason was a sham. Mr Wookey accepted in evidence, as did Ms Dyer, that the Transformation Restructure had been imminent for some time. An aborted version of this exercise took place around a year or so earlier but was not completed. There was no evidence offered by the Claimant to support this assertion. Moreover, the Transformation Restructure was not commenced until 1st September 2020, a month or so after he received the outcome letter dated 31st July 2020. In the light of these facts, the panel was satisfied that the reason for dismissal was as put forward by the Respondent.

Process and fairness: Section 98(4)

116 The LOCA policy requires an appropriate manager of the Respondent to meet with the employee so they can (p.59):

> *"… be given the opportunity to offer their response to the clients request for removal, including any mitigating circumstances…"*

117 The Respondent, acting through Mr Godwin, made several attempts to meet with the Claimant to allow him to offer a response to Airbus. The Claimant failed to attend any of these LOCA meetings. In contrast, the Claimant attended the consultation meetings in relation to the transformation process, even though these were occurring at or around the same time. The Tribunal considered this was a deliberate act of the Claimant in choosing which meetings he was prepared to attend and the ones which he would not attend.

118 The very clear evidence of the Claimant was that he wanted to clear his name. He could not consider any employment away from Airbus's Filton site unless and until he had been given the opportunity to clear his name. However, due to the stance of Mr Houlden, it was clear to the Tribunal that the Claimant would never be able to work at the Filton site whilst Mr Houlden was in a position to refuse or withdraw security badges. This was unfortunate because, through the Claimant's own admission and on the case he presented, he was not able to engage in discussions with the Respondent about alternative employment at a different location. This was despite the fact that the Respondent held meetings with the Claimant under the Transformation Restructure process to encourage him to consider alternative employment and, we consider, it would have done so under

the LOCA policy had the Claimant attended those meetings. We were satisfied that the Respondent provided the Claimant with details of alternative vacancies from September onwards but, on his own evidence, he was not prepared to engage in a meaningful way.

119 There were issues with the Respondent's handling of the process. For example, sending out a letter by post on 13th July 2020 to the Claimant, requiring him to attend a meeting on 15th July 2020, which he didn't receive until 15th July 2020. Or within that letter, confirming that the Claimant had to provide any documents for consideration at that hearing at least 48 hours before it, meaning that he couldn't comply, were issues which added to the Claimant's anxiety levels and painted a poor image of the Respondent. However, the Respondent rectified such issues by agreeing alternative dates with the Claimant.

120 The Tribunal has to look at the picture overall when assessing the fairness of the process adopted. It is rare that there are no issues with a process. We reviewed each of the circumstances and assessed overall, whether the process was fair or not. The one issue that did cause the Tribunal some concern related to the GP note that was supplied to the Respondent by the Claimant in advance of the meeting on 22nd December 2020. We were satisfied that Mr Godwin was aware of the GP note on 22nd December 2020 because the WhatsApp confirm this to be the case.

121 Would a reasonable employer have taken the decision to dismiss at this point, bearing in mind the GP's note that the Claimant could not attend a meeting and, in circumstances, where the Respondent had questioned whether it should refer the Claimant to occupational health?

122 We looked at the background facts, including the failure of the Claimant to attend any of the LOCA meetings; the written submissions he put forward at various points that he wanted the opportunity to clear his name; the attempts by the Respondent to ask Airbus to reconsider its position and the fact that as long as this decision rested with Mr Houlden it was very unlikely to be overturned; and the failure of the Claimant to engage meaningfully to identify alternative employment. We concluded that, looked at overall, the procedure was fair. The Claimant had been given several opportunities to make submissions and to identify alternative employment. He did not engage and we considered that at this time, it could not be said that no reasonable employer would not have taken the decision to dismiss.

123 That is not to say that the Tribunal does not have considerable sympathy for the position the Claimant found himself in. He had worked for 25 years at this site and, through little fault of his own, his security badge was withdrawn by Airbus.

124 We then considered the Claimant's assertion that a reasonable employer, in these circumstances, would have offered the Claimant voluntary redundancy. Ms Dyer, for the Respondent, gave evidence that if the Claimant had asked for voluntary redundancy during the Transformation Restructure consultation, she would have taken the decision to offer it to him.

125 In cross examination, she was taken to the notes of the second consultation meeting where Mr Afrika clearly asked for this. Therefore, on the evidence provided to the Tribunal, she should have allowed the Claimant to opt for voluntary redundancy.

126 However, the clear and uncontested evidence from Mr Hardiman, for the Respondent, was that no redundancy could be considered until the LOCA policy was concluded. This evidence was consistent with the contemporaneous documentation issued at the time. On this point, we preferred the evidence of Mr Hardiman and the contemporaneous documentation in support of his evidence, to that of Ms Dyer's evidence.

127 Whilst we suspect many employers would have allowed the Claimant to opt for voluntary redundancy, we concluded that a considerable number of other employers, still acting reasonably by following the LOCA policy, would not have done so. There was an option to offer voluntary redundancy to the Claimant but it was not available under the LOCA policy and it cannot be said that the failure to do so made the dismissal unfair.

128 This was a difficult point for the Tribunal to determine because the panel felt that given that there was a parallel transformation process ongoing, which provided voluntary redundancy as an option, the Tribunal itself would have offered this option to the Claimant. The Tribunal concluded that there was no legal requirement for the Respondent to effectively switch processes and offer voluntary redundancy to the Claimant and, as such, it is not within the Tribunal's gift to require this.

129 We reminded ourselves that we must not substitute what we would have done with what the Respondent did. The LOCA policy was applied to the Claimant and it was within the actions of a reasonable employer to continue to apply that process until it was concluded.

130 We concluded that the decision to dismiss and the process followed to do so was fair in these circumstances.

Age Discrimination: Relevant Law

Direct Discrimination

131 Direct discrimination is defined in section 13(1) of the EqA as:

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

132 The application of those principles was summarised by the Employment Appeal Tribunal in London Borough of Islington v Ladele (Liberty intervening) EAT/0453/08, which has since been upheld:

(a) *In every case the Employment Tribunal has to determine the reason why the Claimant was treated as he was:* ***Igen v Wong*** *[2005] IRLR 258, CA. In most cases this will call for*

some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

(b) If the Employment Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial.

*(c) Direct evidence of discrimination is rare and Employment Tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the Burden of Proof Directive (97/80/EEC). The first stage places a burden on the claimant to establish a prima facie case of discrimination. That requires the claimant to prove facts from which inferences could be drawn that the employer has treated them less favourably on the prohibited ground. If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If they fail to establish that, the Tribunal must find that there is discrimination: **Igen**. The wording in s136 of the EqA has not changed the way the burden of proof operates – the claimant still has to show a prima facie case of discrimination: **Efobi v Royal Mail Group Ltd** [2019] EWCA Civ 18.*

*(d) The explanation for the less favourable treatment does not have to be a reasonable one: **Zafar v Glasgow City council** [1998] IRLR 36 HL. In the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation: **Bahl v Law Society** [2004] IRLR 799, CA. If the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. The inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, the burden is discharged at the second stage, however unreasonable the treatment.*

*(e) It is not necessary in every case for an Employment Tribunal to go through the two-stage process. In some cases it may be appropriate simply to focus on the reason given by the employer ("the reason why") and, if the Tribunal is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test. The employee is not prejudiced by that approach, but the employer may be, because the Employment Tribunal is acting on the assumption that the first hurdle has been crossed by the employee: **Brown v London Borough of Croydon** [2007] IRLR 259, CA.*

*(f) It is incumbent on an Employment Tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: **Anya v University of Oxford** [2001] IRLR 377, CA.*

*(g) It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The determination of the comparator depends upon the reason for the difference in treatment. The question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was: **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 HL.*

*(h) However, as the EAT noted (in Ladele) although comparators may be of evidential value in determining the reason why the claimant was treated as he or she was, frequently they cast no useful light on that question at all. In some instances, comparators can be misleading because there will be unlawful discrimination where the prohibited ground contributes to an act or decision even though it is not the sole or principal reason for it. If the Employment Tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then it is unnecessary to determine the characteristics of the statutory comparator: **Watt (formerly Carter) v Ahsan** [2008] ICR 82 EAT.*

(i) If the Employment Tribunal does identify a comparator for the purpose of determining whether there has been less favourable treatment, comparisons between the two people must be such that the relevant circumstances are the same or not materially different. The Tribunal must be astute in determining what factors are so relevant to the treatment of the claimant that they must also be present in the real or hypothetical comparator in order that the comparison which is to be made will be a fair and proper comparison. Often, but not always, these will be matters which will have been in the mind of the person doing the treatment when relevant decisions were made. The comparator will often be hypothetical, and that when dealing with a complaint of direct discrimination it can sometimes be more helpful to proceed to considering the reason for the treatment (the "reason why" question): ***Shamoon****.*

Harassment

133 Harassment is defined in Section 26 of the EqA as follows:

1. A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) The conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

4. In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account-

(a) the perception of B;

(b) the other circumstance of the case;

(c) whether it is reasonable for the conduct to have that effect.

134 The wording of section 26 makes it clear that a distinction is to be drawn between conduct with *"the purpose of… "* which will amount to harassment as a matter of law and conduct with *"the effect of… "*.

135 In the latter case the test is partly subjective *("the effect on B"* and, arguably, *"the other circumstances of the case"*) and partly objective *("whether it is reasonable for the conduct to have that effect").*

Time Limit

136 Section 123(1) of the EqA provides that a complaint must be brought within the period of three months starting with the date of the act complained of, or such other period as the employment tribunal considers just and equitable.

137 Section 123(3) of the EqA provides that if acts extend over a period i.e. form part of a continuing course of conduct or continuing act, limitation is judged by reference to the last act. The test is broad but the Claimant must show a link: **Hendricks v Commissioner of Police for the Metropolis** [2003] IRLR 96 EWCA.

138 For a continuing course of conduct to exist, at least one discriminatory act must be in time. A finding that one of the acts complained of, which is within time, is not discriminatory, will mean that it cannot be considered to be part of a continuing act: **South Western Ambulance NHS Foundation Trust v King** [2020] IRLR 168.

139 If an act is out of time, there is a wide discretion to extend time, but the Claimant must show time should be extended on a just and equitable basis: **Robertson v Bexley Community Centre** [2003] IRLR 434 EWCA. However, that is essentially a question of fact for the Employment Tribunal: **Lowri Beck v Brophy** [2019] EWCA Civ 2490.

Age Discrimination: Conclusion

Time Limit

140 The Claimant's witness statement did not contain much evidence in support of his age discrimination complaints which includes direct discrimination and harassment. Page 3 of the statement records:

> *"I believe my age as an older man has undoubtedly played a part in being terminated. My ability to adapt and cope with the changes was called into question. Leigh Dyer Area HR business partner asked me wither I could cope in the new role as it would involve a lot of retraining. Phone call 2/9/2020*
>
> *Ian Wookey has on numerous occasions made comments with a joking and condescending manner to when I might be retiring. Similar comments have been as why I am doing nights at my age."*

141 On 15th September 2020, the Claimant produced an addendum statement as part of his appeal against the findings by Mr Wookey on 31st July 2020. This appeared at p. 455. Within this email, the Claimant states:

> *"I believe that I have been subjected to age discrimination. Most of the security staff are much younger than me. Because I am beyond the 'normal' retirement age, I believe this process has been used as a means of getting rid of me, or pushing me to leave…*
>
> *This is clearly less favourable treatment, and there is no justification for this inconsistency of treatment."*

142 It is noteworthy that this sets out a basic understanding of direct discrimination and the Claimant accepted this was the case in response to a question from the panel.

143 On 21st October 2020, the Claimant sent an email to Mr Godwin (p.457). Within this email he states:

> *"All my paperwork regarding the theft allegations have been passed to my solicitors who specialises in work related issues."*
>
> *[our emphasis]*

144 In evidence, the Claimant confirmed that he had taken legal advice from two different solicitors. The first had offices near Filton. The second was a specialist employment advisor. The reference above was a reference to the second solicitor and the advice was sought on or before 21st October 2020.

145 The Claimant offered no evidence in his statement as to whether the alleged incidents of discrimination were in time; and if not in time, there was no explanation of why he could not issue proceedings within the relevant time period. There was no evidence in the statement setting out the reasons why the Tribunal should exercise its discretion to extend the time limit on a just and equitable basis for presenting the complaints of discrimination.

146 During cross examination the Claimant accepted that all of the allegations of discrimination, apart from the dismissal, arose on or before 26th June 2020. The relevant time limit for presenting a claim of discrimination is within 3 months of the incident complained of, or within 3 months of the last incident if there is a continuing course of conduct.

147 The Claim Form was presented on 10th May 2021. The dismissal took effect on 16th March 2021. The Claim Form was in time for the dismissal but all other complaints were raised out of time. The only way the earlier complaints could be considered as amounting to a continuing act of discrimination is where one allegation has been found to be discriminatory and is within time. Therefore, if the dismissal was found to be discriminatory, this could make the earlier complaints in time. If not, then the earlier complaints are out of time and the just and equitable extension must be considered.

148 The Tribunal has found above that the reason for dismissal was due to Airbus withdrawing the Claimant's security badge. There was no evidence placed before the Tribunal that this decision was tainted by age discrimination in any way.

149 Putting this another way, the Tribunal found that the reason for dismissal (the less favourable treatment complained of) was due to the application of the Respondent's LOCA policy to the Claimant due to Airbus's decision to withdraw his security badge. This was the reason why. There was no evidence that this was in any way tainted by age discrimination. This was the only act that was within time. This being the case, all of the other alleged incidents of discrimination are out of time.

Just and equitable extension

150 The Tribunal had to consider whether it should exercise its discretion to extend time for presenting the claim out of time. The test applicable requires the Tribunal to be satisfied that it would be just and equitable to extend time. This is a broad test. In **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA, Civ 23, Underhill LJ stated at para 37:

> *"The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it*

considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) the length of, and the reasons for, the delay."

151 Whilst the Claimant gave evidence that he was completely stressed by this state of affairs; had difficulty in concentrating on anything other than clearing his name, it was apparent that he was able to engage with the Respondent in respect of the Transformation Restructure consultation meetings, as well as with external legal advisors. He did not attend any of the LOCA meetings and it was clear to the Tribunal that he was selecting which meetings he would attend.

152 His email at page 455 dated 15th September 2020 demonstrated that the Claimant had a good understanding of the legal principles of age discrimination. In his email 21st October 2020, he confirms that he has sought legal advice on his position. This being the case, we can see no reason why the Claimant did not issue legal proceedings at or near this time. In fact, the Claimant did not issue proceedings until nearly 7 months later.

153 Looking at the Claim Form itself, it does not provide any details of the alleged discriminatory acts and it is not until February 2022, when the Claimant has been ordered to provide further particulars, that the Respondent has sufficient notice of the discrimination claims the Claimant wishes to pursue.

154 The Claimant's statement offers little more in the way of detail in respect of most of the allegations he raises. In evidence the Claimant added that he was not permitted to attend training courses over the previous years. However, he could not identify the dates of such courses, who attended, what their ages were and on what dates he was denied the opportunity to attend. The allegations were extremely vague.

155 The Respondent's witness statements mainly offer bare denials of the allegations due to their lack of detail. This is not a criticism of the Respondent, simply an observation of the evidence supporting its position, that it is not able to offer a more substantive response to what are often extremely vague allegations.

156 We consider it would not be in the interests of justice to allow the Claimant to pursue such vague complaints because this would place the Respondent at a significant disadvantage to be required to answer such allegations.

157 Therefore, the Tribunal considers that all of the Claimant's allegations of discrimination (except for dismissal) have been raised out of time and for the reasons given, the Tribunal does not consider it just and equitable to extend the time limit for presenting claims. The Tribunal declines jurisdiction to hear these claims.

158 The Tribunal does not consider the dismissal was in any way tainted by age discrimination for the reasons set out in paragraphs 115, 148 and 149.

Specific Allegations

159 Notwithstanding the fact that the Tribunal has declined jurisdiction to determine the Claimant's complaints of discrimination and harassment, it has reviewed the evidence and if it had found that it had jurisdiction it would have made the following determinations:

The Claimant and his colleague Darren Painter (who was similar to the Claimant and a long service employee) who were on "older contracts" were dismissed and made redundant respectively, whilst the two new employees on newer contracts and paid less remained on site and in the business;

160 The Claimant sought to rely upon Darren Painter as an actual comparator. The Tribunal is required to consider a comparator in the same or similar circumstances. In this case, the Claimant sought to compare himself with an age group of under 50s. However, in evidence, the Claimant accepted that Darren Painter was 52 or 53 years old.

161 Therefore, on the Claimant's own evidence, Mr Painter was not an appropriate comparator because he did not meet the condition of being under 50.

162 Notwithstanding this, the Tribunal looked at the reason why the Claimant had suffered the less favourable treatment, in this case, the refusal to offer a voluntary redundancy payment. The Tribunal was satisfied that the reason for the Claimant's dismissal was due to Airbus's decision to withdraw his security badge. Constructing a hypothetical comparator, this would be a man with similar length of service to the Claimant who was under 50; and Airbus had withdrawn his security badge. We consider that the Respondent would have applied its LOCA policy, as it did with the Claimant, and we are of the opinion that the outcome would be the same. In short, we were not satisfied that there would be any difference in treatment.

163 The reason for the treatment was the withdrawal of the security badge by Airbus, not because of age discrimination.

The Claimant's manager, Mr Godwin, failed to put the Claimant on any courses to progress the Claimant as an employee, while younger employees were put on courses;

164 As stated above, the Claimant was not able to provide any further details. This allegation was not sufficiently detailed for the Tribunal to be satisfied that a *prima facie* case of discrimination had occurred. We would not have upheld this allegation.

The claimant was dismissed rather than being put on statutory sick pay

165 This was not advanced in any significant way at the hearing. However, the Claimant had been sick since 7th August 2020 until 17th January 2021. He had already had approximately 5 months of sickness absence. SSP is only available

for a period of 28 weeks in any three year period. As such, it is difficult to see how this would have assisted the Claimant in these circumstances. He remained an employee of the Respondent from 7th August 2020 until 16th March 2021. The reason he was dismissed was due to some other substantial reason. There is no requirement to delay dismissal whilst SSP is available. We would not have upheld this allegation.

Dismissing the Claimant because of his age (which is an allegation advanced under both Sections 13 and 39(2)(c) EqA).

166 For the reasons set out above, we were satisfied that the reason for dismissal was for some other substantial reason because of the withdrawal by Airbus of the Claimant's security badge.

Harassment

167 Did the Respondent do the following things:

On 1st September 2020, Leigh Dyer told the Claimant that staff on the Claimant's contract would have to reapply for their jobs, and this would require new and intense training. The Claimant was asked: *"how he would cope with the training and enquired whether he would prefer one of the other jobs"*;

168 The Claimant sent an email to Mr Hardiman on 15th September 2020 (p.455). Whilst this email mentions age discrimination, there is no express reference to this allegation. The Tribunal felt that if this had been said, it was more likely than not to have featured in this email.

169 We have mentioned above our concerns over the accuracy of Mr Wookey's statement. In his statement, he confirmed that he was present in the room when the telephone conversation took place between Ms Dyer and the Claimant and he did not hear Ms Dyer make this comment. However, it was clear that, in actual fact, Mr Wookey was not present on site at this time, was not within the near vicinity of Ms Dyer, did not hear the telephone conversation and certainly could not provide evidence refuting this allegation.

170 In cross examination, the Claimant accepted that he could not be sure that Ms Dyer had made this statement. She denied it. He answered that this was the impression he had because of his age and he would be required to complete training. In the light of this admission from the Claimant, it seems implausible that this statement was made and we have found that this did not occur.

On unspecified dates in the last two years Mr Wookey asked the Claimant in a courteous but *"banterous"* manner *"why you haven't retired and how he was still there"*

171 For the reasons set out above, including the unspecific nature of the allegation and the fact that they were not raised until February 2022, the Tribunal would not have

found that there were facts that could give rise to a *prima facie* case of discrimination.

On an unspecified date in the last two years Mr Wookey told the Claimant when the Claimant was arriving for a night shift and Ian was leaving, that the Claimant *"shouldn't be doing nights at his age".*

172 For the reasons set out above, including the unspecific nature of the allegation and the fact that they were not raised until February 2022, the Tribunal would not have found that there were facts that could give rise to a *prima facie* case of discrimination.

Employment Judge Lambert
Date: 23 February 2023

Judgment sent to the parties on 09 March 2023

For the Tribunal Office