Case No:- 3312708/2020.

EMPLOYMENT TRIBUNALS

Claimant Mr D Benton

Respondent v The CGM Group (East Anglia) Limited

Heard at: Cambridge **On:** 27 and 28 April 2023

Before: Employment Judge Tynan

Members: Mr D Hart and Mr K Rose

Appearances:
For the Claimant: Ms S Bewley, Counsel
For the Respondent: Mr D Frame, Solicitor (in respect of Remedy only)

JUDGMENT having been sent to the parties on 6 June 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a Claim Form presented to the Employment Tribunals on 29 September 2020, following ACAS Early Conciliation between 31 July and 31 August 2020, the Claimant has brought various claims against the Respondent. Subject to there having been a series of acts or failures and/or acts extending over a period, and subject also to the Tribunal's power to extend time as appropriate, any matters complained of which occurred prior to 1 May 2020 are potentially out of time.

2. The Respondent's response to the claims was due to be filed by 23 December 2020. However, that deadline was missed due to an oversight on the part of Mr Frame. On either 6 or 7 January 2021 he checked the file and realised that the response had not been submitted. He emailed the Tribunal on 7 January 2021 making application for an extension of time for the Respondent to submit its response. The email contained an admission by Mr Frame that he had failed to submit the Response on time as a result of his own error. His oversight in the matter was seemingly compounded when he failed to copy the application to the Claimant's solicitors.

3. Following a hearing on 10 June 2022, Employment Judge Bloom refused

the application to extend time for presenting the response. He determined that the Respondent would only be permitted to take any further part in these proceedings in order to make any representations concerning the issue of Remedy and to respond to any application for costs against the Respondent and / or any application for wasted costs against the Respondent's Solicitors.

4. As we observed yesterday in the context of the Claimant's application for permission to file a 5-page supplemental witness statement, Employment Judge Bloom applied the relevant time limits strictly when he refused the Respondent permission to file its response effectively two weeks out of time. He was of the view that Mr Frame's oversight was a matter for his firm's professional indemnity insurers. We considered whether the interests of fairness and justice required that we should effectively hold the Claimant to the same standard, specifically whether he should be precluded from relying upon his supplemental witness statement given that it was filed just three days prior to the start of the Hearing and over six months after the date that his witness statement was ordered to be filed and served. Whilst we determined that the interests of justice required that we should admit the statement as further evidence, our observations in the matter seemingly led Ms Bewley to make certain comments in closing to the effect that the Tribunal should not indirectly seek to address any perceived hardship to the Respondent in terms of how it approached the claim more generally. Her comments in that regard slightly miss the point that was being made by the Tribunal. We have no intention of going behind Employment Judge Bloom's decision, whether directly or indirectly. However, not least given the Tribunal's obligation to seek to give effect to the overriding objective and, as far as practicable, to ensure that the parties are on an equal footing, it was important that the Tribunal give careful and consistent thought to the proposed introduction of supplemental evidence that would address at least two significant evidential gaps in the Claimant's initial 19-page witness statement, namely why he said he had made protected disclosures and why he believed he had been discriminated against by the Respondent. For the reasons we gave yesterday and do not repeat again today, we were ultimately satisfied that the overriding objective would be served by permitting the Claimant's supplemental witness statement to be admitted, notwithstanding Employment Judge Bloom's strict approach to time issues on 10 June 2022.

5. Rule 21(2) of the Employment Tribunal Rules of Procedure 2013 details the Tribunal's approach in cases where, as here, a response has not been presented. Whether or not a hearing is required, the Tribunal must make a determination of the claim. In other words, a claimant is not automatically entitled to a judgment. Instead, the Tribunal must exercise its powers judicially, making findings as appropriate (even if the claimant's evidence is effectively unchallenged) and applying the law to the facts found by it. It is not the Tribunal's function to simply rubber stamp a Judgment where there is no response. Amongst other things, the Tribunal has to be satisfied that it has jurisdiction in respect of any claims, and that any complaints are factually and legally well-founded. In this case, we do not overlook that our findings, conclusions and Judgment will be a matter of public record, particularly in circumstances where the Claimant is

asserting that he was discriminated against and subjected to detriments as a whistleblower. Although this is a secondary consideration, it also seems to us that our findings, conclusions and Judgment may have some bearing upon any issues that arise between Mr Frame, his insurers and his client.

6. The Claimant gave evidence at Tribunal. His initial witness statement is dated 10 November 2022. His supplemental statement is dated 24 April 2023. We have read both statements. There was a 206-page Hearing Bundle. The page references in this Judgment correspond to the numbered pages of the Hearing Bundle.

7. The Claimant's complaints are summarised in a List of Issues contained within the Hearing Bundle (pages 38 to 45). The List of Issues was updated by Ms Bewley for the purposes of this Hearing. At the outset of the Hearing we spent some time exploring the updated List of Issues with her, and identified various matters within the List that did not form part of the original claim. In the course of these discussions we referred to the often cited decision of the Employment Appeal Tribunal in **Chandhok v Tirkey [2015] ICR 527 EAT,** in which Mr Justice Langtsaff observed:

> **16 […] The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made— meaning, under the Employment Tribunals Rules of Procedure 2013 (SI 2013/1237), the claim as set out in the ET1.**
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> **17 … the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.**
>
> **18 In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so**

> **that they can tell if a tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.**

8. There is no application by the Claimant to amend his claim to include the additional matters within the updated List of Issues. In any event it is unlikely that we would have permitted the claim to be amended given the obvious hardship and prejudice this would cause to the Respondent in circumstances where the effect of Employment Judge Bloom's Judgment is to preclude it from taking any part in the proceedings other than in respect of Remedy.

9. Although the claims remain as set out in the Grounds of Claim, the references in this Judgment to the Issues are to the numbered Issues in the updated List of Issues.

Preliminary Issues

10. There are two preliminary issues that we have thought it appropriate to determine before we go on to consider the substantive complaints. The first issue was highlighted in Employment Judge Bloom's Judgment sent to the parties on 17 August 2022, namely whether the Claimant was employed by the Respondent (worker status having been conceded by the Respondent). The second issue is when and how the parties' relationship came to an end.

11. The issue of employment status is addressed at paragraph 41 onwards of Ms Bewley's written submissions. We agree with everything she says. She has correctly set out the relevant legal principles including those set out in the longstanding decision in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497. Employment status is to be assessed objectively. In our judgement, Ms Bewley is right to highlight the extensive evidence regarding the various ways in which the Respondent exercised control over the Claimant (paragraphs 46 to 59 of her written submissions). The point is well illustrated by the events of 4 May 2020 (events we shall come back to in this Judgment); throughout that day the Claimant remained subject to direction, oversight and control by the Respondent, including being instructed to leave site and go home following an incident on site. It seems to us that the only evidence that might be said to point to the Claimant being self-employed are the invoices which he submitted to the Respondent. However, in our judgement, they carry little or no weight in the matter since, had the Claimant not submitted them, he would not have been paid for his services. In effect he was required by the Respondent to prepare his own wage slips.

12. For all the reasons Ms Bewley has set out in her submissions, which we fully adopt, we are satisfied and conclude that the Claimant was indeed an employee of the Respondent and therefore eligible to pursue a complaint of unfair dismissal.

13. The question then is whether, as the Claimant asserts, the Respondent terminated his employment and if so, when this was? The Claimant last worked for the Respondent on 4 May 2020. He was assigned to cutting grass with four other operatives. They spent the morning mowing a grass embankment. The Claimant worked alone in the afternoon, in the course of which his equipment caught a piling in the bank. He reported the matter immediately to the Team Leader and was instructed to contact Mr Dockray of the Respondent, which he did. Mr Dockray asked him to prepare a statement setting out what had happened. He also told the Claimant that he was to leave site immediately and go home. The Claimant complied with Mr Dockray's instructions. He plainly did not resign his employment. When he left work on 4 May 2020 and went home, this was in response to a clear instruction from Mr Dockray. If the Claimant had resigned, he might have submitted a final invoice to the Respondent in respect of his work up to 4 May 2020. He did not do so. On the contrary, he continued to contact the Respondent each week for an update on his situation. The fact that the Claimant did not submit any further invoices beyond 4 May 2020 is unsurprising; he was not working, was uncertain as to his status and did not know what was happening. His failure to submit invoices in these circumstances is not evidence that he had resigned his employment or otherwise that he believed his employment had been brought to an end. The fact that the Claimant submitted an incident report/statement on 6 May 2020 as instructed by Mr Dockray provides further confirmation that the Claimant understood the relationship to be ongoing and that he remained accountable to the Respondent.

14. If the Claimant did not resign his employment, the question then is how and when it ended? We have given careful consideration to whether the Claimant's employment may have ended on 4 May 2020 when he was told by Mr Dockray to leave the site and, possibly, not to come back. In our judgment, considered objectively, those comments did not amount to a clear and unambiguous statement that the Respondent was terminating the Claimant's employment. The Claimant's evidence at Tribunal was that Mr Dockray said, *"The machine is broken, you've nothing to drive"* and accordingly that he went home to await further instructions. Those instructions were not forthcoming in spite of the Claimant's efforts, he said, to contact the Respondent a number of times over the following weeks. Even when his company vehicle was collected from his home some weeks later, it remained unclear to the Claimant whether that meant he would no longer be working for the Respondent. We accept the Claimant's evidence that Mr Dockray told him they had a broken down vehicle and accordingly that they needed the Claimant's vehicle. If the Respondent intended to end the relationship or believed that it had already been brought to an end, there would have been no reason for Mr Dockray to provide that explanation, instead he would simply have said to the Claimant that the vehicle was to be returned as the Claimant no longer worked for the Respondent. Mr Dockray's comments and explanation were consistent with a continuing relationship.

15. We conclude that the Claimant's employment ended on 2 July 2020 during a telephone conversation with Mr Masters of the Respondent, who told the Claimant that he would not be coming back and that he was not going to be working for the Respondent anymore. When this was challenged by the Claimant, who told Mr Masters that they had not given him a proper dismissal, Mr Masters' responded, *"Well, you're finished"*. In our judgement, those words amounted to a clear statement by Mr Masters that the employment relationship was being terminated and that they were so understood by the Claimant.

Findings and Conclusions

16. We accept the Claimant's evidence in its entirety and without reservation. As Ms Bewley said, the Claimant is a decent, straightforward and fundamentally honest individual.

Protected Disclosures

17. The first issue we have to determine is whether the Claimant made qualifying disclosures within the meaning of section 43B of the Employment Rights Act 1996. The alleged disclosures relied upon are: a verbal report to the Environment Agency on 11 March 2020, which the Claimant followed up in written report filed with the Respondent on 13 March 2020, to the effect that the Respondent's tractors and equipment were unsafe; and on 6 May 2020 when the Claimant submitted a further report/statement to the Respondent following the incident already referred to on 4 May 2020.

18. We accept both that these disclosures were made by the Claimant and his evidence as to their content, including the additional evidence in this regard set out in his supplemental witness statement. Although there is no copy of the 13 March 2020 written report in the Hearing Bundle, we accept that the Claimant has endeavoured to secure a copy of it from the Respondent, albeit without success. It seems that the report has been withheld by the Respondent. The 6 May 2020 report/statement is at page 92 of the Hearing Bundle. In the penultimate paragraph the Claimant referred to having not been shown a PDI map with obstacles on it, that a tractor was sent on to the bank operated by someone (i.e, himself) who was unfamiliar with the area whilst four other tractors worked out of sight, leaving the Claimant to work alone on the bank.

19. The Claimant has satisfied us that he disclosed information to the Respondent. One need only read the paragraph just referred to and the Claimant's detailed evidence at paragraph 11 of his supplemental witness statement regarding the discussions that took place on 11 March to be satisfied that these were disclosures of information.

20. The next question is whether the Claimant believed that the disclosures tended to show one or more of the matters referred to in s.43B(1) of the Employment Rights Act 1996. We are satisfied that the Claimant believed, in each case: that the Respondent had failed, was failing and was likely to fail, to comply with its legal obligations including its obligation to ensure, so

far as is reasonably practicable, the health, safety and welfare at work of its employees, and to address the risks to the health and safety of others who might be affected by its operations; and that he also believed that the environment had been, was being or was likely to be damaged as a result of how the Respondent's operations were being conducted.

21. Disclosures only qualify for protection if a claimant reasonably believes the disclosures to be made in the public interest. We consider the Claimant to be a public spirited individual rather than someone who is focused on his own rights and interests. That is self-evident from the report/statement he submitted to the Respondent on 6 May 2020. He was not concerned with his own interests in the matter, rather in providing a balanced and objective account of an incident that had occurred and where damage had been potentially caused to a bank and to a piece of machinery. Likewise, his account of events on 11 March 2020 evidences his concern for others and for the environment, rather than any personal interests of his.

22. The report of 6 May 2020 was plainly a disclosure to the Claimant's employer and protected as such pursuant to s.43A and s.43C of the Employment Rights Act 1996. In the case of the disclosure to Michael Holmes of the Environment Agency, the Agency is a prescribed person for the purposes of s.43F of the Employment Rights Act 1996. The Claimant has satisfied us both that the relevant failure on 11 March 2020 fell within the description of matters in respect of which the Agency is prescribed, namely an act which had a potential effect on the environment (in this case the bank being worked on), and that the information and allegation contained in it, namely that the PTO roller and shaft were faulty and accordingly dangerous, was substantially true (s.43F(1)(b) of the Employment Rights Act 1996). We accept the Claimant's evidence in this regard at paragraphs 10 and 11 of his supplemental witness statement. As we say, he is an fundamentally honest individual. He is also a reasonably experienced and knowledgeable tractor operative. He did not just suspect that something was amiss, he was certain that the relevant machine was not fit for purpose and would not meet Environment Agency standards, and accordingly that the information and allegations disclosed were substantially true.

23. Having satisfied us that he made protected disclosures, the question is whether the Claimant was subjected to detriments for having made those disclosures.

Detriments

24. The Claimant claims that he was subjected to the following detriments: that he was not paid after March 2020, that he was suspended by the Respondent and thereafter dismissed. His complaints in that regard are well-founded. He was not paid by the Respondent after March 2020, he was sent home and effectively suspended between 4 May 2020 and 2 July 2020 and, as we have already found, he was dismissed by the Respondent on 2 July 2020.

25. Section 48(2) of the Employment Rights Act 1996 provides that it is for the Respondent to show the grounds on which any act, or failure to act, was

done. In terms of causation, a complaint under s.48 of the 1996 Act will succeed if a protected disclosure has materially influenced the respondent's treatment of a claimant. It need not be the sole or principal reason why the claimant was subjected to detriment(s).

26. There is no explanation from the Respondent for why it treated the Claimant as it did. Employment Judge Bloom has determined that it should be precluded from providing that explanation within these proceedings. Nevertheless, as we have said already, fairness and justice requires that we make a determination and that we do so objectively and having regard to all the available evidence, even if this does not include witness statements from the Respondent.

27. As to the reasons why the Claimant was not paid, there is no explanation for the Respondent's ongoing failure over a period of what is now three years to pay the Claimant for his work. That is particularly telling against the Respondent. Ms Bewley makes a good point when she observes that the amount the Respondent claims it is owed by the Claimant is £1,801.40. That is significantly less than the amount of the Claimant's outstanding April invoice for £3,373.20. Even if one disregards the VAT element, the amount in question is £2,811.00, just over a thousand pounds more than the Respondent claims to be owed by the Claimant. Inexplicably, even that smaller balance has not been settled by the Respondent. Its failure to do so gives rise to an adverse inference that the reason why it has withheld payment to the Claimant is that he made one or more protected disclosures. The Respondent was afforded an opportunity to provide an explanation for its actions, since the Claimant's solicitors wrote to it on 12 August 2020. Other than having asserted in response (page 152) that it was owed £1,801.40 by the Claimant in respect of the cost of damage caused to a tractor by the Claimant (damage that has never been evidenced), there has been no further explanation for why monies have been withheld or any balance not paid.

28. As to the reasons why the Claimant was suspended, over a period of nearly two months the Claimant sought an explanation from the Respondent as to what was happening. He endeavoured to contact the Respondent on numerous occasions, we find at least twice a week. We accept the Claimant's evidence that he left voice messages and that on one occasion, when he managed to get hold of Mr Dockray, Mr Dockray told him that Mr Marsh was busy but that he should call back in 10 minutes. When he called back as instructed, his call went through to Mr Marsh's voicemail. We find that Mr Marsh deliberately avoided taking his call and thereafter made a conscious decision not to return his call. He was 'playing games' with the Claimant and content to leave him in limbo.

29. There has been no explanation from the Respondent as to why it suspended the Claimant for nearly two months. His suspension was never confirmed in writing and there is no evidence of any form of investigation which might have warranted his ongoing suspension, particularly once the Claimant filed his report/statement on 6 May 2020 as instructed. We are unable to identify any innocent explanation for his suspension. The reasonable inference is that he was suspended and continued to be suspended in response to his protected disclosures.

30. The fact that a claimant can pursue a complaint under s.103A of the Employment Rights Act 1996 in respect of their dismissal does not preclude them from also pursuing a detriment claim under s.47B of the 1996 Act in respect of the same matter (Timis v Osipov [2018] EWCA Civ 2321).

31. There is no explanation as to why the Claimant was dismissed from the Respondent's employment. We have already referred to the fact that the Claimant's solicitors wrote to the Respondent on 12 August 2020. In numbered paragraph 3 of their letter they asserted that the Claimant had been automatically unfairly dismissed, alternatively subjected to detrimental treatment, as a result of his 6 May 2020 protected disclosure (page 150A-C). The Respondent's Director of Operations, Mr Glover responded to the letter on 25 August 2020. Although the letter addressed the Claimant's employment status, it did not address his dismissal or how or why the working relationship had come to an end. Again, under s.48(2) ERA 1996, it is the Respondent's burden to show the ground on which it dismissed the Claimant. It may have been precluded from providing that explanation within these proceedings, but given the opportunity to do so in the course of pre-action correspondence, it failed to do so.

32. For these reasons, the Claimant's detriment complaints succeed. We are satisfied that his protected disclosures were a material factor in the Respondent's treatment of him.

Unlawful Deductions from Wages

33. As we shall return to, the Claimant was never issued with a written statement of terms and conditions of employment or other worker's contract, save for basic job descriptions for assignments. In which case, in order for the Respondent to lawfully make deductions from the Claimant's wages, for example in respect of the costs of the damage he allegedly caused to its tractor, he must have consented in writing to any such deductions being made. There is no evidence of such consent having been given.

Holiday Pay

34. In terms of holiday pay (Issue 4.2(1)), the Respondent treated the Claimant as a self-employed contractor. During the time the Claimant worked for it, it never recognised that he was a worker with statutory holiday rights. He was plainly entitled to payment in lieu of holiday at the point at which his worker status was conceded by the Respondent, yet no steps have been taken by the Respondent to settle this aspect of his claim. The Claimant's complaint succeeds. The Remedy to which he is entitled shall be dealt with separately following further evidence and submissions as to how his leave entitlement and any payment in lieu is to be calculated.

Unpaid Invoice

35. The Respondent has failed to settle the Claimant's April 2020 invoice. It

has never been suggested by the Respondent that the hours in question were not worked by the Claimant. In our judgement, there is no lawful basis for the Respondent to either withhold or to make any deductions from his wages in that regard (Issue 4.2(2)). As we have noted already, the Claimant was not issued with written particulars of employment that authorised deductions from his wages. He never consented to any monies being withheld, nor did he sign any agreement authorising deductions to be made. We have reviewed the provisions of the Respondent's Damages Policy in the Hearing Bundle and note, subject to certain procedural safeguards under which the Respondent is required to produce evidence of any damage allegedly caused, that the Respondent may deduct the sum of £150 plus 10% of the amount of any such damage from the wages of the employee in question. The alleged value of any damage caused by the Claimant is unevidenced. Be that as it may, the Damages Policy did not form part of the Claimant's contract of employment. He did not otherwise consent to his April 2020 wages being withheld and did not sign any other agreement to signify his agreement or consent to deductions being made from his wages. He is entitled to payment of his April 2020 invoice i.e, his April 2020 wages, without deduction.

Unpaid wages

36. For all the same reasons, the Claimant is also entitled to be paid for the further hours that he worked on 1 and 4 May 2020 (Issue 4.2(3)). Thereafter, throughout the period 5 May to 2 July 2020, the Claimant remained ready, willing and able to work. Accordingly, he is also entitled to be paid his wages for that period.

Pension auto enrolment

37. The Tribunal has no jurisdiction in respect of the Respondent's alleged failure to auto-enrol the Claimant into its pension and/or to make employer pension contributions (Issue 4.2(4)).

Working Time Regulations 1998

38. Regulation 30(1) of the Working Time Regulations 1998 sets out those matters in respect of which a worker may present a complaint to an Employment Tribunal. We have no jurisdiction to determine any complaints that the Respondent contravened regulations 4 and 8 of the 1998 Regulations (Issues 5.1 to 5.4).

39. The Claimant complains that he did not receive uninterrupted daily rest periods of not less than 11 consecutive hours in each 24-hour period (Issue 5.5). The last breach complained of in paragraph 25 of the Claimant's witness statement is said to have occurred on 19 March 2020. Accordingly, his complaint has been brought over three months out of time. By 12 August 2020, if not before, the Claimant had instructed solicitors who wrote to the Respondent on his behalf, asserting amongst other things that he had been denied rest periods and rest breaks. Yet he delayed a further seven weeks before presenting a claim to the Employment Tribunals in respect of these matters. The Claimant has the

burden of proving, on the balance of probabilities, that it was not reasonably practicable for him to present his claim in time, but has not put forward any evidence in the matter. He has failed to discharge his burden in the matter; the Tribunal has no jurisdiction to determine his complaint.

40. As regards the Claimant's complaint that he did not receive rest breaks in accordance with regulation 12 of the 1998 Regulations, having regard to paragraph 20 of the Claimant's Witness Statement, the last breach complained of is said to have occured on 1 December 2019. For the same reasons as above, the complaint has been brought out of time and the Claimant has failed to identify why, if it is the case, he says it was not reasonably practicable for him to present the claim in time.

Age Discrimination

41. In its initial letter of 12 August 2020 to the Respondent, the Claimant's solicitors asserted on his behalf that his suspension and dismissal were age discrimination. At the time of the events in question the Claimant was 63 years old. We accept that the Respondent knew how old the Claimant was when it dismissed him. The Respondent was also aware that the Claimant was 61 or 62 years of age when it recruited him, which raises the question in our minds why, if his age was not a barrier to him being recruited to work for the Respondent, it subsequently became a relevant factor in the Respondent's thinking little more than a year later. It is obviously not determinative of the matter, since an employer might, for example recruit an older worker in the belief that they will be more malleable and less likely to assert their rights. However, and notwithstanding Ms Bewley's belated reference to assumptions that older workers are not as valuable because they are unlikely to continue working for much longer or are likely to have health conditions, that is not the basis upon which the claim has been brought.

42. The Claimant's solicitors' letter of 12 August 2020 contains nothing more than a bare assertion of age discrimination. No facts or other circumstances are referred to in support of any inference of age discrimination. The same observation can be made in relation to paragraph 22 of the Grounds of Claim. Indeed, the pleaded assertion that the Respondent did not wish to have older employees working for it is at odds with its decision to recruit the Claimant little more than a year earlier and, indeed, seems not to have been pursued by Ms Bewley in closing. There is no obvious further explanation in the Claimant's initial 19-page witness statement as to why the two specific matters complained of, namely his suspension and subsequent dismissal, might have been acts of age discrimination. Instead, to the extent that the Claimant has explained the basis of his belief that he was discriminated against, the explanation is to be found in paragraph 20 of his supplemental witness statement. Even then, his evidence amounts to little more than a bare assertion of discrimination. He suggests that, "almost exactly the same thing happened to Bill Stevens two years earlier but I presume that he didn't make a disclosure and is younger than me, and that is why he wasn't dismissed but I was". He does not elaborate further.

43. S.13 of the Equality Act 2010 ("EqA") provides,

> 13. Direct Discrimination
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

44. In considering the direct discrimination complaints we focus on the reasons why the Respondent acted, or failed to act, as it did. That is because, other than in cases of obvious discrimination (this is not such a case), the Tribunal will want to consider the mental processes of the alleged discriminator(s): Nagarajan v London Regional Transport [1999] ICR 877. In order to succeed in any of his complaints the Claimant must do more than simply establish that he has a protected characteristic and was treated unfavourably: Madarassy v Nomura International plc [2007] IRLR 246. There must be facts from which we could conclude, in the absence of an adequate explanation, that the Claimant was discriminated against. This reflects the statutory burden of proof in section 136 of the Equality Act 2010, but also long established legal guidance, including by the Court of Appeal in Igen v Wong [2005] ICR 931. It has been said that a Claimant must establish something "more" than unfavourable treatment and a protected characteristic, even if that something more need not be a great deal more: Sedley LJ in Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279.

45. The grounds of any treatment often have to be deduced, or inferred, from the surrounding circumstances and in order to justify an inference the Tribunal must first make findings of primary fact identifying 'something more' from which the inference could properly be drawn. This is generally done by a Claimant placing before the Tribunal evidential material from which an inference can be drawn that they were treated less favourably than they would have been treated if they had not had the relevant protected characteristic: Shamoon v RUC [2003] ICR337. 'Comparators', provide evidential material. But ultimately they are no more than tools which may or may not justify an inference of discrimination on the relevant protected ground. The usefulness of any comparator will, in any particular case, depend upon the extent to which the comparator's circumstances are the same as the Claimant's. The more significant the difference or differences the less cogent will be the case for drawing an inference.

46. In the absence of an actual comparator whose treatment can be contrasted with the Claimant's, the Tribunal can have regard to how the employer would have treated a hypothetical comparator. Otherwise some other material must be identified that is capable of supporting the requisite inference of discrimination. This may include a relevant statutory code of practice. Discriminatory comments made by the alleged discriminator about the Claimant might, in some cases, suffice. There were no such comments in this case.

47. Unconvincing denials of a discriminatory intent given by the alleged discriminator, coupled with unconvincing assertions of other reasons for the allegedly discriminatory decision, might in some case suffice. Discrimination may be inferred if there is no explanation for unreasonable

treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it.

48. It is only once a *prima facie* case is established that the burden of proof moves to the Respondent to prove that it has not committed any act of unlawful discrimination, so that the absence of an adequate explanation of the differential treatment becomes relevant: Madarassy v Nomura [2007] EWCA Civ 33.

49. In our judgement, the Claimant has failed to establish the existence of something more from which we could infer that age was the reason for his suspension and subsequent dismissal. The evidence regarding Bill Stevens is so lacking in detail that we cannot sensibly embark upon any comparison in terms of how they were treated and whether their respective circumstances were sufficiently similar such as to support an inference being made. Ms Bewley's efforts to identify grounds from which inferences might be drawn runs into some difficulty given how the case is pleaded and the glaring lack of evidence on the issue. Taking a step back and having asked ourselves why the Respondent treated the Claimant as it did, for the reasons we have already identified, the reason why the Claimant was suspended and then dismissed was because he made protected disclosures. It had nothing whatsoever to do with his age.

50. Section 26 of the Equality Act 2010 ("EqA") provides,

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

51. In Richmond Pharmacology v Dhaliwal [2009] ICR724 it was observed,

> "A Respondent should not be held liable merely because his conduct has had the effect of producing a prescribed consequence: it should be *reasonable* that that consequence has occurred… overall the criterion is objective because what the Tribunal is required to consider is whether, if the Claimant has experienced those feelings or perceptions, and it was reasonable for her to do so. Plus if, for example the Tribunal believes that the Claimant was unreasonably prone to take offence, then, even if she

> did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for the Claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the Tribunal as to what would important for it to have regard to all the relevant circumstances including the context of the conduct in question. One question that may be material is whether it should reasonably be apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the prescribed consequence): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt…
>
> (22) …dignity is not necessarily violated by what was said or done which was trivial or transitory, which should have been clear but any offence was unintended. But it is very important that employers and Tribunals are sensitive to the hurt which can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

52. The Claimant asserts that his suspension and dismissal were acts of age harassment. Whilst the Respondent's treatment of him was undoubtedly unwanted, for all the same reasons that his direct discrimination complaints fail, we conclude that his suspension and dismissal were unrelated to his age. His complaints in that regard are not well-founded.

Automatic Unfair Dismissal

53. The Claimant had less than two years' continuous service with the Respondent. Accordingly, the burden of establishing the reason for dismissal does not rest with the Respondent, rather it is for the Claimant to establish primary facts from which it might be inferred that he was dismissed because he made protected disclosures.

54. Whereas, in order to succeed in a whistleblower detriment complaint under s.47B of the Employment Rights Act 1996, the protected disclosure(s) need only be found to have materially influenced the respondent's treatment of its worker, a claim of automatically unfair dismissal under s.103A will only succeed if the protected disclosure was the reason or principal reason for dismissal. The question then is whether the Claimant has established primary facts from which we could infer that his protected disclosures were the reason or principal reason for his dismissal. It is not sufficient in this regard that we might infer it was a factor in his dismissal, or that it *could* have been a reason for his dismissal. We have to be satisfied that there are grounds for inferring that any protected disclosures *were* the sole or principal reason for dismissal.

55. When Mr Dockray spoke to the Claimant on 4 May 2020 his stated reason for sending the Claimant home was that a piece of machinery had been damaged. We find that Mr Dockray had first spoken with Mr Marsh about the matter. We find that this issue continued to inform Mr Marsh's thinking on 2 July 2020 when he dismissed the Claimant. He told the Claimant, *"I want my money"*, a clear reference we find to the damage he believed the

Claimant had caused to the tractor. Whilst the Claimant's protected disclosures had undoubtedly been operating in his mind over the preceding period, it is equally clear from his rather impetuous comments that in that moment in time he had in mind that the Claimant had damaged the Respondent's property/equipment, that he needed to recompense the Respondent for that damage and that he was "finished" because he dared to challenge Mr Marsh in the matter. For these reasons we are not satisfied that the Claimant's protected disclosures were the sole or principal reason why he was dismissed on 2 July 2020 even if they were a material factor in the Respondent's treatment of him. Given that the Claimant has succeeded in his whistleblowing detriment claim, it will not make any difference in terms of his remedy.

Wrongful Dismissal

56. The Respondent has not established that it had grounds to summarily dismiss the Claimant from its employment. The Respondent has the burden of proof in the matter. Even if it might be said that the Claimant was negligent on 4 May 2020 (as to which we make no findings), it has not been suggested by the Respondent that he was guilty of gross negligence. The Respondent's Damages Policy evidences that it is recognised by the Respondent that accidents will occur from time to time and that whilst employees may find themselves with some financial liability in respect of damage caused by their negligence, the accidents of themselves are not grounds for summary termination of employment.

Written Statement of Particulars of Employment

57. The Claimant was never issued with a written statement of particulars of employment in compliance with the requirements of the Employment Rights Act 1996, no doubt because he was considered by it to be self-employed. The amount of any award in respect of the Respondent's breach in that regard is a Remedy issue.

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Employment Judge Tynan

Date: 26 September 2023

Judgment sent to the parties on

27 September 2023

For the Tribunal office