Case No: 3304188/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr C Gregory	**v**	**Petrotrace Ltd**

Heard at: Reading **On:** 5,6,7 June 2023
8 June 2023 in chambers,
9 June 2023

Before: Employment Judge S. Matthews
Tribunal Members: Mr J. Appleton
Mr K. Rose

For the Claimant: Mr. M. Singh (Counsel)
For the Respondent: Nigel Buxton (Director) on 5,6,7 June 2023
Miss Banton (Counsel) on 9 June 2023

JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

1. The claimant was unfairly dismissed.

2. The respondent subjected the claimant to direct age discrimination by singling him out for dismissal and dismissing him.

3. The complaint of direct race discrimination is not well founded and is dismissed.

4. The respondent subjected the claimant to Victimisation.

5. The respondent was in breach of contract by dismissing the claimant without notice.

6. The claim for a redundancy payment pursuant to section 135 of the Employment Rights Act 1996 is dismissed.

7. The claimant is awarded compensation for the complaints of unfair dismissal, age discrimination, victimisation and breach of contract of:

   Unfair Dismissal basic award: £3264
   Financial Loss: £147,853
   Injury to Feelings: £20,000
   Uplift on compensation of 25% for failure to comply with the ACAS code: £42,779.25.
   Total compensation: **£213,896.25.**

8. The claimant is entitled to an award of interest pursuant to the provisions to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. The amount of interest has been agreed by the parties as:
   Interest on past loss: £4974.21
   Interest on injury to feelings award: £2503.01
   Total interest: **£7477.22**

9. The amount to be added to the claimant's award in respect of the tax payable on the award, so that, after paying tax the claimant received the net sum awarded by the Tribunal has been agreed by the parties as **£118,839.33**.

10. The total award payable by the respondent is **£340,212.80**.

REASONS

Introduction

11. The claimant was employed between early September 2017 and 30 November 2021 as a Leading Project Geophysicist by the respondent, a Geo Science service provider. The respondent provides services to clients in the oil and gas industry. The claimant is ethnically Indian and was aged 62 at the time of his dismissal. He brings claims of unfair dismissal, direct age discrimination, direct race discrimination, victimisation, failure to pay notice and failure to pay statutory redundancy pay. Early conciliation started on 12 January 2022 and ended on 22 February 2022. The claim form was presented on 1 April 2022.

12. The respondent denies liability for each of the claims. The respondent contends that the claimant was dismissed for poor performance. It denies age and race discrimination. It maintains that the claimant was paid for his contractual notice period and denies that there was a contractual agreement to extend the period. The respondent denies liability to pay a redundancy payment. It denies that redundancy was the real reason for dismissal. The respondent's case is that it was agreed with the claimant that

the reason for termination of employment would be recorded as redundancy to assist him when looking for alternative employment.

13. It was agreed that the Tribunal would first hear evidence on liability including evidence relating to whether compensation should be reduced following Polkey v AE Dayton Services Limited or owing to the claimant's conduct and contributory fault. Judgment on liability was given 9 June 2023 and evidence and submissions on remedy were heard on the same day. Judgment on remedy was given on 9 June 2023.

14. Judgment in respect of both liability and remedy having been given orally written reasons were requested by both parties.

Issues

15. The following issues were identified at the preliminary hearing on 24 March 2023 (53-59). The comparators were subsequently updated as set out below (48-51).

Unfair Dismissal

1. What was the reason for dismissal?

   a. The Respondent says capability (performance).

   b. The Claimant says age, race and/or victimisation. Alternatively, redundancy.

2. Was the reason a potentially fair reason?

3. If the reason for dismissal was a potentially fair reason, in the circumstances (including the size and administrative resources of the Respondent's undertaking), did the Respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant, having regard to equity and the substantial merits of the case?

Direct age discrimination: s.13 Equality Act 2010

4. Was the Claimant subjected to the following:

   a. Being singled out for dismissal.

   b. Dismissed.

5. If so, was this less favourable treatment because of his age?

   a. The Claimant relies upon Artem Kashubin, Maxim Zverev, Olga Lityakova, Milena Muskurova, Elena Svistova, Alexander Bodrov and Yury Stepanov as comparators.

   b. Alternatively, hypothetical comparators.

Direct race discrimination: s.13 Equality Act 2010

6. Was the Claimant subjected to the following:

   a. Being singled out for dismissal.

   b. Dismissed.

7. If so, was this less favourable treatment because of his race, being that of an ethnic origin of Indian?

   a. The Claimant relies upon Momtchil Roussanov, as a comparator.

   b. Alternatively, hypothetical comparators.

Victimisation: s.27 Equality Act 2010.

8. It is not in dispute that the Claimant carried out the following protected acts:

   a. On 24 October 2021, the Claimant emailed Mr Buxton expressing concerns that he was being singled out for dismissal because of his age.

   b. On 10 November 2021, the Claimant's solicitors wrote to the Respondent alleging age discrimination.

9. Did he suffer detriment because of the protected acts? The detriments alleged by the Claimant are:

   a. On 25 October 2021, Mr Buxton was aggressive and threatening to the Claimant.

   b. On 5 November 2021, Mr Buxton was aggressive and threatening to the Claimant in a meeting.

   c. The Claimant was summarily dismissed on 30 November 2021.

Notice pay: wrongful dismissal/ breach of contract/ deduction of wages

10. Was the Claimant entitled to wages and/or notice pay from 1 to 31 December 2021?

Procedure

16. At the outset of the hearing Mr Buxton made an application to postpone the hearing. He stated that the company was in financial difficulties, he had not had the time to prepare the case and he did not have legal representation. That application was considered under rule 30A of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Rule 30A (2) applies where a party makes an application for a

postponement of a hearing less than 7 days before the date on which the hearing begins. It provides that in the absence of agreement by the parties the Tribunal may only order the postponement where the application was (b) necessitated by an act or omission of another party or the Tribunal; or (c) there are exceptional circumstances. Rule 30A (4) (b) states that 'exceptional circumstances' *may* include ill health relating to an existing long term health condition or disability. Rule 30A (2) (b) did not apply here and the Tribunal therefore needed to consider whether there were exceptional circumstances justifying a postponement.

17. The Tribunal did not consider these to be exceptional circumstances. It noted that the case had originally been listed for February 2024 (30). The claimant's representatives wrote to the Tribunal expressing concern about the delay (34-36). One of their concerns was that the respondent had alluded to challenging financial circumstances. The matter had been re-listed with this earlier hearing date at the case management hearing on 24 March 2023. The respondent had ample time to prepare for hearing between then and now. The challenging financial circumstances have, according to the respondent, persisted over a long period of time, and are not exceptional circumstances that should delay the hearing. Indeed delaying the hearing could deprive the claimant of the opportunity to pursue his claim if the respondent ceases trading. Accordingly, the Tribunal refused the application.

18. Employment Judge McNeill KC made an order on 23 March 2023 that the respondent must by 31 March 2023 send to the claimant the documents set out in Schedule 1 to the claimant's application dated 14 March 2023, previously requested on 3 February 2023. The respondent did not comply with the order. We refer to this where relevant in our Reasons below (paragraphs 63 and 84).

19. The respondent was ordered to exchange witness statements with the claimant by 19 May 2023. It did not do so. On 24 May 2023 the respondent sent a statement by Mr Buxton and Mr Esinov (BE). These were not in the format required by the order. Mr Buxton confirmed in the hearing that the respondent would rely on them and they were sworn.

20. Mr. Buxton indicated that he wished to call Martin Grimshaw (MG) (Head of Land Processing and the claimant's former line manager) on behalf of the respondent. The respondent was given an opportunity during the course of the hearing to produce a written statement from MG so that the Tribunal could consider whether to give leave to the respondent to call MG. MG was in attendance at the hearing, but a statement was not produced, and Mr Buxton decided not to call him.

Evidence

21. The claimant gave oral evidence on behalf of himself. Mr Buxton and Mr Esinoff gave oral evidence on behalf of the respondent. The witnesses from whom we heard oral evidence each confirmed the truth of a written statement before being questioned.

22. We had a bundle of documents of 339 pages. In reaching its decision the Tribunal has taken into account only the documents to which it was taken in evidence.

23. References to pages in the Bundle are in brackets (X) and references to paragraphs in the witness statements consist of the witness's initials and number of the paragraph (AB/YZ).

Findings of Fact

24. This section of our Reasons sets out the broad chronology of events. There were points where we had to resolve disputed issues of primary fact in order to decide the case and we give our reasons for the findings we made.

The respondent company structure and management

25. The claimant was employed as a Geophysicist by the respondent, a Geo Science service provider from early September 2017 until 30 November 2021.

26. In paragraph 2 of the Particulars of Claim the claimant asserts that at the time of his employment the respondent was part of the Petrotrace Group which 'has its headquarters, senior leadership and major shareholders in Russia'. In paragraph 5 of the response the respondent states that paragraph 2 of the Particulars of Claim is admitted save that the senior leadership team is based in the UK.

27. The managing director of the respondent at the material time was, and continues to be, Mr Nigel Buxton (NB). Mr. Buxton is also a shareholder. In evidence Mr Buxton initially stated that the majority shareholder at the material time was Mr Nikolai Baransky (NBa), a Russian national. He later corrected that evidence, stating that NBa held shares jointly with his wife. Mr. Buxton maintained in evidence that NBa was not involved in the day to day management of the company.

28. NBa signed off on emails to Mr Buxton and to others as President/CEO (118/120). Mr Buxton denied that NBa was the CEO of the respondent. He said the title referred to his title in a Russian company. The title of CEO is used to refer to NBa by Katherine Harington (KH) (Operations Manager) in the letter of appeal outcome (268-273). The claimant said in evidence that he had always considered NBa to be the CEO of the respondent.

29. NBa is not named as a party to the proceedings and his exact status, job title or shareholding within the respondent company is not relevant to the issues we need to decide. However, we do need to make careful factual findings about the interaction between NBa and Mr Buxton in relation to the decision to terminate the claimant's employment. This is because we need to make findings about the mental processes of the alleged decision maker. We need to decide the "reason why" the decision maker acted as he did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator to identify

whether the protected characteristics (in this case age and race) had any material influence.

30. Mr Buxton's case is that NBa did not influence his decision to terminate the employment and he invites us to disregard NBa's comments about the claimant in emails which we refer to below.

31. The Tribunal found that NBa was heavily involved in the day-to-day management of the respondent company during the period of the claimant's employment. This went beyond the role of the shareholder. We expand on our reasons for making this finding below at paragraph 40 and in our analysis of the email correspondence at paragraphs 50 to 66.

The claimant's job title

32. The claimant's contract of employment dated 6 December 2017 (60-71) specifies the claimant's job title as 'Geophysical Imaging Supervisor'. The parties are in agreement that no written job description was ever produced for that role.

33. In 2019, as part of updating their HR processes, the respondent decided that job descriptions should be produced. On 3 October 2019 the claimant signed a job description headed 'Leading Project Geophysicist' (84-85). It was explained to him by KH that a written job description was necessary for ISO accreditation, and he thought no more of it (CG/7). There was no change in his salary, there was no other paperwork relating to it and as far as the claimant was concerned, his job didn't change.

34. Mr Buxton's evidence was that the change in job title in the written description represented a change in role and it was a demotion. Mr Buxton said the claimant lacked supervisory and technical skills. Consequently, he was assigned to report to Martin Grimshaw (MG) and all direct reports were removed from him. This explanation was also set out in the response to the claimant's appeal on 25 January 2022 (270).

35. The claimant's version of events is that the alleged demotion was not communicated to him at the time. There was no substantial change in the reporting structure. Before reporting to MG the claimant reported to a Mr Aitchinson (60). The claimant had never had any direct reports, even when his job title included the name 'Supervisor'. Mr. Buxton accepted this latter fact in evidence.

36. The Tribunal considered the organograms in the bundle. A 2019 one (82) shows junior, senior and leading geophysicists. 'Leading' is on a higher line than 'Senior' and 'Senior' is on a higher line than 'Junior'. The claimant confirmed in evidence that his understanding of the order in the ranking was 1) junior, 2) senior, 3) leading. There is no job title containing the word 'Supervisor' in that organogram.

37. An organogram for August 2020 (87) and one for July 2021 (88), shows one 'Supervisor', ES. She is on the same line as the claimant. The Tribunal infers that this demonstrates that the claimant was on the same level within

the hierarchy as ES. Her job title is 'Supervisor' but the organogram does not indicate that she had any direct reports.

38. On the basis of the organograms and the lack of written evidence of demotion, the Tribunal accepted the claimant's version of events and find that the change in job title did not represent a demotion.

39. Mr Buxton said that he arranged an 'interview lunch' between the claimant and NBa to discuss the possibility of a promotion in 2019 (269). The claimant denies that he applied for a promotion, and he cannot recollect such a lunch. He can recall going for lunch on occasions with NBa and other members of the team but there were always several of them there; he cannot remember a lunch when just he and NBa were present.

40. We prefer the claimant's version of events as he is more likely to remember an event which was potentially significant for his career. We decided that Mr Buxton was mistaken in his recollection. However, Mr Buxton's view that he would have sent the claimant for lunch with NBa before promoting him demonstrates the extent to which NBa was involved in making decisions about employees and the extent to which Mr Buxton deferred to him before making decisions.

The claimant's performance

41. The claimant had a clean disciplinary record. He denies ever having received any negative feedback from Mr. Buxton. He received positive feedback from clients (CG/13), (183).

42. Mr Buxton said that he raised performance issues on many occasions. He could not give specific examples; he referred in evidence to it 'being understood between us'.

43. There are no written records of any feedback on performance while the claimant was employed. The Tribunal was not taken to any evidence to show that anyone, including Mr Buxton, ever talked to the claimant about poor performance. Only one appraisal was carried out. This was by MG in January 2021. There is no written record of it (CG/12).

44. Following termination of the claimant's employment KH carried out an investigation which concluded that the claimant had under performed in his role (268-273). The respondent purportedly carried out this investigation in response to the claimant's appeal against the dismissal. However, the claimant withdrew his appeal before the investigation outcome as he did not consider that KH would give him a fair hearing (CG/45/46).

45. KH interviewed MG and BE as part of the investigation. When MG was asked about the appraisal which he did with the claimant in January 2021 he said that he did not discuss the claimant's past performance during the meeting. KH recorded that MG was 'clearly uncomfortable saying anything about the claimant's performance' (221).

46. Mr Esinov (BE) was also asked for evidence about the claimant's performance for the purposes of the appeal. His recollection covered the period from October 2017 to April 2019. He did not supervise the claimant after April 2019. He raises 4 matters in his statement which, in his opinion, the claimant should have known about (BE2-6). It appeared to the Tribunal that these criticisms were weak. They were an attempt to unearth evidence for the purpose of the appeal over 2 years later. There was no evidence that the claimant was given feedback at the time or that they were escalated.

47. The claimant received salary rises and bonuses throughout his 4 years with the respondent (82, 85). The Tribunal found that there were no serious or genuine concerns about the claimant's performance at the time of his employment.

48. We accept that adverse comments were made about the claimant's performance by NBa. We deal with that in the next section of our reasons. NBa was based in Moscow and not in a reasonable position to assess the claimant's performance. He reaches arbitrary conclusions which are not based on data or reasonable enquiry.

Sequence of events leading up to termination of the claimant's employment: June 2020 to August 2021

49. We considered events during the 14 months preceding the meeting on 17 August 2021, when the claimant was informed that his employment would be terminated.

50. From the Summer of 2020 there was a downturn in business due to the Covid pandemic. There were a series of emails passing between Mr Buxton and NBa which refer to the claimant.

51. On 23 June 2020, NBa criticised the work carried out on a project (the WF project) by the claimant and another employee, Steve. He also criticised Martin Grimshaw (MG) who he said 'does not play Team leader role properly' (118).

52. In July 2020, there is an email from NBa to Mr Buxton (129), which states,

'We have to sack a few people…'

He names the claimant as well as two others, one of which is Steve who is referred to in the email above. He writes,

'We can say that the reason we let Steve and [the claimant] go is bad performance for the [project]'.

53. In July 2020 NBa prepared what he described as a 'very general comparative rating assessment of our staff' (121 to 123). It appears arbitrary. No data or documents are alluded to in support: it is NBa's assessment of 'the usefulness and future potential of each'. Steve, the claimant and another employee, KE, are at the top in red, which NBa refers to as 'the relegation zone'. He says that the claimant has 'done nothing of note' on the WF project and he is 'for the decision to fire' him and Steve.

Steve's employment was terminated in the summer of 2020. The employees relied on by the claimant as comparators are not in the 'relegation zone'.

54. In the note accompanying the performance rating NBa states, 'I would leave the Bulgarians to the last. They are a valuable asset.' He says MM 'quickly learned the software' and RM is 'more experienced'. He puts them both in the yellow zone. The Tribunal's interpretation of the comments is that NBa was referring to them as the Bulgarians as a way of identifying two people. It is not a direction to leave them to the last *because* they are Bulgarian. He put them further down the list than the claimant because of his rating of their performance.

55. On 16 June 2021 an email from NBa to Mr Buxton discusses replacing the claimant and MR with other staff, PH and ST (159). He refers to the claimant as not 'showing good performance' and being 'expensive'. Mr Buxton said in evidence that PH and ST were both about 40 years of age. MR, named as a comparator in respect of the claim for direct race discrimination, was an employee who was over 60, a little older than the claimant.

56. In reply to this email (159) Mr Buxton wrote

'Generally I agree with all your comments (my comments in red)'

Next to the instruction to replace RM and the claimant he has written in red,

'Yes we can plan till the end of the year depending on workload and the replacements coming'.

57. In the event, PH and ST were not recruited by the respondent. RM left of his own accord; having told Mr Buxton he was thinking of retiring in about a years' time.

58. In an email to Mr Buxton dated 9 July 2021 NBa wrote of the claimant

'He is quite expensive and not productive. We better for replacement with [PH or ST]….[the claimant] is far over 60 years old and I am sure he doesn't have a shortage with money' (171).

59. The Tribunal infer from this email that age ('far over 60') was a significant factor in deciding to replace the claimant. When this email was put to Mr Buxton in evidence he commented that NBa meant that termination of employment would affect the claimant less seriously from a financial point of view. The Tribunal considered that Mr Buxton was demonstrating a degree of sympathy with NBa's views.

60. On 4 August 2021, NBa sent an email to Mr Buxton headed 'What shall we do about Cyril' (174). He referred to a project the claimant had been working on for 5 months and said his work was 'absolutely useless'. Again he indicated that he was motivated by his age, referring to him as 'not a young person' and 'a pensioner'. He said:

'I don't like to continue with [the claimant]. Let's move on and let him go. I don't like to blame him on his poor performance but I believe we should be able to find a good reason to take him out. He is not a young person and I believe he is pensioner. As a company we don't have any work for him at this moment and nothing planned. Please, give me the options and costs associated. In Moscow we normally offer 2 months salary and cancel the contract on mutual agreement. We should be doing that in a smart way.'

61. On 11 August 2021 NBa sent an email to Mr Buxton (178) which referred to replacing him with 'younger and more active experts', from which the Tribunal infers that he was motivated by age. He said:

' Please, give me what kind of deal we can offer [the claimant] to let him go. I don't like to wait. We have resources in Moscow to help London and this year it is still almost free. We need to bring younger and more active experts instead. This should be as soon as we can because we will need time to get then (sic) trained and learn how we operate.'

62. On 12 August 2021 an email to Mr Buxton headed 'Company restructuring' (180) states:

'We need to bring one of our candidates (Sam or Peter) once [the claimant] has left'

63. There is no written reply to most of these emails from Mr Buxton in the bundle of documents before the Tribunal. This omission formed part of the claimant's specific disclosure request (43). The Tribunal found that it is unlikely that Mr Buxton did not reply. The replies were likely to be in writing but possibly he replied verbally. He gave no evidence about what he said. The Tribunal note that a short time after that those emails in August 2021, the dismissal takes place and they find the timing significant.

64. Referring to these emails and the apparent lack of response from Mr Buxton, the Tribunal has considered how the decisions to dismiss the claimant were made and on what grounds. In evidence Mr Buxton said he was not 'a puppet' of NBa. He did concede that he thought that NBa had vast experience and knowledge and he was a major shareholder, so he could not ignore him.

65. Mr Buxton did not challenge NBa on his statements about age or about replacements. He denied he had acted on the grounds indicated by NBa emails. He said he based his decision on the financial performance of the respondent company. He said he waited 18 months to take action but at that point he had to do so because of the financial state of the company. We do not accept that the reason Mr Buxton terminated the claimant's employment was due to financial difficulties. We noted the emails at that time were very directly linked to the claimant's age. There was not an emphasis on the financial downturn and NBa was actively talking about replacements.

66. In the absence of any documentation to show that he challenged the statements we looked at the actions of Mr Buxton. We noted that his actions were fully consistent with the action he had been told to take by NBa. He terminated the contract, effectively giving the claimant 2 months garden leave. His statement reads, 'I promised to the shareholders to start

a dialogue to come to an agreement for him to leave in a mutually acceptable way' (NB/14). The only other shareholder according to his evidence was NBa. He knew what NBa's motivations were and agreed with him. He did not disregard NBa's emails and the comments about the claimant's age. He was not an innocent decision maker who was unaware of NBa's views. By acting as he did he accepted NBa's expressed views about age.

Meeting on 17 August 2021

67. The claimant was informed that his employment would be terminated on 17 August 2021. The letters at pages 187 to 190 of the bundle refer to a meeting on Tuesday 19 August 2021. The Tribunal assumes that this is an error. 17 August 2021 was a Tuesday and we assume that the letters intended to refer to the meeting on 17 August 2021.

68. The claimant said he was told at the meeting that he was being made redundant because of a lack of work coming in (CG/16). Mr Buxton said that he asked the claimant to consider resigning to give the company a chance to recover from the crisis and that there was resentment in the team at having to shoulder a high workload (NB/14).

69. We find that Mr Buxton told the claimant that he was being made redundant. The only reference to performance, by Mr Buxton's own admission, was the comment about resentment in the team at having to shoulder a higher workload. It is not clear what Mr Buxton meant by this. We found the claimant very credible when he said that his performance was not discussed. Mr Buxton had agreed with NBa that the claimant needed to go by the end of the year. Mr Buxton saw his task as coming to an agreement to ensure that would be the case. The personal capability of the claimant and his performance was not discussed, and we find that it was not the principal reason for dismissal.

Sequence of events following the meeting on 17 August 2021 to 24 October 2021

70. The respondent sent a series of letters to the claimant after the meeting referring to the termination (187-190). All the letters refer to the reason as relating to the 'current downturn' in the oil industry. They do not refer to capability or performance.

71. The first letter dated 24 August 2021 (187), does not specifically use the word 'redundancy'. It says it is 'to confirm the termination of your contract'. The claimant asked him to clarify that he was being made redundant and Mr Buxton said that he would get the letter amended (CG/19). The following 3 letters state that they 'confirm notice of redundancy' (188-190). The final letter dated 7 September 2021 (190) is counter-signed by the claimant. The respondent's case is the claimant knew that the real reason was his performance and that the claimant asked him to change the letters to hide the performance reason behind the dismissal (NB/16).

72. We prefer the claimant's evidence. Mr Buxton had not given performance as the reason for termination, he had given redundancy as the reason. The claimant did not feel in a position to negotiate and indeed he was not in a position to negotiate. He was told he was leaving, and he was trying to understand the reason and on what terms. He asked Mr Buxton to confirm whether he was being made redundant.

73. We find that the letters do not reflect the reason for the termination. In Mr Buxton's view, they were reaching a deal to give the claimant 2 months money and to go without a fuss. He wanted to move him on and to put together a package that he thought was attractive enough. Mr Buxton was annoyed when he was challenged as he felt that the claimant was reneging on those discussions (paragraph 80 below).

74. We find that, although the respondent refers to cutting staff in 2020 in the emails with NBa, there was not a serious attempt to consider redundancies. Replacements were being discussed. There is a reference to a potential insolvency situation between KH and the respondent's HR advisors on 25 October 2021 (203) (after the claimant was notified of the termination of his employment) but this was not referred to in the email correspondence between NBa and Mr Buxton as a reason to terminate the claimant's employment.

75. In late August 2021, the claimant heard Mr Buxton say on the telephone that his face did not fit (CG/21). He wasn't clear about the date or who Mr Buxton was speaking to at the time, he thinks it may have been NBa, although NBa had already made his views clear that he did not think the claimant fitted in. We accept that Mr Buxton may have said this, but it is not sufficiently clear what he meant or who it was he was referring to. The claimant thought that it could be race; that perhaps he did not fit in as he was not a Russian speaker but the Tribunal heard that there were others in the office who could not speak Russian including MG and so we found that this was not the explanation for the comment.

Agreement on notice pay

76. Under his contract of employment, the claimant was entitled to one week's notice for each year of employment (61); at the date of termination this amounted to 4 weeks. The first letter referring to termination stated that the last day of work would be 30 September 2021 and notice would be paid until 31 October 2021. The following 3 letters provided for an increased notice period to 2 months which would have taken the period to the end of November 2021(190). The claimant was then informed that the respondent was able to extend his work to 31 October 2021 and would give 2 months' notice which would take him to the end of December 2021. This was signed by the claimant (192). We find that was the agreement which applied at the date of termination of his employment on 30 November 2021.

Performance policy

77. KH (Operations Manager) was responsible for HR matters. She did not give evidence and is no longer employed by the respondent. In the bundle there were policies on disciplinary and grievance procedures (72 to 76) and equal opportunities (77 to 81). Mr Buxton said he went through these when the business started up. It was clear that Mr Buxton was not aware of the detail of the policies, and he admitted that these policies were 'not the way he worked'; he accepted that he did not apply the policies when he terminated the claimant's employment.

78. The disciplinary policy refers to unsatisfactory work performance as an example of misconduct (72). A process is set out for dealing with unsatisfactory performance (73). The concerns about performance should be communicated to the individual in writing and there are a series of warnings and meetings before dismissal. Mr Buxton accepted that he did not follow this policy in respect of the claimant.

Sequence of events from 24 October 2021 onwards

79. On 24 October 2021, an email from the claimant to Mr Buxton, expressed concerns about the decision to make him redundant and asserted that he was being singled-out because of his age (198). On 25 October 2021, he had a conversation with Mr Buxton in which the claimant says Mr Buxton was aggressive.

80. When asked about the meeting in evidence Mr Buxton admitted he was extremely disappointed; he thought they 'had a deal' to work to the end of October followed by 2 months garden leave, and then, just before the claimant was due to leave, he received this email.

81. Mr Buxton accepted in oral evidence that he behaved, in his words, assertively. He used the word 'assertively' as well in relation to a further meeting on 5 November which we discuss below, where KH describes the meeting as being 'of an aggressive nature.'

82. KH took notes of the meeting on 5 November 2021 (211):

> 'The meeting was of an aggressive nature. Only Nigel spoke. Telling Cyril that he must resign and retract his letter. Threatening Cyril with an HR alternative, saying 'we can go down that route if you force us but they'll have it all done in one week. You don't want us to go down that route'. Nigel asked me to quote from the contract of employment at this stage. So I read that, 'Disciplinary is not contractual'. Then Nigel told him that this meant he couldn't take it to a tribunal. Nigel said if Cyril wanted a letter of recommendation he must resign. Nigel pointed out that Cyril was not a supervisor and reminded Cyril that he signed a job description for leading project Geophysicist in Oct 2019. Cyril looked surprised by this.
> I tried to steer the conversation to how this is not a redundancy and to bring in to Kate's drafted letter but Nigel changed the conversation back to Cyril resigning and then told Cyril not to do anything yet but to bring his wife in on Monday when Nigel would not to the talking and would let Cyril do all the talking. At that, Nigel picked up his phone and walked out of the meeting room.'

83. We find that Mr Buxton shouted at the claimant. There was a clear attempt to bully and intimidate the claimant. We find that he was aggressive on 24 October and 5 November 2021. We accept the evidence of the claimant on this; it is supported by the notes of the meeting by KH.

84. We find that the letter referred to by KH in the note is a draft letter dated 2 November 2021 (207). There are no documents which indicate why the letter was prepared although disclosure relating to it was requested (59a). Mr Buxton denied knowledge of it. It was not sent to the claimant but it appears to constitute an attempt to dismiss the claimant on the grounds of performance. It is personalised to the claimant in that it has his name and address on it. Specific details about performance are left blank. It reads:

> **As you are aware we have had a number of discussions over the last year, starting on [date], and followed up on [date] and [date] concluding on 19th August 2021 relating to your performance and your contribution to the company. During that period, we have discussed your performance particularly within the area of your technical ability. The market within which we are operating is one that requires everyone to be performing at a high standard.**
>
> **During these discussions I explained to you the areas where your performance was falling short specifically**
> **[example]**
> **[example] and**
> **[example]**
>
> **I concluded that unfortunately you were not meeting the standards required to successfully continue in your role. The final discussion on the 19th August concluded with an agreement that your contract would be terminated.**

85. We find that the draft reflects the decision of the respondent to move to the reason being performance/ capability once the claimant raised allegations of discrimination. The meeting on 5 November 2021 was an attempt to intimidate him to drop the claim. We find that KH had significant involvement in that; it is clear she was not just taking the minutes and we find this significant in terms of her subsequent role as the appeal officer as she was clearly not independent.

86. Although the draft letter regarding capability was not sent, the respondent instead sent out a letter of dismissal which dismissed the claimant with immediate effect (247). In that letter, the respondent asserts that his notice expired in August. It does not refer to performance issues. It states:

> **'Due to the company's serious financial position, we cannot agree to extend your employment any further'.**

87. We find that this letter was sent because of Mr Buxton's exasperation that the claimant had raised allegations of discrimination and not accepted the deal he had offered him. We find it significant that it does not refer to performance. The allegations of poor performance and the subsequent investigation by KH were an attempt to intimidate the claimant and change the reason to performance retrospectively.

88. In summary Mr Buxton carried out the dismissal. He knew that a significant factor was age. He had no other reason to act as he did: he did not have

genuine concerns about performance and the reason was not redundancy as he knew that NBa wanted to replace the claimant with new, younger employees.

Law

Unfair dismissal and redundancy

89. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111.

90. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

91. In this case the respondent asserts that the potentially fair reason for dismissal was capability under s. 98(2) (a). The claimant asserts, as an alternative to discrimination and victimisation, that the principal reason was redundancy under s.98(2)(c). Under s.98 (3) (a) 'capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality. Redundancy is defined under s.139 and includes a dismissal wholly or mainly attributable to the fact that the requirements of that business for employees to carry out work of a particular kind, or work of a particular kind in the place where the employee was employed, have ceased or diminished or are expected to cease or diminish.

92. Section 98(4) deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

Discrimination

93. The complaints of age and race discrimination and victimisation are brought under the Equality Act 2010. Section 39(2)(d) prohibits discrimination against an employee by subjecting him to a detriment. Section 39(3) prohibits victimisation.

Burden of Proof

94. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

'(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.'

95. Consequently, it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

96. In Hewage v Grampian Health Board [2012] IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in Igen Limited v Wong [2005] ICR 931 and was supplemented in Madarassy v Nomura International PLC [2007] ICR 867. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Direct Age and Race Discrimination

97. Direct discrimination is defined in section 13(1) as follows:

'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.'

98. The protected characteristic of 'Race' includes nationality or national origins. The protected characteristic of 'Age' includes a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages. Section 13 (2) of the Equality Act 2010 states that, in respect of 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.

99. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

100. It is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person of a different age or

race. The real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator to identify whether the protected characteristics (in this case age and race) had any material influence. It may be possible for the Tribunal to make a finding as to the reason why a person acted as they did without the need to concern itself with constructing a hypothetical comparator (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285).

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

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

Victimisation

103. Victimisation in this context has a specific legal meaning defined by section 27:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because:
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
***(2)** Each of the following is a protected act -*
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

104. This provision does not require any form of comparison. If it is shown that a protected act has taken place and the claimant has been subjected to a detriment, it is essentially a question of the "reason why", for which the test is as for direct discrimination.

105. Something amounts to a detriment if the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment – see paragraphs 31-37 of the speech of Lord Hope in Shamoon v Chief Constable of the RUC [2013] ICR 337 (House of Lords).

106. In Alcedo Orange Limited v Ferridge-Gunn [2023] EAT 78 the EAT confirmed the Tribunal must determine the motivation of the decision maker, expressed by Underhill LJ in para 36 of the Court of Appeal decision in Reynolds v CLFIS (UK) Ltd [2015] ICR 1010:

'I believe that it is fundamental to the scheme of the legislation that liability can only attach to an employer where an individual employee or agent for whose act he is responsible has

done an act which satisfies the definition of discrimination. That means that the individual employee who did the act complained of must himself have been motivated by the protected characteristic.'

Breach of contract

107. An employer will be in breach of contract if they terminate an employee's contract without the contractual notice to which the employee is entitled, unless the employee has committed a fundamental breach of contract which would entitle the employer to dismiss without notice.

Conclusions on Liability

Unfair Dismissal

108. We set out below our conclusions on liability. Paragraph numbers in brackets (paragraph XY) refer to our factual findings in the paragraphs above.

109. The burden of proof is on the respondent to establish the principal reason for dismissal. The Tribunal does not accept the respondent's case that the principal reason was capability (performance). Mr Buxton had no issues with the claimant's work, nor did MG and nor did BE (paragraph 38, 42-47). The capability issues were only brought up after the claimant made allegations of discrimination at the end of October and beginning of November 2021. The respondent then retrospectively investigated to try to find performance issues. In the event it was not able to find any issues of significance and a draft letter referring to performance was not sent (paragraph 84).

110. The Tribunal did not find that the principal reason was redundancy. Although there was a downturn during Covid and the respondent continued to be concerned about its financial stability, there were no serious attempts to enter a redundancy or restructuring process. The respondent considered other people that they would like to recruit to replace the claimant, which is not consistent with a diminution in the requirements for employees to carry out work of the kind that the claimant was carrying (paragraphs 55, 56, 58, 61, 62, 74).

111. The respondent having failed to establish the principal reason for dismissal was capability (performance) or another potentially fair reason and the Tribunal being satisfied that redundancy was not the principal reason the Tribunal finds that the dismissal was unfair.

112. For the sake of completeness, we went on to consider whether, if capability was the principal reason, the respondent acted fairly in treating it as the reason. NBa was critical of the claimant's work. He was based in Moscow and we found he reached arbitrary conclusions which were not based on data or reasonable enquiry (paragraph 48). The respondent did not implement a performance management procedure or give the claimant any

negative feedback on his performance. We therefore do not consider that it was reasonable to treat capability as the reason for dismissal.

113. On the respondent's case that the reason was capability the claimant was in a disciplinary situation to which a fair capability procedure should have been applied. On Mr Buxton's own admission, a procedure was not adopted or even considered (paragraphs 77-78).

114. Having found that there was no issue with the claimant's capability that might or would have resulted in a fair dismissal if a proper procedure had been applied, a POLKEY reduction is not appropriate. No evidence was put forward that the claimant contributed to his own dismissal by his conduct.

Direct Age Discrimination

115. The claimant's complaint is that he was singled out for dismissal and dismissed, and this was less favourable treatment because of his age.

116. We found that there was evidence from which we could find discrimination, in the numerous emails which we refer to at paragraphs 50 to 62 above. By the summer of 2021, the emails from NBa refer repeatedly to the claimant's age.

117. We find that the comments in the emails at paragraphs 58, 60 and 61 are inherently discriminatory and sufficient in their own right to make a firm finding that age was the reason why the claimant was singled out for dismissal and dismissed. But even if we had not found that they were inherently discriminatory, we find that they shift the burden of proof.

118. The claimant was treated less favourably than the comparators in that he was singled out for dismissal. The emails speak for themselves. The only other person who was regularly singled out for dismissal was RM. He was a similar age to the claimant. The plan was to replace him if he had not retired voluntarily.

119. The emails referring to age were sent by NBa. There was no rebuttal of those comments by Mr Buxton. Indeed in one of the few responses we have seen he said that he generally agreed (paragraph 56). Mr Buxton did what he was told by NBa and he knew that that NBa was motivated by the claimant's age (paragraphs 64-66 and paragraph 88). By acting as he did, he demonstrated that he was also motivated by the claimant's age.

120. The respondent has not established that the claimant's dismissal was not related to his age; there was no non-discriminatory reason. We did not find performance or redundancy was the reason.

121. There was no evidence put forward of a defence that the less favourable treatment was a proportionate means of achieving a legitimate aim.

Direct race discrimination

122. We next considered whether there was evidence of discrimination on the grounds of race sufficient to shift the burden of proof. We found that there was not. The comment that the claimant overhead that his face does not fit, was not sufficiently specific to understand what Mr Buxton was referring to (paragraph 75). The reference to the Bulgarians was more likely to have been shorthand for identifying employees rather than a direction to keep them because they were Bulgarian (paragraph 54).

123. If it did shift, it would be for the respondent to establish a non-discriminatory reason. When we look at why he was treated differently to the comparator, MR, who was also lined up for dismissal on grounds of capability, we conclude that it was because MR decided to retire of his own accord.

124. We found that age was the significant factor rather than race. Accordingly, the Tribunal upholds the claim of age discrimination but not race discrimination.

Victimisation

125. The protected acts are set out in the list of issues. They have been accepted by the respondent. We found that the claimant was subject to a detriment in relation to the aggressive behaviour by Mr Buxton in the two meetings on 25 October 2021 and 5 November 2021 (83). In addition, the summary dismissal on 30 November 2021 was motivated by the protected disclosures (87).

Breach of contract

126. The claimant was dismissed without notice on 30 November 2021. We have found that the agreement between the claimant and the respondent was that his notice would expire on 31 December 2021 (paragraph 76).

Summary

127. We have expressly rejected redundancy and capability as being the principal reason for dismissal. We have found that age was a significant factor in the respondent's decision to dismiss the claimant. We have found that the respondent subjected the claimant to victimisation and breached his contract by dismissing him without notice on 31 November 2021. We do not uphold the complaint of race discrimination.

128. The claimant is entitled to an award for unfair discrimination, direct age discrimination, victimisation and notice pay. We have not found that redundancy was the reason for dismissal, so it is not appropriate to award a statutory redundancy payment.

Remedy

129. The following issues were considered by the Tribunal in relation to remedy:

1. Unfair dismissal, what basic award should be awarded to the Claimant?

2. Discrimination and victimisation:

a. What financial loss, if any, has the Claimant suffered?
b. Has the claimant taken reasonable steps to mitigate his loss?
c. What should the claimant be awarded for Injury to feelings.

3. In relation to breach of contract what was the Claimant's loss?

4. Did the ACAS code on grievance and disciplinaries apply?

5. Should the tribunal apply an uplift of up to 25% to any award for failure by the Respondent to comply with the ACAS code?

6. Should interest be awarded and if so how much?

130. The Tribunal had before it the bundle of documents referred in the hearing on liability which included a Schedule of Loss dated 19 May 2023 (292A to 292D). It was also referred to a Spreadsheet prepared by the claimant entitled 'Mitigation tracker' which covered the period from 21 September 2021 to 18 April 2023. The Tribunal heard oral evidence from the claimant.

131. For this part of the hearing the respondent was represented by Ms Banton (Counsel). The claimant continued to be represented by Mr. Singh (Counsel).

Basic award

132. We accepted the calculation in the Schedule of Loss in respect of the basic award: **£3264.**

Financial loss and mitigation

133. We made the following findings of fact specifically in relation to mitigation of loss.

134. The claimant's age at the date of termination was 62 (d.o.b. 17.3.59). He was an experienced. geophysicist, having worked in the industry since leaving university (CG/ 2). He intended to continue working full time until at least 65 (which will be in March 2024) and then reduce his hours to part time before retirement. His state pension is due to be paid from 17 March 2025 when he will be aged 66 and he may have retired then. At the date of termination his retirement plans had not crystallised.

135. The Tribunal found that he would have worked full time with the respondent until age 65. He would then have worked half time until age 66, when he would have retired. There is inevitably a degree of speculation in making this finding. He may have worked more days a week between the ages of 65 and 66 and have tapered his days down more gradually to full retirement.

136. The claimant had no intention of leaving the respondent to work for another employer and would not have left if his employment had not been terminated. We found this credible; he was relatively close to retirement and in those circumstances, it is unlikely he would look for another job.

137. The claimant started looking for alternative work on 21 September 2021, prior to the date of termination on 30 November 2021.The Spreadsheet shows the claimant's email enquiries, contacts and interviews for geophysicist roles between that date and 18 April 2023. The number of enquiries and contacts amounts to 74. By way of example, in November 2021 he made 9 enquires. In November 2022 he made 7 enquiries. He applied or made enquiries for some roles which were abroad. He has registered with 11 employment agencies.

138. Despite the number of enquiries and applications he has only been offered 3 interviews. In some cases his age is clearly a factor. For example, in Saudi Arabia the retirement age is 60.

139. Some of the roles he applied for advertised salaries of over £70,000, which was more than he was paid by the respondent. However, there are also several roles that he applied for which were advertised without a salary attached. He made several speculative applications where he was not aware of the salary. He also applied for more junior roles, but he found that his age was an obstacle as the companies advertising for junior staff envisaged the roles being filled by new graduates.

140. In December 2022 he started a job working 12 hours a week for World Duty Free at Gatwick airport. He does not work in this role full time as he wishes to continue to search for work commensurate with his skills and experience. He is attempting to explore how he can transfer his skills. He completed a business administration course, level 2, and has recently completed a 'Restart' programme run by Allen & Overy.

141. We heard submissions from claimant's counsel and respondent's counsel. On behalf of the claimant Mr Singh said the claimant had acted reasonably in trying to obtain work in his industry which was a niche industry. He had also reflected on how he could build his skills. Ms. Banton for the respondent submitted that after 6 months of unemployment the claimant could have taken a lower paid job in the industry and then moved up.

142. The Tribunal found that the claimant has made strenuous efforts to find work in the area in which he has spent his career. The respondent did not produce any evidence to indicate that he could have done more in terms of looking for work in the industry.

143. The Tribunal find that it was not unreasonable for the claimant to hold out for an opportunity commensurate with his skills and experience, after such a long career in the industry. We find he did apply for jobs where a lower wage was advertised. Salary was not his criteria: he applied for all roles in which he felt he had the technical skills. The job he has obtained with World Duty Free is not appropriate to his skills or earning potential and it is reasonable to restrict his hours to part time so he can continue to look for a role which is commensurate with his experience.

144. The claimant has considered how he can transfer his skills. The Tribunal accept that it is difficult to change role after so many years' experience in one role. Re-training will take time. He has taken the first steps in reflecting how he can transfer his skills.

145. The Tribunal found that, due to his age and the fact that he has long service in a niche industry, the claimant is unlikely to obtain employment earning the same salary and benefits as he earned with the respondent, in the period between now and when he reaches 66, It is reasonable for him to carry out some further study or training while he continues to look for an opportunity. It is reasonable for him to decide not to work full time in a role such as World Duty Free while he looks for work commensurate with his skills and experience.

146. In reaching this view the Tribunal took account of the general approach to mitigation is summarised by Langstaff P in **Cooper Contracting Ltd. v Lindsay** UKEAT/0184/15 at paragraph 16:

'(1) The burden of proof is on the wrongdoer; a Claimant does not have to prove that he has mitigated loss.
(2) It is not some broad assessment on which the burden of proof is neutral. ….. If evidence as to mitigation is not put before the Employment Tribunal by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works: providing the information is the task of the employer.
(3) What has to be proved is that the Claimant acted unreasonably; he does not have to show that what he did was reasonable.
(4) There is a difference between acting reasonably and not acting unreasonably.
(5) What is reasonable or unreasonable is a matter of fact.
(6) It is to be determined, taking into account the views and wishes of the Claimant as one of the circumstances, though it is the Tribunal's assessment of reasonableness
and not the Claimant's that counts.
(7) The Tribunal is not to apply too demanding a standard to the victim; after all, he is the victim of a wrong. He is not to be put on trial as if the losses were his fault when the central cause is the act of the wrongdoer.
(8) The test may be summarised by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.
(9) In a case in which it may be perfectly reasonable for a Claimant to have taken on a better paid job that fact does not necessarily satisfy the test. It will be important evidence that may assist the Tribunal to conclude that the employee has acted unreasonably, but it is not in itself sufficient.'

147. In calculating his loss of earnings to date and future loss of earnings we have used the figures and calculations in the Schedule. We have allowed full loss of earnings, as calculated in the Schedule, up to March 2024 and half loss of earnings from March 2024 to March 2025, in accordance with our finding that he would have worked 'half time' between the ages of 65 and 66.

148. The loss to the hearing on 5 June 2023 (consisting of salary, notice pay, bonus, pension benefit and other benefits minus state benefits and salary from World Duty Free) was calculated in the Schedule as £81,936. The Schedule included £300 for loss of statutory rights which the Tribunal considers reasonable, the claimant having lost the benefit of 4 years' service. The total figure for financial loss to the date of hearing inclusive of loss of statutory rights is £82,235.

149. In respect of future loss, we calculate earnings (salary, bonus and pension benefit) would have been £79,722 for the period from 5 June 2023 to 17 March 2025 when the claimant reaches state pension age of 66 years. We have based our calculation on the figures in the Schedule. We have adjusted the calculation to take account of our finding that the claimant would have worked to age 65 and then would have worked one year at half time to the age 66.

150. We have deducted the earnings for World Duty Free of £14,104. Therefore we find that the total future loss is £65,618.

151. The total financial loss is **£147,853.**

Injury to Feelings

152. The claimant outlined ways in which his feelings were affected in oral evidence and his witness statement (CG/67-68). He was upset at the way he was singled out on discriminatory grounds and he found the false accusations of poor performance and capability demoralising, describing them as 'hammering my physical and mental health', He suffered a bout of Shingles in August 2022 (CG/62) which he believes was stress related.

153. The Tribunal made findings that he was shouted at aggressively by Mr Buxton in meetings on 25 October 2021 and 5 November 2021. This caused him significant distress and made him feel intimidated (CG/26). It was a traumatic experience (CG/30). He was 'shaken up' to the extent that he did not feel able to attend any further meetings with Mr Buxton (CG31-32).

154. The focus for the tribunal when assessing injury to feelings is the effect the discriminatory act had on the claimant, not the nature of the respondent's unlawful conduct (explained in, for example, *Base Childrenswear Limited v Otshudi* UKEAT/0267/18).

155. In *Vento v Chief Constable of West Yorkshire Police (No. 2)* [2002] EWCA Civ 1871 the Court of Appeal identified three broad bands of compensation for injury to feelings awards. The Presidential Guidance on injury to feelings

of 5 September 2017 sets out updated Vento bands which include the 10% *'Simmons v Castle'* uplift. The fourth addendum to the guidance says that for claims presented on or after 6 April 2021, the lower band is £900 to £9,100 (less serious cases); the middle band of £9,100 to £27,400 (cases that do not merit an award in the upper band); and the upper band of £27,400 to £45,600 (the most serious cases), with the most exceptional cases capable of exceeding £45,600.

156. The Tribunal decided that the injury falls within the middle band. The discrimination and victimisation has had a long term effect on the claimant's confidence. His mental and physical health has been affected. The experience of being shouted at was traumatic and the effects persisted after the events themselves. The Tribunal decided to award **£20,000.**

ACAS uplift

157. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides:

"If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,the employer has failed to comply with that Code in relation to that matter, and that failure was unreasonable,the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."

158. In *Rentplus v Coulson* [2022] EAT 81 it was confirmed that if an employer considers that an employee is guilty of misconduct or has rendered poor performance, the Acas Code is applicable. If an employer considers that there is an issue with the employee's conduct or capability, but that is to some extent a result of discriminatory assumptions, that will not prevent the Acas Code applying because it will still be a disciplinary situation.

159. We find that the ACAS code did apply. No procedure was followed. Mr Buxton admitted that was not how he worked. We have decided to apply the the maximum uplift of 25%, which amounts to **£42,779.25.**

Interest

160. Interest on discrimination awards is provided for in the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. The regulations give tribunals the power to award interest on the claimant's losses as part of the compensation for discrimination.

161. For injury to feelings, interest normally runs from the date of the discrimination to the date of calculation (regulation 6(1)(a)). For all other awards of damages, interest normally runs from the "mid-point" between the date of the discrimination and the date of calculation (regulation 6(1)(b)). However, the tribunal may refuse to award interest, or may calculate

interest by reference to a different period, if it believes that serious injustice would be caused if the usual rules were applied (regulation 6(3)).

162. The Tribunal could not identify a good reason not to award interest at the usual rate of 8%.

163. Interest was calculated by the representatives and agreed as follows:
Interest on past loss £4974.21
Interest on injury to feelings £2503.01
Total interest **£7477.22**

Grossing Up

164. Grossing up is an exercise to calculate the tax which will be payable on the award. The exercise is necessary to ensure that the claimant is properly compensated, because the figures used to calculate the losses are net figures which do not take into account the amount of tax which will have to be paid on the award. The assessment of the tax payable in the grossing up exercise is an estimate on broad lines (*British Transport Commissioner v Gourley* [1955] UKHL 4).

165. The calculation for grossing up was agreed by Counsel in the total sum of **£118,839.33**.

Total award

166. The total award payable by the respondent to the claimant is **£340,212.80.**

Employment Judge S. Matthews

Date: 6 September 2023

Judgment sent to the parties on
7 September 2023
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For the Tribunal office