Case Number: 2200019/2023

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant:	**Mr. Khalil Chikri**	**and**
First Respondent:	**Support Service Leaders**	**and**
Second Respondent:	**Investcorp International Limited.**	
SITTING AT:	**London Central**	
ON:	**25, 26, 29, 30 and 31 January 2024**	
BEFORE:	**Employment Judge G Smart** **Mrs S Brazier** **Dr. C Whitehouse**	
Appearances:	**Mr Khalil for himself**	
	Mr. Charles Davey (Counsel) for the First Respondent	
	Mr. Alex Francis (Counsel) for the Second Respondent	

JUDGMENT

On hearing for the Claimant in person and Counsel for the First Respondent and Counsel for the Second Respondent:

1. The Claimant's claim against the First Respondent that his dismissal was age discrimination is not well founded and is dismissed.

2. The Claimant's claim against the Second Respondent, that it encouraged the First Respondent to dismiss him as an act of age discrimination, is not well founded and is dismissed.

3. Consequently, all the Claimant's claims fail and are dismissed.

The Claimant has requested reasons in time in accordance with rule 62 of the Employment Tribunal Rules 2013.

REASONS

The issues to be decided

1. The issues to be decided were discussed at the commencement of the hearing after any preliminary issues had been discussed.

2. After discussion with both counsellors and the Claimant, it was decided that the only issues needing to be determined were issues 2.1 through to 2.6 in the case management order of Judge Green at page A48 and A49 in the bundle.

3. The issues were:

   *"**Direct age discrimination (Equality Act 2010 section 13)***

   2.1 The Claimant's age at the time of dismissal was 56.

   2.2 It is accepted that the Claimant was dismissed by the First Respondent on 29 July 2022.

   2.3 Did the Second Respondent encourage the First Respondent to dismiss the Claimant.

   2.4 Was the Claimant's dismissal or, if proven, the Second Respondent's encouragement of the First Respondent to dismiss the Claimant less favourable treatment?

   The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

   If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

   The Claimant says s/he was treated worse than Miguel (Team Leader and Butler) and Jamil (a Butler).

   2.5 If so, was it because of age?

2.6 Did the respondents' treatment amount to a detriment?"

4. All parties confirmed that whilst it was pleaded at paragraph 14 of the Second Respondent's Grounds of Resistance, no defence of justification was being pursued by either respondent in these proceedings.

5. No jurisdiction references were made in the list of issues explicitly, so the Tribunal continued on the basis that the First Respondent was alleged to have committed a contravention of the Equality Act under section 39 (2) and the Second Respondent was alleged to have committed a contravention of the Equality Act under section 111 (causing, inducing and instructing discrimination).

Preliminary issues and other issues raised during the hearing

6. The Claimant was unrepresented in the face of two barristers supporting one Respondent each. He was therefore initially at a significant disadvantage in these proceedings.

7. To try to level the playing field we provided assistance with additional time, explanations and breaks where the Claimant appeared to become a little overwhelmed at times. We also gave him more latitude than we ordinarily would in the way he asked his questions or referred to evidence. The Judge also, on occasion, needed to put points of the Claimant's case to the Respondent's witnesses that the Claimant had missed because he was not legally trained.

8. We explained to the Claimant that we were not there to advise him in any way or put forward any positive points for his case. However, generally the Claimant did very well and was able to ask questions at most points rather than make statements.

9. We did often need to intervene to ask questions of the witnesses, if the Claimant asked compound questions or where he was not as clear about the point he was trying to ask about. This was totally normal and understandable for a litigant in person.

10. Where the Claimant had failed to put a point of his case to a witness after he completed his cross examination, we put those points from his witness statement or the list of issues to the relevant witnesses, being careful to only include the points the Claimant made.

11. We also allowed the first and Second Respondent to do their closing

submissions first so that the Claimant could get the gist of how to do closing submissions. This was agreed to by all parties by consent.

12. We are content that this levelled the playing field somewhat.

Additional documents

13. There were a couple of minor preliminary issues that needed to be discussed at the outset of day one of the hearing. The first involved two documents the First Respondent had identified as missing from the agreed bundle of documents. The first document was a risk assessment that was mentioned in Page three of the claims witness statement. The second was a version of the probationary review meeting that was produced with the input of both the 1st and 2nd respondents. The version in the bundle only had the First Respondents comments in it.

14. When the Tribunal broke to continue its preliminary reading in accordance with the timetable agreed between the parties, counsel was asked to provide those documents to the Claimant with a view to attempting to come to an agreement about whether they should be included in the main bundle.

15. The documents were agreed to be in the bundle by consent.

16. Further documents were added in the same way on day two after we had heard the evidence of the Claimant and Ms Oliveira and at the start of day three.

The evidence

17. The Tribunal heard evidence from the following people:

    17.1. The Claimant;
    17.2. Ms Ana Oliveira (First Respondent),
    17.3. Mr. Hugh O'Neill (Second Respondent),
    17.4. Ms Leighann Berry (Second Respondent).

18. Because of time lost by the Claimant's late application to adduce evidence, the cross examination of the Second Respondent's witness Mr. O'Neill was guillotined under rule 45.

19. The Claimant was generally a credible witness about factual information.

20. Ms Oliveira was credible for the most part. However, her evidence did not make sense when she was talking about when the decision to dismiss the

Claimant had been made, or what process was followed after 22 June 2022.

21. Ms Berry was only partially credible in her evidence. Some of the explanations put forward about why she had made some decisions, in our judgment, made no sense and were demonstrably incorrect.

22. Mr. O'Neill, we found to be evasive, provided changeable evidence depending upon who asked the question and gave answers that were not supported by the contemporaneous documents. For the most part, he was an unconvincing witness.

23. We also had a bundle of documents provided in two parts. Part one was numbered A1 – A144 consisting of pleadings and Tribunal interparty correspondence. Part two was evidential documents numbering from B1 – B144 initially.

24. Additional documents were added throughout the hearing by consent as follows:

24.1.	Probation review form	B145 – B147;
24.2.	Risk Assessment	B148;
24.3.	Email chain re generic risk assessment	B149 – B152;
24.4.	Generic risk assessment	B153 – B162; and
24.5.	Text message transcript Clamant/Miguel	B163.

Claimant's application for postponement on day five

25. On the final day of the hearing, after the parties had been called back into the Tribunal room so the judge could give oral Judgment, before judgment was given, the Claimant became very upset. He alleged that he was at a significant disadvantage because he was unrepresented and wanted to have more time to revisit his closing submissions. He also applied for a postponement of the hearing.

26. We took steps to comfort him by ensuring a clerk was with him in the Claimant's waiting room and in the hearing room for the remainder of the hearing, as he had attended alone.

27. After hearing submissions from all three parties, the application was refused because it was not in the interests of justice or the overriding objective to revisit submissions and there were no exceptional circumstances to warrant a postponement in the circumstances.

28. Oral judgment was given, the parties were reminded about Rule 62 and that

written reasons, if requested, would supersede oral reasons given.

Second Respondent's comments about the oral judgment and reconsideration request

29. After oral judgment was given, counsel for the Second Respondent raised concerns about the case being decided under section 111. He submitted five key points:

    29.1. The Tribunal had decided a claim which had not been brought;

    29.2. The case should have been decided fully under section 13 Direct Discrimination and no other section;

    29.3. The Tribunal was unable to go past the list of issues unless it was a jurisdictional point being put forward;

    29.4. Section 111 could not have applied to the Claimant's case because of the closeness of relationship needed between the relevant people identified in that section; and

    29.5. Regardless of the application for reconsideration, it would still make no difference to the outcome of the case overall or the findings of fact made by the Tribunal.

30. Rather unusually, despite it successfully defending the claim and despite there being no written judgment at that time, the Second Respondent applied for a reconsideration of the oral decision.

31. There was insufficient time at the end of the hearing to deal with the reconsideration request other than to set down directions for it and, in any case, the Claimant as a litigant in person and struggled to understand why such an application had been made by a party who has won its case, which was reasonable.

32. In addition, Counsel for the Second Respondent submitted that, despite the Claimant not understanding the application, he requested the Tribunal grant the application there and then. We refused that request because all parties have the right to properly consider the application, and it was not a reasonable stance for the Second Respondent to take to simply waive the application through, whether or not it eventually makes any difference to the overall result of the case. We suggested the Claimant might benefit from legal advice about the application, given he could not understand why the application was being made by the Second Respondent.

33. The First Respondent made no comment about the application as it didn't affect it.

34. Directions on reconsideration and the Judgment were sent to the parties on 1 February 2024.

35. On 12 February 2024, the Claimant applied for written reasons to be provided.

FINDINGS OF FACT

Background

36. The Claimant had a long-standing relationship with the Second Respondent Investcorp International. On and off, he had been providing services to them as a butler for over ten years via agencies.

37. The First Respondent Support Service Leaders, or "SSL", provided support services in the form of catering services and cleaning services to the Second Respondent.

38. The Second Respondent, Investcorp, is a multinational business providing investment products to both private individuals and organisations.

39. The Claimant was first engaged by the Second Respondent providing butler services. That engagement ended after a few years when the financial crash in 2009 occurred. His services then were arranged to be provided to the Second Respondent via Compass Group.

40. Pre-2019 and therefore pre-covid, there was a chef and kitchen staff at the Second Respondent's offices. There were also butlers and cleaning staff.

41. Post pandemic, there was no permanent chef and were no permanent kitchen staff. A housekeeper would visit the office frequently to do regular touch surface cleaning. There had been a redistribution of work duties and that meant that some of the duties that used to be performed by the cleaning team, were now performed by the butlers and vice versa. The precise details aren't important other than as mentioned below.

42. At all material times, the Claimant was employed as a Butler by SSL, who paid the Claimant's wages, dealt with sickness absence, annual leave and all other employment related administration.

43. By the title Butler, what is meant, and what was common ground amongst the parties, was the Claimant would perform the following main types of services for the end user:

    43.1. Provide general catering duties such as providing and replenishing cold food items such as sandwiches, snacks, fruit and other similar items;

    43.2. Provide a drinks service of both hot and cold drinks generally as well as wine and other alcoholic or non-alcoholic beverages if there were more involved corporate events;

    43.3. Provide front facing waiter assistance for fine and/or hot food dining experiences provided to both internal and external colleagues in a business setting from time to time;

    43.4. Portering duties, such as transferring stock on a trolley from Investcorp's Grosvenor Street Office to its Curzon Street office about a ten-minute walk from each other.

44. There were two other butlers in the Claimant's team. These were Miguel Medina "Miguel" and Djamel Bezanine "Djamel". Before the Claimant was recruited by SSL, Ms Oliveira had already recruited Miguel as the Team Leader and Djamel as second butler.

45. The butler services were predominantly undertaken at Investcorp's larger Grosvenor Street premises, which was the Claimant's predominant place of work at all material times.

46. Djamel and Miguel also spent their time at Investcorp's Curzon Street premises, which opened in or around spring 2022.

47. When considering decisions made about the butler team, these were not made in a 'bubble' as the Second Respondent would have us believe. For example, in his evidence, Mr. O'Neill was very keen to try to extricate himself from having any involvement in any decisions that SSL made about the Claimant's employment or the other butlers.

48. However, for example, even though SSL said that they were responsible for managing the annual leave of the Claimant, SSL did not have sole discretion about that decision. We believe the business reality of the type of service offered to Investcorp by SSL, was that SSL needed to run all annual leave requests past Investcorp for approval. This is shown by the email referred to in Ms Berry's statement at paragraph 15 and at page B36 in the bundle, where the annual leave dates of Miguel and Djamel were approved by Ms

Berry at Investcorp.

49. It was therefore a classic agency triangular relationship, whereby SSL would supply services via agency workers to Investcorp under a commercial contract. SSL employed the Claimant and paid his wages under a contract of employment (which we will come onto later.) Investcorp would supervise the Claimant in his day-to-day work and would be in charge of giving him his day-to-day instructions whilst he was performing services at its premises, but there was no direct contractual relationship between Investcorp and the Claimant.

50. SSL were therefore the agency; the Claimant was the agency worker providing the direct services to Investcorp and Investcorp were the end user.

51. There was a commercial contract in place between SSL and Investcorp. This was reviewed on a yearly basis with regular monthly operational review meetings involving both Respondents' witnesses and also Daniel Vargas, SSL's Commercial Director.

52. The Claimant's line manager was Ms Ana Oliveira who is the First Respondent's Operations Manager.

53. At all material times, the Claimant was 56 years old. Miguel was 48 years old and Djamel was 49 years old.

Second Respondent's needs during spring 2022

54. In Spring 2022, Investcorp was approaching a very busy period with its financial year end on 30 June 2022. The country and large parts of the world were finally emerging from the Covid-19 pandemic, and restrictions on travel etc. were much less.

55. The financial year end meant that Investcorp would have an increased number of visits to its London offices from senior overseas managers and other international employees. Consequently, there was a predicted increased need for butler resource as per Mr. O'Neil's statement at paragraph 8 and Ms Berry's evidence given during cross examination.

56. From 24 April 2022 until 1 June 2022, the usual manager who supervised the butlers' work at Investcorp, Leighann Berry, Corporate General Services Manager, was out of the country, in New Zealand, visiting her family. It was common ground that she took no part in the recruitment of the Claimant.

57. For many years, Investcorp had only needed and had only used two butlers.

One was the team leader and the other was titled second butler. With the exception of the period 1 May 2022 until 30 June 2022, we find that Investcorp only ever needed two butlers.

58. Whilst Ms Berry supervised the work of the butlers, this was distanced and she had little daily interaction with them other than if they had any queries about events as per Ms Berry's statement at paragraph 9. The Claimant agrees that he had little to do with Ms Berry, but he argues that's because she sidelined him.

59. The person who had daily responsibility for the work of the butler team, was therefore Miguel as team leader.

The basis upon which the Claimant was recruited

60. The Claimant had built a long-standing professional and friendly relationship with one of Investcorp's Executive Chairman's Executive Assistants, Suzie Garas. The Claimant described this as a friendly professional relationship where both he and Ms Garas could trust each other. The closeness of their relationship is evident from text exchanges that are in the bundle and we refer to these later.

61. It was via a referral from Ms Garas to SSL through Investcorp's Hugh O'Neil, Principal – Corporate General Services for London, Gulf and Asia, which led to the Claimant being suggested as a possible recruit for SSL.

62. What triggered the referral, according to Mr. O'Neill, was when he had mentioned that another butler would probably be needed, Ms Garas had suggested the Claimant to him because he had previously worked at Investcorp as a butler about 6 or seven years earlier.

63. Mr. O'Neill said that he had only discussed the need for there to be three butlers on a permanent basis with Ms Garas. We believe him on this point. We say this because this is what Ms Garas says to the Claimant in her text message to him at page B113 on 30 May 2022.

64. There was a dispute about whether the Claimant had been recruited simply as a third butler for the team or as the "second butler". Mr. O'Neill said in his evidence that he had only ever discussed the need for a butler not a second butler. He also said, crucially, that Ms Garas was an Executive Assistant to the Executive Chairman and was, therefore, not interested in the detail of the butler arrangements, and was only interested in whether butlers were present providing the service the Executive Office needed.

65. We doubt one part of that evidence, which is the discussion about whether it was a second butler to be recruited. We find that Investcorp had at all material times intended there to be two permanent butlers with a third butler simply to provide extra support during May and June 2022.

66. Similarly, we also find that at the time the Claimant was recruited, either Miguel or Djamel were going to be dismissed in their probationary periods. Consequently, Mr. O'Neill did discuss recruitment of a "second butler" with Ms Garas, not just a "butler".

67. We have come to these decisions because:

    67.1. It was said in evidence by Mr. O'Neill, the Claimant and Ms Berry, that the need for three butlers after 1 July 2022 would significantly decrease because the year-end was over, and the summer months were usually much quieter than in the spring months. Ms Berry and the Claimant agreed that this had always been the case in their respective times working for the company.

    67.2. It would therefore have been obvious at the outset of recruiting the Claimant, that there was only ever going to be a need for two butlers after 1 July 2022.

    67.3. Investcorp put forward the argument, via evidence from Mr. O'Neill and Ms Berry, that at some point before June 2022, they had been given the heads up from senior management that the next financial year would have significant budget restraints, which meant they then, suddenly, had a realisation that they would not need a third butler. This sudden realisation is fanciful and untrue in our judgment. Given the evidence we have heard, it is simply incredible that there would have been this sudden realisation that three butlers were not needed when there have only ever been two butlers needed previously. Mr O'Neill in particular knew that Investcorp would only ever need two permanent butlers plus a temporary third butler during year end.

    67.4. It is therefore our conclusion that at all material times, from 28 April 2022 until the Claimant's dismissal on 29 July 2022, Investcorp and SSL were talking about dismissing one butler. They had simply not identified which butler that was to be. This is shown throughout the documentary evidence between SSL and Investcorp, which we discuss later.

    67.5. The fact that a second butler was being discussed, is also evident from the initial text message that Ms Garas had sent to the Claimant letting him know of the position available. This is in the bundle at page B108

and reads *"Hi Khalil, I hope all is well with you and the family and have a good Easter break. We might have a [position] for a second butler and I recommended you for an interview if you could please let me know if you would be interested? Regards Suzie".*

67.6. On 26 April 2022, Mr. O'Neill met with the Claimant to confirm that initial impressions of him from Ms Garas were correct and then Mr. O'Neill referred the Claimant on to Ms Oliveria via email at page B1 in the bundle which said *"Hi Ana, can we have a quick call tomorrow regarding the below gentlemen. I met with him today and think he could be a good addition to our Butler team. I would like to discuss process to follow from here."* Mr. O'Neill then provides the Claimant's email address and phone number to Ms Oliveira to make contact.

67.7. On 28 April 2022 @ 15:52, Mr. O'Neill briefly chased Ms Oliveira to see if she had the chance to contact the Claimant at page B2 in the bundle.

67.8. On 28 April 2022 @ 16:08, Ms Oliveira replies in an email that infers other conversations that we believe, on balance, were ongoing at the same time as the Claimants recruitment. She says as follows:

"Hi Hugh,

We did and I spoke with Khalil today too, he accepted, and he is ready to start immediately.

I trust that will be good if he could start Thursday next week. This will allow him to get familiar again with the work and the staff.

If you agree from the 5th to the 20th of May, we could keep the three butlers (Miguel, Djamel and Khalil), to avoid to the bring agency staff or have [REDACTED] in full time in busiest days.

We will be doing the performance review meetings with Miguel and Djamel next week on Friday afternoon to decide with which one we will terminate the contract and arrange for the notice period.

Please let me know your thoughts on the above."

67.9. From this email, the following is therefore clear to us:

67.9.1. at the time this e-mail had been written, it was already in contemplation of both Miss Oliveira and Mr O'Neill that one of the existing butlers, either Miguel or Djamel, would soon be leaving

SSL's employment;

67.9.2. at this time, namely for the period 5th to 20th of May 2022, this would be the only time that 3 butlers working full time would be needed;

67.9.3. the Claimant had been taken on to fulfil 2 objectives for the Second Respondent, the first was to be an additional resource for the expected busy period between the 5 - 20 May 2022 and the other was to replace either Miguel or Djamel when one had been dismissed. That way the busy period would be covered, additional ad hoc agency resource would not be needed from temp agencies and the Respondents would get an almost instant replacement for an outgoing butler so that the level of service SSL provided would not be interrupted.

67.10. We asked both Mr. O'Neill and Ms Berry what the reasoning was for why it was in contemplation that either Djamel or Miguel would be dismissed. Neither witness could tell us. They said they don't recall. We believe Ms Berry because she was out of the country for most of this period and this email was to Mr. O'Neill. However, we do not believe that Mr. O'Neill doesn't know what was going and why. It was obvious on any reasonable review of the evidence that we were referred to, that all arrangements with the butlers were directed by the Second Respondent and SSL would comply with the Second Respondent's wishes because they were its customer.

67.11. The Claimant asked Ms Oliveira about this, pointing to the notice period mentioned in the email at B2 and this clearly meant that there were always going to be just two butlers. Ms Olivera answered that that was what the client wanted. During this email exchange, this correspondence was with Mr. O'Neill. When answering another question about why the Claimant was chosen instead of Djamel, Ms Oliveira's answer was also significant and indicated to us what she thought at the time the Claimant was recruited, which would give an insight into what we find really happened. Her answer was *"Before the performance review I thought [the Claimant] would be the strongest"* and when asked specifically whether he was recruited specifically as second butler, Ms Oliveira said *"I did not know. Initially I thought they wanted to replace one."*

68. Consequently, we conclude the following:

68.1. Mr O'Neill's instructions to SSL were that Investcorp was going to take

on an additional experienced butler full time;

68.2. Investcorp would not need three butlers after June 2022, so one would need to be dismissed at some point after 1 July 2022.

68.3. Initially this would be either Djamel because when the Claimant was recruited, Djamel was the least experienced butler and did not know Investcorp, whereas the Claimant was very experienced and knew Investcorp or Miguel because his employment was at that time in the balance, because he had been offered work elsewhere and it was not at that time clear whether he was going to stay with the Respondent. This explains the paragraph in the email of 28 April 2022 at page B2.

68.4. The situation with Miguel was as follows:

68.4.1. In his evidence, the Claimant had mentioned that he knew Miguel wanted to leave SSL and therefore Investcorp, because Miguel informed him he had been offered a job as an in-house butler for a billionaire Russian family living in London for £70,000 per year which was double the Claimants butler salary of £35,000 per year.

68.4.2. Miguel informed the Claimant that this job had fallen through because of the start of the Ukraine war and the implementation of UK sanctions against high profile Russian figures meant that the job offer to Miguel could not go ahead.

68.4.3. Given the war in Ukraine started on 24 February 2022, which we have taken on judicial notice, we find this evidence plausible.

68.4.4. This job fell through, but prompted Miguel, according to the Claimant, to ask for a pay rise from SSL. The Claimant described these negotiations as ongoing up until he was dismissed and said Miguel had threatened to leave if he didn't get a pay rise.

68.4.5. The later negotiations with Miguel were readily proven by the email in the bundle we were referred to by the Claimant, at page B43. This email confirms that Miguel had turned down one offer but didn't want to leave. SSL had therefore offered him another offer and Daniel Vargas, Commercial Director SSL, had therefore sent an email to Ms Berry, to update her.

68.4.6. The Claimant mentioned in evidence that he had a conversation with Miguel by text about the negotiations. However, no text conversation had been disclosed. At the start of day 3 of the case,

the Claimant disclosed a note of the text messages in email form that was admitted into evidence by consent. In this text exchange, the Claimant asks, *"Hope you didn't ask for extortionate amount of pay rise [4 smileys]"* in response, Miguel says *"Nooo I am cheap [3 laughing smiley's with tears]"* at page B163 in the bundle.

68.5. It was also clear that SSL and Investcorp had envisaged that one butler was going to leave regardless, meaning that no butler would become surplus to requirements.

68.6. Either way, the Claimant's employment at that point seemed to be secure. As far as he was concerned, he was being taken on as a permanent second butler and took the offer at face value. It was only later that he discovered that the Second Respondent had other plans and had done form the start.

68.7. Mr. O'Neill had not informed Ms Garas that there may be a competition in the future if three butlers remained meaning one would have effectively and unwittingly been taken on as a temporary staff member, despite the contract of employment stating it was permanent.

68.8. Finally, Mr. O'Neill would obtain a "win win" from this situation where, regardless of what happened, he would achieve all the objectives he needed to, which were to cover the upcoming busy period in May and June and then maintain two butlers thereafter to ensure that the Executive team were properly serviced with butlers in the usual way, without an increase in expenditure.

The Claimant's recruitment, induction and equipment

Background issues

69. The Claimant attempted to amend his claim in a previous preliminary hearing to include a number of additional examples of age discrimination. This application was refused by Employment Judge Stout, but the Claimant was allowed to raise these issues as background information.

70. Whenever the Claimant refers to issues as background, we have interpreted the reason why he has raised these issues is to provide examples of other situations where, he says, he was treated poorly because of his age, from which he would like us to draw adverse inferences about his pleaded claim of his dismissal being tainted with age discrimination. All of these issues were aired at the hearing in both evidence and submissions. We have therefore proceeded on that basis.

71. It is important to note that the Claimant had no permanent work at the time the opportunity with SSL and Investcorp came up. The Claimant said during cross examination that he had been offered permanent work at his last employer but had turned this down because he thought the job with SSL and Investcorp was more attractive.

72. We have no reason to doubt this. Indeed, in a text message, the Claimant described the job as a *"…my dream come true"* at page B142. In addition to him being placed at a company he knew well and with whom he clearly had a very positive past relationship, this was also offered to him as being a permanent position when, at that time, he only had temporary work. It is no wonder he accepted the offer.

73. It is also clear that because the referral came from Ms Garas, the recruitment of the Claimant was pretty much a "done deal." We have decided this because the referral of the Claimant came from Investcorp, its customer. Unless the Claimant did a massively poor interview or failed some sort of legal requirement such as right to work, in our judgment it was highly unlikely the Claimant's application for employment with SSL would be unsuccessful. Indeed, Ms Oliveira in evidence, suggested she did not even have access to his CV and that the recruitment process had been very short, which was also confirmed by Mr. O'Neill. Both these statements support our view.

74. In his statement, Mr. O'Neill has tried to distance himself from this situation saying he had no strong views about whether SSL should hire him and that it was SSL's decision. Ms Oliveira's statement is silent on the situation involving Ms Garas. In our view, we think it unlikely that Mr. O'Neill and Ms Oliveira did not discuss the politics of the referral. When a potential candidate referral, such as this, comes from a big multinational customer via both a senior manager (Mr. O'Neill) and an Executive Assistant with the ear of the Executive Chairman of the customer business (Ms Garas), it is very likely that Mr. O'Neill would want to facilitate Ms Garas' suggestion and that Ms Oliveira would want to comply with the customer's wishes.

75. Consequently, whilst Mr. O'Neill is clearly right that it is legally and strictly speaking SSL's decision whether to employ the Claimant or not, we believe that decision was heavily influenced by the business needs and wishes of the Second Respondent. This influence was exerted by Mr. O'Neill at the time, who was about to have a busy period and insufficient butler service could have been embarrassing in front of the very senior overseas managers who would be visiting the offices in May and June 2022.

The induction

76. On 29 April 2022, the Claimant received an email from SSL's Debora Galrinho, HR and Payroll Officer, welcoming the Claimant onboard and asking him for the usual ID and right to work information such as his passport, P45 and proof of NI number at page B4 in the bundle.

77. There was then email correspondence between Ms Oliveria and Mr. O'Neill about the Claimant's induction. Mr. O'Neill seemed to be keen that the Claimant had a decent and supportive induction as per his email at page B6 in the bundle.

78. When questioned about this, the Claimant accepted that as Ms Berry was away, she could not have given hm an induction, it should have been Mr. O'Neill. However, he accepted that it was SSL who had performed the induction, which is corroborated by Ms Oliveira's statement at paragraph 11 where she explains she organised for the Claimant to shadow Miguel and Ms Oliveira completed the necessary paperwork and remainder of his induction herself.

79. The Claimant commenced his employment on 5 May 2022 which is the day his induction took place. The Claimant did not think the induction was thorough enough, but he fairly accepted in cross examination that this was not because of his age and he did not think this was an act of age discrimination.

80. To enable agency workers to move around its buildings without an escort, The Second Respondent also requires all agency workers to sign a non-disclosure agreement. The Claimant's agreement was emailed to Ms Berry by Ms Oliveira on 5 May 2022, the Claimant's start date. The signed agreement and emails about it are in the bundle at pages B8 – B13 in the bundle.

81. The Claimant's contract of employment is signed and in the bundle at pages B17 – B25. The key points to note from it are as follows

    81.1. At clause 3, the employment was subject to a three-month probationary period during which the Claimant's performance would be monitored.

    81.2. The notice period is two weeks in the probation period from either the employer or employee.

    81.3. The contract is not a temporary or fixed term contract.

81.4. It contains everything you would expect to see in a standard statement of terms and conditions of employment.

Security pass

82. The respondent had recently opened a new smaller satellite office in Curzon Street a few minutes' walk away from the Grosvenor Street office.

83. The Claimant complains, as background to his main age discrimination complaint, that he was not given a pass to the Curzon Street site because he was older than the other two butlers.

84. Ms Berry said that she did not give the Claimant a pass, because she wanted him working at the Grosvenor street site to get him up to speed with the more pleasurable parts of the role, namely interacting with the managers and visitors and so he could re-learn how things were being done since his absence from when he worked for Investcorp previously.

85. We have no reason to doubt what Ms Berry was saying. She seemed genuine about this issue and it made sense to us that if the Claimant was not allocated to work at Curzon Street, then no security pass would be issued to him for that office.

iPhone

86. It was common ground that the Claimant was not given an iPhone when he started his assignment to Investcorp. The Claimant argues he was not given an iPhone because of his age and that put him at a disadvantage compared to his younger colleagues. He said that it was very useful to have an iPhone so he could pick up the messages from reception about events, meetings and arrivals to be kept informed. We tried to ascertain why he thought this was done because of his age, but he was not able to articulate this in any way other than they were younger than him and got iPhones, so in his view that was discrimination.

87. It was also common ground that there were two butler iPhones at Investcorp. Mr. O'Neill tried to argue these were for general use and not allocated to individual butlers. Ms Berry said they were allocated to individual butlers. We prefer Ms Berry's evidence.

88. Ms Berry says in her statement at paragraph 8 that the Claimant had not raised this with her, that he was in his probationary period and that Investcorp had not budgeted for an additional iPhone.

89. We accept that the Claimant did not raise this with her because he did not advance this as a positive part of his case at the hearing. We reject the explanation that he was not provided one because he was in his probationary period. Clearly, Djamel was in his probationary period too and he got an iPhone so this argument did not make any sense.

90. We do however believe that Investcorp did not provide the Claimant with an iPhone because this had not been budgeted for. We believe this because, in our judgment, the reason this had not been budgeted for was because it was never Investcorp's plan to have three butlers and therefore a third iPhone was not needed. In addition, the Claimant was the last butler to be recruited so the fact an iPhone wasn't available, was partly for that reason too.

Issues with the other butlers

91. The Claimant also raises other concerns about the other butlers or how the work was allocated to them.

Miguel shouting at the Claimant and ageist comments

92. The Claimant alleges that on or about 16 June 2022, there was a situation where the lift had broken and heavy crates of water needed to be lifted by hand. The Claimant thought this was unsafe and said so to Miguel.

93. The Claimant says that, in response, Miguel shouted at him and called him old.

94. Ms Oliveira was present that day in the office and she recalled the conversation with the Claimant about the safety of lifting the heavy crates of water. Ms Oliveira said during cross examination that she agreed with the Claimant that if he felt it was unsafe, he shouldn't have lifted the water and she told Miguel that. However, significantly, Ms Oliveira stated that the Claimant had made no mention at all about Miguel shouting at him or making any derogatory remarks.

95. On having heard the Claimant's evidence, and that of Ms Oliveira, we accept Ms Oliveira's evidence that this was not mentioned at the time during his conversation with her. The Claimant has therefore failed to put forward sufficient evidence that these comments were made.

96. The second complaint of ageist comments the Claimant makes is that, on occasion, despite not being allocate to Curzon Street, he had to accompany either Miguel or Djamel and could not get into the building without them because he was not issued with a pass. He claims that, as a result, both

Migeul and Djamel on occasion referred to him as “granddad”, which he found to be humiliating.

97. Neither Djamel or Miguel were present to give evidence about this issue and no one else admitted to knowing about this issue at all. It is not present in the Claimant’s original claim form. The Claimant has therefore failed to put forward sufficient evidence that these comments were made.

98. If we take his case at its highest and if we had concluded that these comments were made, it was clear to us that this would have made no difference to the outcome of his pleaded case, because neither Djamel or Miguel were involved in the decision to terminate the Claimant’s contract of employment and, we believe the Respondents when they say there were unaware of these comments being made.

99. The final point about the ageist comments involves Ms Berry. The Claimant alleges that Ms Berry has incited Miguel and Djamel to make these comments. When questioned about what he meant by this, he said that Ms Berry had stopped him from doing any heavy lifting because of his age and that he was not allowed out on his own to Curzon Street because he didn’t have a pass, which he claims was because of his age. He claimed Miguel was unhappy that the Claimant wasn’t pulling his weight with lifting and he was treated like an invalid, which opened him up to the ageist remarks.

100. We are not persuaded that Ms Berry has incited these comments at all. Ms Berry denies preventing the Claimant from doing any heavy lifting and, if her decision about providing a Curzon Street pass had caused Miguel or Djamel to make ageist comments, that would not have been Ms Berry’s fault. The blame for that behaviour would lie with the butlers themselves or, if a claim was successfully made for harassment, then possibly with Investcorp or SSL. There is no pleaded harassment claim before this Tribunal.

Ordering of stock and the computer in the basement

101. The Claimant makes a further allegation that he was not informed that there was a computer in the basement for ordering and is aggrieved that on or around 23 June 2022, Djamel was shown how to do the ordering in Miguel’s absence when Miguel was not in work. He claims this was done because of his age.

102. When he was asked why he thought this was age related, he said that the decision had already been made to keep Djamel and that decision was because of age so this issue was also because of age.

103. On 23 June 2022, Ms Berry emailed Ms Oliveira at page B36 to confirm approval of Djamel and Miguel's annual leave and said *"These are both approved and although we will be [quiet] July/August time, we will need to ensure Djamel is fully trained up to cover all of Miguel's responsibilities whilst he is away in terms of stock control and online ordering. We would be happy for Khalil to cover these periods if he is available, or alternatively we need to ensure we [have another] temporary resource available in place with a 1 day overlap for training".*

104. Ms Berry explained why she says Djamel was chosen, instead of the Claimant, for providing cover in Miguel's absence, at paragraph 15 in her statement. She says that Djamel was picked because he had been working at Investcorp for longer and that the Claimant was in his probation period so she did not want to put additional pressure and responsibility onto him.

105. We reject those explanations. They make no sense to us at all. Djamel had been working for Investcorp for a matter of a couple of weeks more than the Claimant, not any significant period of time and he was also in his probation period and still learning when he had less experience of being a butler both generally and at Investcorp compared to the Claimant.

106. However, we know from an email at page B34 sent to Ms Berry on 22 June 2022, that Ms Oliveira had already recommended the Claimant's selection for dismissal and this had already been ratified by Mr. O'Neill on the same date. We therefore find that the ordering was given to Djamel, because Ms Berry, by this time, knew the Claimant was about to leave and it made more business sense to train Djamel up because he would be staying. That was the real reason for her decision.

107. When considering why Mr. O'Neill ratified the decision to pick the Claimant for dismissal, we believe him when he says that this decision made business sense because they would be keeping the best performers at paragraph 21 of his statement. This is a very plausible opinion given how focused Mr. O'Neill seems to have been on getting results and meeting business need.

Conducting the performance review at the same time as Djamel

108. This allegation was not really pursued to a great extent by the Claimant.

109. It was clear from the documentary evidence in the bundle that the performance reviews were conducted by Ms Oliveira to decide who should stay and who should go when Investcorp wanted to reduce the butler team.

110. Djamel had not been working for Investcorp for a significantly longer period

than the Claimant.

The budget and performance review process

111. Unbeknown to SSL, by 30 May 2022, someone at Investcorp had been loose lipped about the plans for the butler team. By this date, Miguel had informed the Claimant that he knew the plan was to reduce the butler team to 2 by the end of June 2022.

112. This is proven by what the Claimant says to Ms Garas in a text message of the same date. He says *"Dear Suzie there's so much uncertainty whether investcorp needs 3 butlers. According to Miguel was only to be 2 Butler by end of June. Me and Djamel are left in the dark. You have mentioned if I had any issues to let you know. Uncertainties is a killer. Don't know where do I stand, or if I have to look for another job. Sorry for any inconvenience to bother you. Khalil"* at page B112 in the bundle.

113. Understandably, we find that at this point both Ms Garas and the Claimant believe they had been misled. In our judgment that was a perfectly reasonable belief to have. They had been misled.

114. In addition, the Claimant had turned down the offer of a permanent job at his previous workplace to commence what was his dream job working at Investcorp permanently. He had therefore gone from the uncertainty of temp work to a permanent position and that now looked as if it was in doubt after just three weeks of working for them. He was understandably upset and angry.

115. By 17 July, Ms Garas summed up how she felt in another text message exchange after the Claimant had a probation review meeting, which we discuss later. She says *"I am truly sorry Khalil and I was equally misled. Bottom line it's not u it's the crap politics and egos and dishonesty. I was categorically told that [D]Jamal was only part time and they were looking for a full time Butler hence that's why I brought you on. Please keep me posted with ur plans and I will also look out."*

116. By late June 2022, the Second Respondent's busy period with overseas meetings and getting through their fiscal year ending 30 June 2022 was coming to an end.

117. On 16 June 2022, Ms Oliveira and Ms Berry had discussed the ongoing situation with the butlers. It turned out that neither Djamel nor Miguel had yet left SSL's employment, as had been envisaged when they took on the Claimant. This meant that Investcorp was going to be over budget with its

butler team and the number of butlers needed was two instead of three. Whilst we do not accept that this was a sudden revelation or that this would have been a surprise to Ms Oliveira, it was the reality of the situation.

118. Ms Oliveira informed Ms Berry that all three staff were undergoing probation reviews anyway and so Ms Berry suggested that they should decide which butlers to keep based on performance or skill.

119. Ms Oliveira had been reviewing the performance of all the butlers during May and June 2022 anyway because they were probationers and also because she knew the butler team would be reducing to two butlers. Ms Oliveira therefore had virtually all the information she needed and was able to recommend that Djamel and Miguel should stay by 22 June even though the meeting identifying that the reduction of butlers needed to happen by 1 July 2022 had only taken place 6 days earlier on 16 June 2022.

120. We also believe this because, at page B35 in the bundle, there is an email titled *"Butler probation Reviews"* dated 20 June 2022. In this email, Ms Berry asks Ms Oliveira to provide her with an update about the probation reviews following on from a call the previous week.

121. When considering Miguel, the Second Respondent had been very clear that it wanted to keep Miguel as the team leader. Consequently, the choice of butler to dismiss had to be made between the Claimant and Djamel as per Ms Oliveira's statement at paragraph 15.

122. The decision about who SSL was going to dismiss had already been made by 22 June 2022, when Ms Oliveira proposed to keep Miguel and Djamel at page B34 in the bundle. It was not made later as Ms Oliveira would have us believe.

123. In response, Mr. O'Neill had confirmed that his instruction to SSL was to go ahead with the proposal to dismiss the Claimant. This is contained in his email to Ms Oliveira at page B34. He said that he wanted the situation dealt with *"sensitively given the internal relationship"* and was keen that the Claimant was given sufficient notice to allow him to get another job.

124. Mr. O'Neill was also offering to have a conversation with the Claimant himself, if necessary, but the news needed to broke that week with a clear explanation as to why SSL had come the decision to dismiss the Claimant during his probationary period.

125. We therefore conclude that the decision to terminate the Claimant's employment was a joint decision where SSL put forward a proposal about

who to dismiss and Investcorp considered and approved that proposal then giving a 'go ahead' instruction. It is also our view that in any dealings between the Respondent's when it comes to providing workers, both Respondents have detailed and involved conversations with each other about these arrangements and that SSL will not make any more serious decisions about service provision, without first gaining approval from Investcorp.

126. To the extent that either Respondent gave evidence to the contrary, we have discounted that evidence as false.

127. Equally unreliable was Ms Oliveria's statement at parts of paragraph 15 and paragraph 16.

128. Here, at the start of paragraph 15, Ms Oliveira stated that she had a meeting on 21 June 2022 with Investcorp to plan how to handle the dismissal of one of the butlers. Here Ms Oliveira says that she discussed her performance observations about the Claimant and Djamel, given that Investcorp wanted to keep Miguel. At paragraph 16, she then says that she sought guidance and advice from her HR Manager who advised her not to make an immediate decision about which butler to let go. Ms Oliveira said, *"So we decide to run the performance review meeting with Djamel and the Claimant to give both feedback and set up expectations to understand who would be the butler we had to let go".*

129. In our view, this evidence does not make sense. It is clear from the email of the next day on 22 June 2022, that the decision about who would be staying and who would be going had already been made and just needed approval from Investcorp. By 22 June 2022, before any performance review meeting with the Claimant and/or Djamel, the decision to let the Claimant go had already been made and ratified by Investcorp. This is corroborated by the statement of Mr. O'Neill at paragraphs 20 – 21. It was therefore not possible for there to be a performance review process where the Claimant was allowed time to improve. His fate was already sealed, and Ms Oliveira knew that.

130. On 23 June 2022, SSL and Investcorp had their annual contract review meeting. Present on that call was Daniel Vargas, Carla Salas, Business Development Director SSL, Hugh O'Neill and Ana Oliveira.

131. During this call Investcorp apparently explained that they wanted to keep Miguel as the butler team leader, because they believed he had the skills to do that role and had previous experience for that role as per Ms Berry's statement at paragraph 14. We do not believe that evidence. Ms Berry says that she summarised what was discussed at the meeting in her email to SSL

of 1 July 2022 at page B45 in the bundle. This email makes no reference to informing SSL of the need to reduce the number of butlers from three to two because of budget constraints. It makes no reference to it for good reason. That was because SSL already knew of the plan weeks before 16 June 2022.

132. In this email, Ms Berry also requests details of the performance assessments to "validate" them before any conversation with the Claimant. In our judgment, Investcorp wanted the probation review forms from SSL so that it could manage its internal message as to why it was the Claimant who would be dismissed so that the message could be handled sensitively.

133. On 8 July 2022, Ms Oliveira held performance review meetings with both the Claimant and Djamel.

134. The meeting with the Claimant did not go well and he was cynical and at some points rude in his manner, and in messages and emails that he sent afterwards.

135. Ms Oliviera explained why she thought the Claimant's performance required improvement. The form with Ms Oliveira's comments is in the bundle at page B48. In summary she was not happy with the way the Claimant appeared on occasion with an untucked shirt. He was good at the service-oriented tasks but not the tasks that were ancillary to that such as replenishment, storage organisation and kitchen tidiness. He was also identified as struggling to embrace new ways of working.

136. The Claimant disagreed with this feedback and, in cross examination, described himself as "perfect".

137. Given the Claimant's view of himself, which was not credible because nobody is perfect, and given how Ms Oliveira came across during this part of her evidence, we accept that Ms Oliveira genuinely believed these criticisms of the Claimant's performance.

138. In her statement at paragraph 14, she described Djamel's attitude to work and performance attitude as impeccable.

139. During the Claimant's cross examination, we were taken to an email chain in the bundle at pages B51 – B52. The first email in the chain is from Ms Oliveira to Ms Berry. Here she provides copies of the probation review forms for the Claimant and Djamel and asks for Ms Berry's feedback on their performance. It also confirms that Miguel has decided to stay with Investcorp after a pay rise.

140. In response, Ms Berry provided balanced positive feedback of both Djamel and the Claimant. Significantly, one differential between the two is that the Claimant will need to be upskilled about ordering. That is true, but the reason for this is because Ms Berry has deliberately chosen Djamel to do the ordering because she already knows the Claimant would be leaving from 22 June 2022. This email is not therefore a true representation of the process that has actually been followed. Indeed, Ms Berry seems to accept this in her statement at paragraph 18 where she says *"On 11 July 2022, Ana sent me the draft probation review forms and asked me for my feedback on the butlers, which I gave on 12 July 2022. At this stage I understood that the decision had already been taken to dismiss Khalil. Nonetheless, my feedback for Khalil was positive with constructive feedback on areas that he could improve."*

141. Ms Berry goes on to state that the relevant changes for the team would take effect from 1 August 2022, so there had been a change of the target date to reduce the butler team from 1 July 2022.

142. Turning to Ms Oliveira's statement about the performance review, there is a part of both paragraph 18 and 19 of her statement, which does not make sense. Ms Oliveria says when discussing the performance review meeting *"I confirmed the information with him and explained that before making any decision would be important to review the performances and set expectations to be as fair as possible in a difficult situation as the one I was in."* This cannot be correct. Yes, we agree that Ms Oliveira was in a difficult situation. She had just taken on two butlers on permanent contracts and within a few months needed to dismiss one of them. However, contrary to what Ms Oliveira is saying, she had already made and ratified the decision about the Claimant's dismissal with the Second Respondent back in June 2022.

143. We therefore conclude that the performance review meetings and the emails sent about them between SSL and Investcorp were a sham. The probation meeting was not a meeting to discuss performance and try to set expectations for the Claimant to improve. They appeared to us to be meetings that were put in place to make the dismissal decision that had already been made, look more legitimate from an HR point of view. The process was effectively the wrong way around. This performance review meeting should have happened first, before any proposals were made and before the decision to dismiss the Claimant as ratified by Investcorp.

144. The case put forward by the Claimant that the performance review process was false and was put together to try to show that SSL was acting legally is in our view proven.

145. The Claimant also refers to an email chain in the bundle at B79 and B80 on 19 July 2022. He says that Mr. O'Neill, Ms Berry and Ms Oliveira have colluded to come up with a process that was convincing so they could communicate this with Ms Garas internally. The email that is significant here, in our view, is the email of 18 July 2022 where Mr. O'Neill writes *"Can somebody tell me exactly what has been said to Khalil and if he is aware yet that he will be leaving. I need to know so I am prepared for any internal calls I receive."*

146. At B79, in a conversation with Mr. Vargas because Ms Oliveira is out at meetings, Mr. O'Neill discusses his understanding of the Claimant's performance shortfalls. Mr. Vargas confirms the understanding of the feedback to be correct and Mr. O'Neill then says in response *"Please do not notify him until I confirm to you. I need to have a call internally first..."*

147. Clearly, just as the Claimant suggests, it is clear to us that Mr. O'Neill is trying to handle the political fallout from this decision and is putting together after the event justification for why the Claimant is to be dismissed when the decision was actually made a month previously. It was simply the formality of handing the Claimant his notice that had not yet taken place.

148. Either way, the decision to dismiss the Claimant made on 22 June 2022 had not altered by the date the Claimant was actually handed his notice on 29 July 2022.

149. After his dismissal, the Claimant complained to Investcorp about his treatment at page B93 in the bundle, complaining of age discrimination.

150. On 3 January 2023, the Claimant presented his ET1 to the Tribunal.

151. On 12 May 2023, the Claimant submitted a subject access request to Investcorp. He then became aware of a lot of the internal emails that had been sent to and from the First and Second Respondent.

The Law

Jurisdiction

152. The Equality Act 2010 sets out the jurisdiction of the Employment Tribunal in section 120. This says as follows as far as is relevant to this case:

"120 Jurisdiction

(1) An employment Tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—

(a)a contravention of Part 5 (work);

(b)a contravention of section 108, 111 or 112 that relates to Part 5.

…"

153. The sole claim against the First Respondent is that of an age discriminatory dismissal of the Claimant. The relevant section of part five for the First Respondent as the Claimant's employer is section 39, which states as far as is relevant:

"39 Employees and applicants

(1) …

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment."

154. Section 111 states as far as is relevant:

"111 Instructing, causing or inducing contraventions

(1) A person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 112(1) (a basic contravention).

(2) A person (A) must not cause another (B) to do in relation to a third person (C) anything which is a basic contravention.

(3) A person (A) must not induce another (B) to do in relation to a third person (C) anything which is a basic contravention.

(4) For the purposes of subsection (3), inducement may be direct or indirect.

(5) Proceedings for a contravention of this section may be brought—

(a) …

(b) by C, if C is subjected to a detriment as a result of A's conduct;

(c) …

(6) For the purposes of subsection (5), it does not matter whether—

(a) the basic contravention occurs;

(b) any other proceedings are, or may be, brought in relation to A's conduct.

(7) This section does not apply unless the relationship between A and B is such that A is in a position to commit a basic contravention in relation to B.

(8) A reference in this section to causing or inducing a person to do something includes a reference to attempting to cause or induce the person to do it.

(9) For the purposes of Part 9 (enforcement), a contravention of this section is to be treated as relating—

(a) in a case within subsection (5)(a), to the Part of this Act which, because of the relationship between A and B, A is in a position to contravene in relation to B;

(b) in a case within subsection (5)(b), to the Part of this Act which, because of the relationship between B and C, B is in a position to contravene in relation to C."

Prohibited conduct - Direct discrimination

155. Before a cause of action on part 5 can be founded, there must first be an act of prohibited conduct, which amounts to "discrimination".

156. If prohibited conduct is proven, that prohibited conduct must then amount to a cause of action under section 120 as a contravention of Part 5.

157. There can also be a cause of action under section 111 related to part 5.

158. Here, if a person instructs, induces or causes another to commit a basic contravention (in this case the Second Respondent instructs, induces or causes the First Respondent to dismiss the Claimant because of his age) that too will be actionable discrimination so long as there was a sufficient close relationship between the First and Second Respondent to the extent that the Second Respondent could hypothetically commit a contravention of part 5 against the First Respondent.

159. The Equality Act 2010 defines direct discrimination as:

"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.

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

160. If the protected characteristic is age, then the Respondent can put forward a defence of justification if it can prove that the treatment complained about was a proportionate means of achieving a legitimate aim.

161. There are two aspects to direct discrimination that must be considered by the Tribunal. One is less favourable treatment and the other is the reason for the treatment complained about with the associated causal link between the two.

162. Unreasonable behaviour should not give rise to an inference of discrimination **Strathclyde Regional Council v. Zafar [1997] UKHL 54** it is usually an irrelevant factor. However, it has been held by the EAT that unreasonable behaviour can go to the credibility of a witness who is trying to argue that their motives were not motivated by the characteristic in question **Law Society v Bahl [2003] IRLR 640 EAT.**

163. In the same way that less favourable treatment does not mean unreasonable treatment, it also does not mean detrimental treatment or unfavourable treatment **T-System Ltd v Lewis UKEAT/0042/15 (22 May 2015, unreported)** or simply different treatment **Shmidt v Austicks Bookshops Limited [1977] IRLR 360 EAT**. There must be a comparison either actually or hypothetically that shows less favourable treatment.

164. It is the treatment rather than the consequences of the treatment that are the subject of the comparison **Balgobin v Tower Hamlets London Borough Council [1987] ICR 829.**

165. Whether less favourable treatment is proven requires a comparison to a suitable comparator. There is a general requirement that there be no material difference between the people being compared either actually or hypothetically. Section 23 Equality Act 2010 says:

"23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case."

166. The comparators need not be identical **Hewage v Grampian Health Board [2012] UKSC 37** because if every single aspect of a comparator was the same between the complainant and comparator, then the less favourable treatment could only be because of the protected characteristic, which would be make it almost impossible to defend a direct discrimination claim.

167. Following the case of **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11**, it will often be appropriate to consider the reason for the treatment first and then decide whether that reason meant the treatment was less favourable. Therefore, if the reason for the treatment was because of the protected characteristic, then it might be that the finding of less favourable treatment is inevitable.

168. Whether something is less favourable treatment is an objective test **Burrett v West Birmingham Health Authority [1994] IRLR 7 EAT,** but if a subjective view is being put forward as showing why the complainant says the treatment was less favourable, then such a view can be upheld as evidencing less favourable treatment so long as the view held was reasonable **Birmingham City Council v Equal Opportunities Commission [1989] IRLR 173 HL.**

169. In all cases, it is irrelevant whether the alleged discriminator has the same protected characteristic as the complainant s24 Equality Act 2010.

170. When considering whether the less favourable treatment was because of the protected characteristic, the Equality Act wording of "because of" has exactly the same meaning as the old legislation wording of "on grounds of" **Onu v Akwiwu [2014] EWCA Civ 279.**

171. Where there is more than one reason put forward for why the alleged discriminator treated the Complainant how they allegedly did, following the case of **Barton v Investec Henderson Crosthwaite Securities limited [2003] IRLR 332,** the characteristic should not play any part in the reason(s) for the treatment complained of, but if it does, it must be a significant factor in being more than trivial and following **R v Commission for Racial Equality, ex parte, Westminster City Council [1984] IRLR 230,** the characteristic needs to be a substantial of effective cause of the discriminatory treatment, but doesn't need to be the sole or intended cause of it.

172. In addition, there is no legal causal link as such. Instead, the Tribunal should focus on the "real reason" why the alleged discriminator subjected the complainant to the treatment they allege was direct discrimination **Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48,** which is a subjective rather than legal test looking at the mental processes of the alleged discriminator.

173. Following **R v The Governing Body of JFS and the Admissions Appeal Panel [2009] UKSC 15,** the following approach should be taken:

    173.1. Where it is self-evident that discrimination is taking place because there is reference made to the protected characteristic, it is not necessary to analyse the motives of the discriminator, they are irrelevant;

    173.2. Where discrimination is not obvious, it is necessary to analyse the motivation of the alleged discriminator but only for determining whether the characteristic played any part in the alleged discriminatory behaviour;

    173.3. In all other circumstances, motivation is irrelevant to a direct discrimination claim.

Burden of proof

174. Section 136 of the Act provides as follows:

> *"(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court [which includes employment Tribunals] 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"

175. Direct evidence of discrimination is rare and Tribunals frequently have to consider whether it is possible to infer unlawful conduct from all the material facts. This has led to the adoption of a two-stage test, the workings of which were described in the annex to the Court of Appeal's judgment in **Wong v Igen Ltd (formerly Leeds Careers Guidance) [2005] ICR 931**, updating and modifying the guidance that had been given by the Employment Appeal Tribunal in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205.**

176. The Claimant bears the initial burden of proof. The Court of Appeal held in **Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913** that *"there is nothing unfair about requiring that a Claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the respondent's act was a discriminatory one) then the claim will succeed unless the respondent can discharge the burden placed on it at the second stage".*

177. At the first stage, the Tribunal does not have to reach a definitive determination that there are facts which would lead it to the conclusion that there was an unlawful act. Instead, it is looking at the primary facts to see what inferences of secondary fact could be drawn from them.

178. As was held in **Madarassy v Nomura International plc [2007] IRLR 246**, "could conclude" refers to what a reasonable Tribunal could properly conclude from all of the evidence before it, including evidence as to whether the acts complained of occurred at all. In considering what inferences or conclusions can thus be drawn, the Tribunal must assume that there is no adequate explanation for those facts.

179. Unreasonable behaviour of itself is not evidence of discrimination – **Bahl v The Law Society [2004] IRLR 799** – though the Court of Appeal said in **Anya v University of Oxford and anor [2001] ICR 847** that it may be evidence supporting an inference of discrimination if there is nothing else to explain it.

180. If the burden of proof moves to the Respondent, it is then for it to prove that it did not commit, or as the case may be, is not to be treated as having committed, the allegedly discriminatory act.

181. To discharge that burden, it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on

the prohibited ground. That would require that the explanation is adequate to discharge the burden of proof on the balance of probabilities, for which a Tribunal would normally expect cogent evidence.

182. All of the above having been said, the courts have warned Tribunals against getting bogged down in issues related to the burden of proof – **Hewage v Grampian Health Board [2012] ICR 1054**.

183. In some cases, it may be appropriate for the Tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, in the absence of a satisfactory explanation, would have been capable of amounting to a prima facie case of discrimination **Laing v Manchester City Council UKEAT/0128/06/DA**.

Discussion and conclusions

184. Looking at all the evidence as a whole it is clear in our judgment that the Claimant has been treated in a cynical and self-serving way by both Respondents, led by the Second Respondent.

185. The Claimant has been misled. He has been the subject of a sham performance review procedure by the First Respondent at the behest of the Second Respondent. He gave up a permanent role to work for the Respondents in his dream job and it has all come to nothing. Yes, the Claimant was rude and disparaging of his colleagues during the course of the performance review procedure and afterwards. However, in our judgment given the circumstances, that is unsurprising given the deplorable way he has been treated by the Respondents.

186. However, whilst he has been poorly, unfairly and unreasonably treated, applying **Bahl, Schmidt, Lewis** and **Zafar,** this does not mean he has been treated less favourably because of his age or that these factors alone are sufficient to draw an inference of discrimination.

187. Looking at each aspect of the test for direct discrimination in turn, our conclusions are:

    187.1. We have ignored the characteristics of the alleged discriminators. They are irrelevant by virtue of section 24 of the Equality Act 2010.

    187.2. The Claimant has clearly been subjected to less favourable treatment by the First Respondent when compared to Djamel, because Djamel remained employed and the Claimant did not.

187.3. The Claimant has clearly been treated less favourably by the Second Respondent when compared to Djamel, because the Second Respondent did not ratify a decision to dismiss Djamel but did ratify a decision to dismiss the Claimant.

187.4. Djamel was an appropriate comparator for these purposes because he was of a different age to the Claimant, he was in the same job, was part of the same performance review process and there were no material differences in their circumstances;

187.5. To the extent that Miguel was pursued as a comparator, he was in materially different circumstances to the Claimant because he was a team leader and the Second Respondent wanted to keep him working at their premises. Neither of these factors were present for the Claimant or Djamel.

187.6. Applying **Barton** and **JFS,** it is clear that in all cases where the Claimant has alleged he was poorly treated, such as, the iPhone not being provided to him, Djamel being asked to do ordering and not him, the issue with him not being given a security pass for Curzon street etc. and indeed his dismissal or the Second Respondent's encouragement of his dismissal, we are not persuaded that age was in any way a motivating factor or effective cause for these decisions. These decisions were made for business reasons stemming from the fact that Investcorp only needed two butlers for most of the year, not because of the Claimant's age.

187.7. There is insufficient evidence that the Claimant was subjected to ageist remarks by the other butlers.

187.8. Consequently, we have drawn no adverse inferences from the background allegations the Claimant alleges.

187.9. It is clear that Investcorp were heavily and intimately involved in the decision to dismiss the Claimant and, in our judgment, they instructed and induced the First Respondent to dismiss the Claimant.

187.10. Applying **Khan,** we accept the evidence of Ms Oliveira, that she made the decision about who should be dismissed out of Djamel and the Claimant, based on performance issues she observed after Investcorp said it needed to reduce its butlers from three down to two. These was the real reasons why the Claimant was initially selected for dismissal in June 2022, not his age.

187.11. When it came to the actual decision of the First Respondent to serve the Claimant with notice, the real reason for this decision, was also the Claimant's performance, the fact Investcorp needed to reduce the number of butlers and also the way the Claimant conducted himself at the probation review meeting on 8 July 2022 and afterwards, which Ms Oliveira perceived to be rude and unprofessional.

187.12. Following **Barton** none of these reasons are tainted because of age for either the decision to dismiss or the decision to give notice of dismissal.

187.13. The Second Respondent both instructed and induced the dismissal, because the First Respondent suggested the Claimant was the least performing butler out of him and Djamel and the Second Respondent's Mr O'Neill believed SSL and thought that keeping the best performers made business sense.

187.14. Following **Barton** none of these reasons are tainted because of age for either the decision to induce dismissal because it needed less butlers or give the instruction for the Claimant to be dismissed based on the performance observations of SSL and the business rationale for the decision.

187.15. Consequently, the decision of the First Respondent to dismiss the Claimant was not because of his age, and the decision of the Second Respondent to encourage that dismissal was not because of his age.

187.16. Investcorp's instruction or inducement was not tainted by age. Age played no part in that decision whether considering the fact of the instruction or inducement itself, or the content of the instruction or inducement. The encouragement of SSL to dismiss the Claimant by Investcorp, was in no way whatsoever an instruction for SSL to commit age discrimination in dismissing the Claimant.

187.17. Applying **Ayodele,** the Claimant has not presented sufficient evidence from which we could conclude that there is a prima facie (on the face of it) case for age discrimination. Consequently, applying **Igen,** the burden of proof has not shifted to the First Respondent or Second Respondent..

187.18. We need not therefore consider the closeness of relationship between Investcorp and SSL required under s111. The claim against the Second Respondent falls at the first hurdle of proving a discriminatory instruction or inducement and/or that the instruction itself was an act of direct age

discrimination.

188. It is therefore the unanimous judgment of the Tribunal, that the Claimant's claims for age discrimination against both Respondents fail and are dismissed.

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EMPLOYMENT JUDGE SMART

26 February 2024

Judgment sent to the parties on

7 March 2024
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For the Tribunal Office

M PARRIS
…….