



EMPLOYMENT TRIBUNALS

Claimant: Mr M Davies

Respondent: Melin Homes Ltd

Heard at: Cardiff **On:** 11, 12 & 13 September 2023

Before: Employment Judge G Cawthray
Mrs M Farley
Mr P Charles

Representation

Claimant: In person, not legally qualified

Respondent: Mr C Ludlow, Counsel

RESERVED JUDGMENT

1. The unanimous judgment of the Tribunal is set out below.
2. The Claimant's complaints of direct age discrimination under section 13 Equality Act 2010 fail and are dismissed.
3. The Claimant's complaints of harassment related to age under section 26 of the Equality Act 2010 fail and are dismissed.
4. The Claimant's breach of contract claim fails and is dismissed.
5. The Claimant's detriment claim under section 146 Trade Union Labour Relations (Consolidations) Act 1992 fails and is dismissed.

REASONS

Issues and Introduction

1. This final hearing was preceded by four earlier preliminary hearings: a case management preliminary hearing conducted by Employment Judge S Moore on 30 March 2022, a public preliminary hearing conducted by Employment Judge R Harfield on 26 October 2022, a case management

preliminary hearing conducted by Employment Judge S Jenkins on 24 March 2023 and a case management preliminary hearing conducted by Employment Judge S Jenkins on 21 June 2023.

2. On 30 March 2022 Employment Judge S Moore removed a number of respondents.
3. On 26 October 2022 Employment Judge R Harfield struck out a number of complaints on the basis that they had no reasonable prospects of success. The remaining complaints, those that were considered at this final hearing, were all made subject to a deposit order. The Claimant paid the deposit.
4. The issues for determination are set out in the Case Management order of Employment Judge S Jenkins, copied below.

Claims of direct age discrimination – Section 13 Equality Act 2010

5. Did the Respondent treat the Claimant less favourably than it treated or would have treated an actual or hypothetical comparator because of age. The Claimant relies on the following acts/omissions:
 - a. The decision to dismiss the Claimant;
 - b. Not providing the Claimant with warning/details of the allegations in advance of the dismissal meeting; and
 - c. Not adopting an alternative to dismissal
6. In relation to any proven less favourable treatment of the Claimant because of age, is the Respondent able to show that such treatment was a proportionate means of achieving a legitimate aim?

Claims of age harassment - section 26 Equality Act 2010

7. Did the Respondent engage in unwanted conduct? The Claimant relies on the following alleged acts of harassment:
 - a. The treatment of the Claimant during the meeting of 21 June 2021 including stating to the Claimant he was going to be dismissed and without any reason;
 - b. The humiliating treatment of the Claimant by escorting him from the office and to his car in view of colleagues and subordinates (who were outside the building or who viewed through the exit windows);
 - c. The refusal and/or failure to use the disciplinary/dismissal procedures;
 - d. The refusal and/or failure to use the capability procedures; and
 - e. The treatment of the Claimant when arranging the meeting of 21 June 2021 without any invite or prior warning.
8. Was any such conduct related to age?
9. If so, did the conduct have the purpose or effect of:
 - a. violating the Claimant's dignity; or

- b. creating an intimidating, hostile, degrading, humiliating, or offensive environment for the Claimant?
10. In addressing the answer to the above, should the conduct be considered as having that effect taking into account the following:
- c. The perception of the Claimant
 - d. The other circumstances of the case; and
 - e. Whether it is reasonable for the conduct to have that effect.

Claim for breach of contract

11. Has the Respondent acted in breach of any contractual provision relating to the operation of the contractual discretion to pay the Claimant in lieu of notice?

Claim pursuant to section 146 TULRCA

12. Has the Respondent subjected the Claimant to any detrimental treatment? The Respondent understands that the Claimant relies on not being provided with notice of the meeting or of the issues leading to the decision to dismiss him, which prevented him from making use of trade union services.
13. Was the sole main purpose of the treatment to prevent or deter the Claimant from making use of trade union services or to penalise him for doing so? The Respondent understands that the Claimant contends that the sole purpose of holding the dismissal meeting on 21 June 2021 with no pre-warning was to prevent or deter him from accessing trade union representation in respect of his dismissal.
14. At the outset of the hearing we discussed the issues for determination with the parties, and at regular intervals throughout the hearing I reminded the Claimant about the issues the Tribunal needed to determine.
15. The Claimant compares himself with the following:
- a. specific team leaders – NE, KA and AP who were there in their 40s, around 50 and late 30s respectively;
 - b. A manager – SW age 52
 - c. A hypothetical comparator age 30 – 50.

Evidence and procedure

16. The parties submitted an agreed Bundle of 273 pages.
17. The Claimant provided a witness statement of 13 pages. The Claimant swore on the bible and was questioned.
18. The Respondent called the following witnesses: Mr. Carl Alston, Mr. Mike Harries, and Mrs. Paula Kennedy. They all produced witness statements. Ms. Kennedy also produced a supplemental witness statement that was

prepared in response paragraph 115 of the Claimant's witness statement which contained new matters that had not been previously raised by the Claimant. All three witnesses affirmed and were questioned.

19. The Respondent provided written Closing Submissions, and brief oral submissions. The Respondent's submissions included reference to both legislation and case law. The Claimant gave oral submissions.
20. We established at the start of the hearing that no attendee required any adjustments to the hearing format. I explained to the Claimant the process involved in a final hearing, specifically the difference between the stages of giving and challenging evidence and submissions. I explained to the Claimant that if he did not agree with the contents of any of the Respondent's witness statements that he must challenge it in questioning. The timetable for managing the hearing was discussed with the parties and the Claimant was informed that he may wish to think about using his time carefully and consider the questions he wishes to ask against the list of issues.

Facts

21. The Claimant started employment for the Respondent on 29 July 2019 as a Maintenance Manager.
22. The Claimant signed a contract of employment on 25 June 2019.
23. The Respondent had a handbook, and specifically a Disciplinary and Dismissal Policy.
24. The Claimant was 58 years and 8 months old when he joined the Respondent. The application form used by the Respondent does not contain any detail about an applicant's age.
25. The Claimant was interviewed on 17 June 2019 by Owain Roberts, Dave Cook (who was in his late 50s) and Joanne Kirrane. After Dave Cook left the Respondent Joanne Kirrane replaced him as Executive Director – Living Well. The Claimant was appointed on a permanent basis.
26. Upon joining the Respondent the Claimant was required to address some serious performance and conduct issues with staff. This included investigating some serious disciplinary matters within his teams.
27. Between commencement of employment in July 2019 and the first Covid Lockdown in March 2020 the Respondent's office-based staff were mostly based in the office. Following the initial lockdown, and lifting of restrictions, office-based staff worked on a flexible basis and there would be less people working in the office on a day-to-day-to basis. When in the office, the Claimant was primarily based in the reception area.
28. The Team Leaders of the teams under the Claimant's remit were responsible for most day-to-day activities and contact with the operatives in their teams. Work was allocated by a booking system, and the Claimant had minimal direct contact with operatives.

29. The Claimant had a good working relationship with his line manager Owain Roberts. Mike Harris said in evidence that Owain Roberts was loyal to the Claimant, in his view misguidedly so.
30. Mike Harris, Head of HR, had some informal conversations with the Claimant regarding his approach in the months following his commencement of employment before the first lockdown. Albeit at that time no formal concerns were raised, nothing was recorded in writing and Owain Roberts did not raise any concerns as part of the Claimant's probation. The Respondent was generally pleased that the Claimant had been tackling the historical and challenging matters.
31. No formal complaints were made against the Claimant, but Mike Harris had heard that some Team Leaders were upset by the Claimant's management style.
32. An exit interview was conducted with a member of staff, Ryan Walters, on 14 April 2021. The interview was conducted by Mike Harris. Key extracts are:
- "Since new manager came things have spiralled downhill. I have been dreading coming to work."*
- "All of this because of 1 man (2 if you count Mark Davies)."*
33. The focus of this interview was primarily on Mark Garland, and not the Claimant.
34. In or around May 2021 Joanne Kirrane developed concerns about the Claimant's management style.
35. In a regular 1-2-1 meeting in or around May 2021, Joanne Kirrane told Paula Kennedy, Chief Executive, that she was carrying out an informal investigation into the Claimant's behavior towards the maintenance teams.
36. Carl Aston, Team Leader, in his witness statement made general assertions about the Claimant's management approach. He felt the Claimant told him what to do and did not let him make his own decisions and he considered this to be patronising and felt frustrated by the Claimant's approach. In response to questioning he gave examples of where he had been personally upset by the Claimant's approach to reviewing his work. Carl Aston said that at times he felt intimidated by what the Claimant said and did. Carl Aston felt he couldn't approach Owain Roberts about the Claimant as he believed Owain Roberts would turn a blind eye on the effect the Claimant was having because he was seen to be getting things done.
37. Joanne Kirrane was not called by the Respondent to give evidence. She remains in employment. Owain Roberts left the Respondent in January 2022, and prior to leaving made comment on dealings with the Claimant.
38. Joanne Kirrane and Paula Kennedy discussed the matter on several occasions.

39. The Claimant went on holiday on 11 June 2021, and was due to return to work on 21 June 2021.
40. An exit interview was conducted with Ieuan Jones on 15 June 2021 which references the pressure put on staff by the Claimant.
41. Following this exit interview, on 15 June 2021 Mike Harris discussed the Claimant with a colleague in HR, Paul Williams.
42. Mike Harris then met with Owain Roberts to discuss a plan of action for managing the situation. Owain Roberts then spoke with staff.
43. Whilst the Claimant was still on annual leave Owain Roberts asked to speak with Carl Aston, together with Nathan Evans, another team leader. Owain Roberts asked for feedback on the Claimant.
44. Carl Aston was of the view that some staff were scared of the Claimant, there was bad feeling in other teams and that the teams were starting to talk and that staff felt under a lot of pressure.
45. Both Carl Aston and Nathan Evans told Owain Roberts that they were looking for another job.
46. Following the discussion between Carl Aston and Owain Roberts, Joanne Kirrane asked to speak with Carl Aston, and he provided her with his views – in particular that the Claimant was having a negative impact on staff and morale was low.
47. At some stage in the week commencing 14 June 2021 Mike Harris spoke separately with Joanne Kirrane and Paula Kennedy. He recommended that the Claimant be removed from the business as soon as possible in an attempt to prevent staff leaving. Mike Harris explained this was a short service dismissal because the Claimant did not have two years' service and that the length of service enabled the Respondent to depart from the process.
48. Paula Kennedy made the decision to dismiss, based on the information and recommendations provided to her by Joanne Kirrane and Mike Harris.
49. Joanne Kirrane did not produce any written report or documentation as a result of her informal investigation.
50. At the time of making the decision Paula Kennedy had not read the exit interviews herself. She made the decision in consideration of the fact that senior managers were concerned about the impact the Claimant's approach to management was having on some staff and formed the view that staff disliked working under the Claimant, did not consider him a good manager, that they felt talked down to and some staff had left or were considering leaving because of this. Paula Kennedy understood that Joanne Kirrane had spoken with Nathan Evans, Team Leader, Rhiannon Elson (Customer Service Manager) and Trish Hodinot (Sustainability Manager). The latter two did not work under the Claimant's management lines.

51. There was no evidence to suggest whether or not Paula Kennedy knew the Claimant's age.

52. Paula Kennedy was not involved in the specific arrangements for the termination.

53. An exit interview was conducted with Craig Sheedy on Friday 18 June 2021. Key extracts are:

"Since Mark Davies came into Melin, things have gone massively downhill. He is a cancer that is destroying Melin from the inside out. The way he acts and deals with people is terrible, he's a bully that has destroyed the morale in every team."

"There is a long list of people in all the teams that are ready to leave and can't wait to get out".

"People haven't spoken out about how they feel because they don't think anything will get done as they've tried before and no action was taken".

"Mark has actually said there is no such thing as a mistake."

"...he is just a nasty person that doesn't care about anyone".

54. On his return to work on 21 June 2021 the Claimant was met by his line manager, Owain Roberts – Director of Assets, in the foyer area and asked to go to a meeting room on the first floor.

55. Mike Harris accepts the Respondent was not following any form of process, and gave no thought to the Claimant being accompanied or represented at the meeting on the basis it believed it was conducting a short service dismissal.

56. Owain Roberts walked with the Claimant to a meeting room on the first floor. Mike Harris was waiting in the meeting room.

57. The Claimant was not given any advance notification about the meeting, or the topic for discussion.

58. The Claimant says he was told that he was not the right fit for the future plans of the maintenance team.

59. At page 187 of the Bundle is a handwritten contemporaneous note of meeting made by Mike Harris. A typed version is at page 189. We accept these to be an accurate account of the discussion.

60. The note has been read in full but key extracts have been copied below:

"OR We know the best company feedback hasn't been great. Comments on management style. Clearly you are a big part of that."

“OR There have been exit interviews with staff. plus, Mark aware that team leaders have been looking for new jobs. Not idle threat because they have interviews lined up. Common theme in all of that is you.”

“OR Simply don’t have time to work these things through. Therefore I am making the decision to remove you from your post.

“MD This feels harsh. Under 2 years service too”.

“OR It needs to be said that you have done some work here that only you could have done. However, our values are important to us and your approach is at odds with these.”

“OR However over last few weeks aware of how serious the issue was + we had to take action before we lost the team leaders and others”.

“MD I can change, I can do things differently.

“OR I feel it has gone too far. We have made our decision and that is final.”

61. On balance, taking into account the oral evidence and the contemporaneous note, we find that the discussions were as set out in the note. There was no reference to “fit” during the meeting, despite the Claimant using that language subsequently in other documents.
62. In response to cross examination the Claimant agreed that Owain Roberts and Mike Harris conducted the meeting professionally.
63. The Claimant was shocked and embarrassed.
64. At the end of the meeting Owain Roberts walked with the Claimant out of the building straight to the carpark. There were some staff in the carpark and outside the building. The Claimant saw some staff inside the building through the window. The Claimant felt humiliated by being walked to his car.
65. The Claimant was dismissed, with immediate effect, on 21 June 2021. The Claimant was 60 years old at the time of his dismissal.
66. He was not given any notice period, but was paid in lieu of his notice. The contract of employment contains a section on notice. Employee’s with less than 2 years’ serve are entitled to one weeks’ notice.

“The Association has the right to terminate your employment without notice of payment in lieu of notice in the case of gross misconduct.

The Association reserves the right to require you not to carry out your duties or attend your place of work during your period of notice.

At the absolute discretion of the Association, payment in lieu of working notice may be made.”

67. The Claimant was given a payment in lieu of notice equivalent to one months' pay.
68. The Claimant's statutory notice entitlement was one week.
69. Following his dismissal, in correspondence regarding the form of announcement to be issued to staff the Claimant made no reference to the decision to dismiss him being related to age.
70. Other persons – matters in paragraph 115 of the Claimant's witness statement
71. The Claimant says Owain Roberts made reference to Dave Cook and made comments such as *"Dave has been too long now and it's his time to go"*.
72. The Claimant says Owain Roberts made reference to Bob Tunley , who was around 70, that *"Bob needed to be put out to pasture"*.
73. The Claimant says Owain Roberts asked Geoff to ask surveyors who were coming up to 60 when they would retire, that he asked Jill Bergin (reaching 60) the same and referred to her as "incoming".
74. The Claimant says Owain Roberts referred to Linda Wilcox, who was in her late 50s, as a "lovely old lady" and that he would speak to Dave Badham about her retirement plans.
75. The Claimant says Owain Roberts, in February 2021, suggested to the Claimant that he would be retiring soon.
76. Paula Kennedy in her supplemental witness statement, addresses all of the allegations set out above. It is noted that these matters had not been mentioned prior to the Claimant's witness statement.
77. The Claimant did not challenge the contents of Paula Kennedy's supplemental witness statement. The Tribunal therefore the accepts the content of Paula Kennedy's supplemental witness statement.

Law

Direct Discrimination

Section 13 Equality Act 2010

Direct discrimination

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

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex—

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

Section 5 – Equality Act 2010

Age

(1) In relation to the protected characteristic of age—

(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;

(b) a reference to persons who share a protected characteristic is a reference to persons of the same age group.

(2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages.

Section 36 – Equality Act 2010

Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

- (2) *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
- (3) *But subsection (2) does not apply if A shows that A did not contravene the provision.*
- (4) *The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*
- (5) *This section does not apply to proceedings for an offence under this Act.*
- (6) *A reference to the court includes a reference to—*
- (a) an employment tribunal;*
 - (b) the Asylum and Immigration Tribunal;*
 - (c) the Special Immigration Appeals Commission;*
 - (d) the First-tier Tribunal;*
 - (e) the Education Tribunal for Wales;*
 - (f) the First-tier Tribunal for Scotland Health and Education Chamber.*

78. Under section 13(1) of the Equality Act 2010 read with section 5, direct discrimination takes place where a person treats the claimant less favourably because of age than that person treats or would treat others.

79. Under section 23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

80. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of age. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as he was. (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11; [2003] IRLR 285).

81. Decisions are frequently reached for more than one reason. Provided the protected characteristic had a significant influence on the outcome, discrimination is made out. (*Nagarajan v London Regional Transport* [1999] IRLR 572, HL).

82. The case law recognises that very little discrimination today is overt or even deliberate. Witnesses can even be unconsciously prejudiced.

83. There are two stages to the burden of proof test as set out in section 136 of the Equality Act 2010.

Stage 1: There must be primary facts from which the tribunal could decide – in the absence of any other explanation, that discrimination took place. The burden of proof is on the claimant (*Ayodele v (1) Citylink Ltd (2) Napier* [2018] IRLR 114, CA; *Royal Mail Group Ltd v Efobi* [2021] UKSC 22). This is sometimes referred to as proving a prima facie case. If this happens, the burden of proof shifts to the respondent.

Stage 2: The respondent must then prove that it did not discriminate against the claimant.

84. In other words, where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of age, then the burden of proof moves to the respondent. It is then for the respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act.
85. The burden of proof provisions requires careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another. (*Hewage v Grampian Health Board* [2012] IRLR 870, SC.)
86. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong* [2005] EWCA Civ 142; [2005] IRLR 258. Once the burden of proof has shifted, it is then for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.
87. The Court of Appeal in *Madarassy*, a case brought under the then Sex Discrimination Act 1975, states: *'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination. A false explanation for the less favourable treatment added to a difference in treatment and a difference in sex can constitute the 'something more' required to shift the burden of proof. (The Solicitors Regulation Authority v Mitchell UKEAT/0497/12.)*
88. In *Glasgow City Council v Zafar* 1998 ICR 120, HL, Lord Browne-Wilkinson said that in the context of a discrimination claim *'the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would*

not have treated the complainant "less favourably". He approved the words of Lord Morison, who delivered the judgment of the Court of Session, that *'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances'*. It follows that mere unreasonableness may not be enough to found an inference of discrimination. Unfair treatment itself is not discriminatory.

89. In *Amnesty International v Ahmed* UKEAT/0447/08/ZT the EAT stated, paragraph 36, *"...the ultimate question – is – necessarily – what was the ground of the treatment complained of (or – if you prefer – the reason why it occurred)..."*.
90. Evidence of discriminatory conduct and attitudes in an organization may be probative in deciding whether alleged discrimination occurred: *Chief Constable of Greater Manchester Police v Bailey* [2017] EWCA Civ 425.
91. The EHRC Statutory Code of Practice states at §2.4: *"An age group can mean people of the same age or people of a range of ages. Age groups can be wide (for example, 'people under 50'; 'under 18s'). They can also be quite narrow (for example, 'people in their mid-40s'; 'people born in 1952'). Age groups may also be relative (for example, 'older than me' or 'older than us')."*
92. The IDS Handbook on Discrimination at Work suggests at §5.8 *"there need not be a dramatic difference in age between the claimant and his or her chosen comparator."*

Section 26 Equality Act 2010

Harassment

- (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.
- (2) A also harasses B if—
- (a) A engages in unwanted conduct of a sexual nature, and
- (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

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

(a) the perception of B;

(b) the other circumstances of the case;

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

(5) The relevant protected characteristics are—

- age;*
- disability;*
- gender reassignment;*
- race;*
- religion or belief;*
- sex;*
- sexual orientation.*

93. Although harassment is similar to direct discrimination it covers actions “related to” a protected characteristic, which goes further than “because of”.

94. When considering whether a claimant’s dignity has been violated or an intimidating, hostile, degrading humiliating or offensive environment has been created, it must be kept in mind that it is not enough that the conduct was simply upsetting.

95. When considering effect it must be considered whether it was reasonable for the conduct to have had the effect taking in to account both a claimant’s perception and the overall circumstances

Section 146 Trade Union and Labour Relations (Consolidation) Act 1992

Detriment on grounds related to union membership or activities.

(1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—

(a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,

(b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so, . . .

(ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or

(c) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.

(2) In subsection 1)“an appropriate time” means—

(a) a time outside the worker's working hours, or

(b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union or (as the case may be) make use of trade union services;

and for this purpose “working hours”, in relation to a worker, means any time when, in accordance with his contract of employment (or other contract personally to do work or perform services), he is required to be at work.

(2A) In this section—

(a) “trade union services” means services made available to the worker by an independent trade union by virtue of his membership of the union, and

(b) references to a worker’s “making use” of trade union services include his consenting to the raising of a matter on his behalf by an independent trade union of which he is a member.

(2B) If an independent trade union of which a worker is a member raises a matter on his behalf (with or without his consent), penalising the worker for that is to be treated as penalising him as mentioned in subsection (1)(ba).

(2C) A worker also has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place because of the worker’s failure to accept an offer made in contravention of section 145A or 145B.

(2D) For the purposes of subsection (2C), not conferring a benefit that, if the offer had been accepted by the worker, would have been conferred on him under the

resulting agreement shall be taken to be subjecting him to a detriment as an individual (and to be a deliberate failure to act).

(3) A worker also has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of enforcing a requirement (whether or not imposed by a contract of employment or in writing) that, in the event of his not being a member of any trade union or of a particular trade union or of one of a number of particular trade unions, he must make one or more payments.

(4) For the purposes of subsection (3) any deduction made by an employer from the remuneration payable to a worker in respect of his employment shall, if it is attributable to his not being a member of any trade union or of a particular trade union or of one of a number of particular trade unions, be treated as a detriment to which he has been subjected as an individual by an act of his employer taking place for the sole or main purpose of enforcing a requirement of a kind mentioned in that subsection.

(5) A worker or former worker may present a complaint to an industrial tribunal on the ground that he has been subjected to a detriment by his employer in contravention of this section.

(5A) This section does not apply where—

(a) the worker is an employee; and

(b) the detriment in question amounts to dismissal.

Section 148 Trade Union and Labour Relations (Consolidation) Act 1992

Consideration of complaint

(1) On a complaint under section 146 it shall be for the employer to show what was the sole or main purpose for which he acted or failed to act.

(2) In determining any question whether the employer acted or failed to act, or the purpose for which he did so, no account shall be taken of any pressure which was exercised on him by calling, organising, procuring or financing a strike or other industrial action, or by threatening to do so; and that question shall be determined as if no such pressure had been exercised.

Breach of contract

96. Under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 the Employment Tribunal was given power to deal with breach of contract claims brought by employees in relation to breaches of contract outstanding on the termination of employment.

97. If there is no expressly agreed period of contractual notice, there is an implied contractual right to reasonable notice of termination. This must not be less than the statutory minimum period of notice set out in section 86 Employment Rights Act 1996. For someone who has been employed at least one month but less than two years, this is one week's notice.

Conclusions

Direct Age Discrimination

98. As set out in the List of Issues above, the Claimant has made three allegations of direct age discrimination. We have considered each allegation separately and together as a whole.

Decision to dismiss

99. We considered whether the Claimant had discharged the burden on him to show evidence from which the Tribunal could reasonably conclude that the decision to dismiss him was 'because of' age.

100. We concluded that there was no evidence sufficient to discharge the burden on the Claimant. There was no evidence from which we could reasonably conclude that age played any part in the reason for dismissal. There is no prima facie case of age discrimination.

101. We have concluded that the reason for dismissal was that senior managers within the Respondent had serious concerns about the impact of the Claimant's management style on staff and the potential consequences to the organisation, in particular, staff (including Team Leaders Carl Aston and Nathan Evans) leaving and/or considering leaving the Respondent.

102. We noted the Claimant's submissions on the fact that Joanne Kirrane was not a witness at the hearing and the impact on his ability to challenge matters relating to Joann Kirrane's actions. We have not drawn any inference from the fact she was not called as a witness. There is no evidence, or anything or infer, that the Claimant's age, had anything to do with Joanne Kirrane informally investigating concerns and speaking to staff. We consider it notable that Joanne Kirrane was on the Claimant's interview panel, at which stage he was almost 59 years old.

103. As set out in the findings of fact above, we do not consider there to be any evidence of any discriminatory attitudes in the work place, and indeed considered the evidence that Owain Roberts had been loyal to the Claimant.

104. The Claimant failed to show that the Respondent treated him less favorably than any actual or hypothetical comparator.

105. There was simply no evidence that the Respondent would have treated someone who wasn't in the Claimant's age group any differently.

106. In any event, the Respondent has shown a non-discriminatory explanation for the Claimant's dismissal, as set out above.
107. Accordingly, the direct age discrimination complaint in relation to dismissal fails.

Not providing the Claimant with warning/details of the allegation in advance of the dismissal meeting

108. We considered whether the Claimant had discharged the burden on him to show evidence from which the Tribunal could reasonably conclude that not providing him with warning/details of the allegation in advance of the dismissal meeting was 'because of' age.
109. We concluded that there was no evidence sufficient to discharge the burden on the Claimant. There was no evidence from which we could reasonably conclude that age played any part in the decision to not provide the Claimant with warning/details of the allegation in advance of the dismissal meeting. There is no prima facie case of age discrimination.
110. We have concluded that the reason for not providing the Claimant with warning/ details of the allegation in advance of the dismissal meeting is that the Respondent's senior managers, in consideration of the information gained during the Claimant's annual leave, made a conscious and deliberate decision to dismiss the Claimant promptly at the first available opportunity after the Claimant's return from annual leave. We conclude that this was done in order to attempt to minimise further staff discontent and the risk of staff leaving. The Respondent, as demonstrated by the comments made by Owain Roberts at the dismissal meeting, felt that things had gone too far and that there was not time to explore alternatives. The decision was made in consideration of the Claimant having less than two years' service and the view that there was minimal risk associated with such an approach.
111. The Claimant failed to show that the Respondent treated him less favorably than any actual or hypothetical comparator.
112. There was simply no evidence that the Respondent would have treated someone who wasn't in the Claimant's age group any differently.
113. In any event, the Respondent has shown a non-discriminatory explanation for the Claimant's dismissal, as set out above.
114. Accordingly, the direct age discrimination complaint in relation to non-provision of warning/details in advance of the dismissal meeting fails.

Not adopting an alternative to dismissal

115. We considered whether the Claimant had discharged the burden on him to show evidence from which the Tribunal could reasonably conclude that not adopting an alternative to dismissal was 'because of' age.
116. We concluded that there was no evidence sufficient to discharge the burden on the Claimant. There was no evidence from which we could

reasonably conclude that age played any part in the reason for the Respondent not adopting an alternative to dismissal. There is no prima facie case of age discrimination.

117. We have concluded that the reason for not adopting an alternative is that the Respondent felt that things had gone too far and that there was not time to explore alternatives. The Respondent choose to act quickly and dismiss the Claimant rather that adopt an alternative in order try and prevent staff from leaving.
118. The Claimant failed to show that the Respondent treated him less favorably than any actual or hypothetical comparator.
119. There was simply no evidence that the Respondent would have treated someone who wasn't in the Claimant's age group any differently.
120. In any event, the Respondent has shown a non-discriminatory explanation for the Claimant's dismissal, as set out above.
121. Accordingly, the direct age discrimination complaint in relation to non-provision of warning/details in advance of the dismissal meeting fails.
122. We have concluded that there is no direct age discrimination of the Claimant, considering the allegations separately and together. The Tribunal's conclusions are unanimous.

Age Harassment

123. As set out in the List of Issues above, the Claimant has made five allegations of harassment related to age.

The treatment of the Claimant during the meeting on 21 June 2021 including stating to the Claimant that he was going to be dismissed and without any reason

124. We conclude the conduct, being what happened at the meeting on 21 June 2021, namely dismissing the Claimant, was unwanted. Clearly, the Claimant clearly did not want to be called to a meeting and dismissed.
125. We have considered whether the conduct was related to age and conclude that the treatment during the meeting, what was said and done, in particular telling the Claimant that he was going to be dismissed was in no way related to age. Instead, we conclude it was for the reasons as we have concluded above in relation to the direct age discrimination claims. Namely that the Claimant was told he was dismissed at the meeting in order to attempt to avoid other staff leaving and minimise staff discontent.
126. If we are wrong on that, we have gone on to consider whether the Respondent intended the conduct to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offence

environment for the Claimant. We conclude that there was no such purpose or intention. We conclude that the Respondent was trying its best to manage the risk of staff leaving and management of the maintenance teams going forward.

127. The Tribunal understands that the treatment at the meeting, and being told he was being dismissed, would have been upsetting for the Claimant. However, noting in particular that the Claimant accepted the meeting was professionally undertaken, we have not been able to conclude that the conduct reasonably had the effect of violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offence environment for the Claimant.

128. The treatment of the Claimant at the meeting on 21 June 2021 was not age related harassment and the complaint fails.

The humiliating treatment of the Claimant by escorting him from the office and to his car in view of colleagues and subordinates (who were outside the building or who viewed through the exit windows)

129. We conclude that some staff may have seen the Claimant being walked to his car with Owain Roberts. We conclude that the Claimant would not have wished to have been accompanied, or in his own words "escorted" from the office.

130. We have considered whether the conduct was related to age and conclude that Owain Roberts escorting the Claimant from the office to his car was in no way related to age. We note that it is common practice where a dismissal without notice takes place that staff are accompanied from an employer's premises. We conclude that the reason that the Claimant was escorted to his car was not related to age, but to ensure a calm exit from the workplace after the Claimant was told that he was dismissed, which was a shock for him.

131. If we are wrong on that, we have gone on to consider whether the Respondent intended the conduct to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offence environment for the Claimant. We conclude that there was no such purpose or intention. We conclude that the Respondent was trying its best to achieve a calm exit from the workplace.

132. The Tribunal understands that being accompanied from the office to the car may have been upsetting and embarrassing for the Claimant. However, in the context of his relationship with Owain Roberts prior to the dismissal, noting again that the treatment at the meeting, and the Claimant being aware of the use of short service dismissals we have not been able to conclude that the conduct reasonably had the effect of violating the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offence environment for the Claimant.

133. The escorting the Claimant from the office and to his car was not age related harassment and the complaint fails.

The refusal and/or failure to use the disciplinary/dismissal procedures

134. We conclude the conduct, being refusal and/or failure to use the disciplinary/dismissal procedures was unwanted. Clearly, the Claimant clearly did not want to be dismissed.
135. We have considered whether the conduct was related to age and conclude that the decision to not follow the disciplinary/dismissal procedure was no way related to age. Instead, we conclude the Respondent made an active choice to dismiss the Claimant promptly, with immediate effect before the Claimant acquired two year's service and in order to attempt to reduce the risk of staff leaving and minimise staff discontent. We also conclude that the reason was that the Respondent
136. If we are wrong on that, we have gone on to consider whether the Respondent intended the conduct to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offence environment for the Claimant. We conclude that there was no such purpose or intention. We conclude that the Respondent was trying its best to manage the risk of staff leaving and management of the maintenance teams going forward.
137. The Tribunal understands that not being given the opportunity to address matters via a formal process would have been upsetting and frustrating for the Claimant. However, noting in particular that the Claimant during the meeting referenced the lack of two years' service, and the Claimant from his working career was aware of the ability to undertake short service dismissals, we have not been able to conclude that the conduct reasonably had the effect of violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offence environment for the Claimant.
138. The refusal and/or failure to use the disciplinary/dismissal procedures was not age related harassment and the complaint fails.

The refusal and/or failure to use the capability procedures

139. In relation to this allegation, we have reached the same conclusions as set out above in relation to the refusal and/or failure to use the disciplinary/dismissal procedures.
140. The refusal and/or failure to use the disciplinary/dismissal procedures was not age related harassment and the complaint fails.

The treatment of the Claimant when arranging the meeting of 21 June 2021 without any invite or prior warning.

141. We conclude the conduct, the arrangements of the meeting on 21 June 2021, in that the Claimant was not given any invitation or prior warning, was unwanted.

142. We have concluded that the reason for not providing the Claimant with an invitation or prior warning in advance of the dismissal meeting is that the Respondent's senior managers, in consideration of the information gained during the Claimant's annual leave, made a conscious and deliberate decision to dismiss the Claimant promptly at the first available opportunity after the Claimant's return from annual leave. We conclude that this was done in order to attempt to minimise further staff discontent and the risk of staff leaving. The Respondent, as demonstrated by the comments made by Owain Roberts at the dismissal meeting, felt that things had gone too far and that there was not time to explore alternatives. The decision was made in consideration of the Claimant having less than two years' service and the view that there was minimal risk associated with such an approach. We do not consider the decision to not provide an invitation or prior warning to be in anyway related to age.
143. If we are wrong on that, we have gone on to consider whether the Respondent intended the conduct to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offence environment for the Claimant. We conclude that there was no such purpose or intention. We conclude that the Respondent was trying its best to act swiftly and dismiss the Claimant promptly on the first available opportunity following his return to work in order to manage the risk of staff leaving and management of the maintenance teams going forward.
144. The Tribunal understands that not being given notice or warning of the meeting would have been upsetting and frustrating for the Claimant. However, noting in particular that the Claimant during the meeting referenced the lack of two years' service, and the Claimant from his working career was aware of the ability to undertake short service dismissals, we have not been able to conclude that the conduct reasonably had the effect of violating the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offence environment for the Claimant.
145. The arrangements for the meeting was not age related harassment and the complaint fails.
146. We have concluded that there is no harassment of the Claimant related to age, considering the allegations separately and together. The Tribunal's conclusions are unanimous.

Claim for breach of contract

147. We have considered whether the Respondent acted in breach of any contractual provision relating to the operation of the contractual discretion to pay the Claimant in lieu of notice.
148. As set out in the findings of fact above, under the Employment Rights Act 1996 the Claimant was entitled to one weeks' notice.

149. The contract of employment gives the Respondent the absolute discretion to make a payment in lieu of notice. The Respondent actually made a payment equivalent to one months' pay, this is above what it was required to do under statute or contract. We have concluded that in all the circumstances, noting the reason for dismissal and the contractual provisions, that the Respondent exercised its discretion reasonably and rationally in the circumstances in making the decision to pay the Claimant in lieu of his notice period.

150. The Claimant's breach of contract claim fails.

Claim pursuant to section 146 TULRCA?

151. We considered whether the Respondent subjected the Claimant to any detrimental treatment by:

(ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or”.

152. The Respondent understands that the Claimant alleges relies on not being provided with notice of the meeting or of the issues leading to the decision to dismiss him, which prevented him from making use of trade union services.

153. We considered whether the sole or main purpose of not providing the Claimant with notice of the meeting or of the issues leading to the decision to dismiss him was to prevent or deter the Claimant from making use of trade union services or to penalise him for doing so.

154. We conclude there was not deliberate decision, no-one with a conscious mindset, to prevent the Claimant from accessing trade union service or to penalise him for having accessed trade union services previously.

155. The fact that the Claimant was a trade union member had no bearing on the decision to call the Claimant to a meeting without prior notice of the meetings or the issues that led to his dismissal. The reasons for not being provided with notice of the meeting and/or the issues was that the Respondent considered it needed to act swiftly on the Claimant's return from annual leave and in view of the fact it had decided to act outside of any process to effect a short service dismissal.

156. The Claimant has not put forward evidence required to discharge the burden of proof on him and has not established a prima facie case. The reason for the treatment by the Respondent is explained above.

157. The complaint of detriment fails.

158. In reaching this unanimous decision the Tribunal recognises the stress and upset this matter may have caused and the strength of feeling on the Claimant's part. However, the conclusions reached are based on the specific allegations as set out in the List of Issues, the finding of facts made on the evidence presented and the application of relevant law.

Employment Judge G Cawthray 18 September 2023

Date 15 September 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 18 September 2023

FOR EMPLOYMENT TRIBUNALS Mr N Roche