RESERVED

EMPLOYMENT TRIBUNALS

Claimant: Mr T Wynne

Respondents: Chorlton Scaffolding Limited

HELD AT: Liverpool (in person) **ON:** 25, 26 & 27 June 2024

BEFORE: Employment Judge Shotter

Members: Ms A Ross-Sercombe
Mr J Murdie

REPRESENTATION:

Claimant: Mr B Wilcox, brother-in-law
Respondent: Mr P Murphy, managing director

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was not unlawfully discriminated against on the grounds of his age. The claimant was not treated less favourably than a comparator because of the protected characteristic of age, his claim for age disability discrimination brought under section 13 of the Equality Act 2010 fails and is dismissed.

2. The respondent was in breach of the implied term of trust and confidence and the claimant's claim of constructive unfair dismissal brought under section 95(1)(c) of the Employment Rights Act 1996 as amended is well-founded and adjourned to a remedy hearing at the Liverpool Employment Tribunal on the **17 October 2024**. A separate Notice of Hearing will be sent to the parties.

3. The claimant, who was employed form the 12 February 2018 to was wrongfully dismissed and his claim for unpaid notice pay is well-founded. The respondent is ordered to pay to the claimant the sum of £1932.00 net.

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REASONS

Preamble

The pleadings

1. In a claim form received on 20 April 2023 the claimant was employed as a driver/labourer from 12 February 2018 to 26 December 2022 and brings claims of unfair dismissal, age discrimination, wrongful dismissal (notice pay), holiday pay and a claim for other payments. Mr Wilcox confirmed there was no claim for other payments and there was no complaint of harassment on the grounds of age under section 26 of the EqA. In the document titled "Details of Claim" the claimant alleges he was dismissed after the respondent collected the keys to the van "because it was perceived that I was too old to do a labouring job and to drive a heavy wagon" and that he was "constantly" discriminated against on the grounds of his age. The respondent's defence is that the claimant was a subcontractor, he was not dismissed and had left voluntarily by not turning up for work. There is a reference to the vehicle being collected "as it was required for other jobs." There is no reference to it being required for Peter Murphy's wife to use to get to work at a supermarket store, in contrast to the evidence given by Peter Murphy at this hearing.

The hearing

2. This is an in-person hearing. Mr Murphy, who represented the respondent, referred to some health issues including stress and medication, and we adjourned a number of times when he was upset. Mr Murphy was invited to request as have as many breaks as he wanted taking into account the Equal Treatment Bench Book and was given time to prepare submissions before oral submissions were to be made.

3. There is an issue in this case of alleged witness intimidation. Both parties were alleging intimidation against the other.. The claimant alleged that after the Tribunal found he was an employee the respondent damaged his Mother's house by breaking windows and leaving a torn card with Lymm Scaffolding Ltd, Peter Murphy's name and contact details. The claimant believed the card was a threat to burn down his Mother's house because the torn pieces were singed. The police went involved and Peter Murphy was questioned, but the matter went no further. It is not disputed between the parties that the claimant's Mother's house was derelict and boarded up, Peter Murphy denied the allegations maintaining that anyone could have broken the windows (i.e. children) and neither he nor anyone else had left the torn card. The Tribunal expressed its concern over the allegations and the high degree of emotion at the hearing, warned the parties about their conduct emphasising that witness intimidation/victimisation was a serious matter that could result in proceedings being adjourned/pleadings struck out and serious consequences for individuals. Security attended in the back of the hearing room and the proceedings were recorded with only one possible issue arising that related to Mr Murphy's elderly Father who was hard of hearing allegedly threatening the claimant after he had witnessed his son breaking down before an adjournment. This was dealt with to both parties satisfaction and the Tribunal was satisfied a fair hearing could proceed.

4. The documents the Tribunal was referred to are in a bundle totalling 277 pages together with additional documents produced by the claimant, the contents of which the Tribunal has referred to where relevant below.

Witnesses

5. The Tribunal was provided with a four witness statements in total, consisting of a written statement prepared by the claimant unsigned and undated, and Mr Bernard Wilcox, the claimant's brother in law who was and remains married to Elizabeth Wilcox, the claimant's sister who also provide an unsigned witness statement dated 12 June 2024.

6. On behalf of the respondent the Tribunal had before it the witness statement of Peter Murphy and the unsigned written statement/email of Paul McSorley dated 6 June 2024 to which no weight as the evidence was disputed and in any event irrelevant as it went back to 2014 when the claimant worked for the respondent before a gap in his employment. It is notable that Mr Murphy was unable to provide any evidence nearer to the event in question of the claimant's alleged poor behaviour, other than the undisputed evidence relating to a road traffic accident that occurred in or around November 2022 as a result of the claimant's fault, who according to the respondent had fallen asleep, and according to the claimant "was in a bit of a dream and had lost concentration."

7. Mr Murphy gave credible evidence that he was annoyed with the claimant because of the road traffic accident and the claimant had failed to get the details of the other driver at the time, arguing that if he wanted to dismiss the claimant because he was 60 years old he could have done so then. The claimant disagreed that he could have been dismissed because "that is why the respondent had insurance." The Tribunal accepted Mr Murphy's oral evidence that he took no action against the claimant because he was a valued employee who worked long hours, was reliable and stepped in the breach when other people failed to turn up for work, sometimes working 7-days a week. The key issue is that the accident took place after the 4 June 2022 when the claimant turned 60 years old, and had Mr Murphy wanted to dismiss the claimant because "after my birthday…Peter Murphy regularly claimed to me that I was too old to be working as a labourer and driving such a big wagon," he had the opportunity to do so after the road traffic accident and did not. The claimant also contradicted himself in oral evidence when he stated that he did not know why he had been dismissed. Taking into account the conflicts in the evidence, with Mr Murphy denying he had made any reference to the claimant's age or suitability to continue working, the Tribunal concluded on the balance of probabilities that Mr Murphy had not used the words attributed to him by the claimant as alleged in his witness statement (para. 5) and the claimant in making the allegation was attempting to bolster up his claim of unfair dismissal with a claim of age discrimination. This raised other credibility issues in respect of the claimant's evidence explored by the Tribunal below.

8. There were a number of conflicts in the evidence between that given by the claimant and the respondent witness which the Tribunal resolved largely through the contemporaneous document, particularly the letters sent to Mr Murphy and the aftermath. This is a case where the Tribunal found the claimant and Mr Murphy to be less than credible witnesses, and it was notable that Mr Wilcox at one point attempted to introduce an explanation for the claimant's total inability to know or recollect the names of those who made the alleged comments about his age as set out in para 5 of the claimant's witness statement; "old Tommy" and "old goat." In cross-examination the claimant was unable to give dates, names or any other information and alleged (in contrast to his witness statement) that it was Mr Murphy who "may be the odd time…if we were having a bit of an argument in the yard" used the words "you old fecker," the "old goat" and said "old Tom will sort that out." Mr Wilcox in oral submissions explained that the claimant knew the names of his colleagues who had made the comments about age but was unable to name them because they remained

employed by the respondent, oral evidence not given by the claimant who explained under cross-examination that he was unable to name the people in question because “they have probably gone. You don’t really know people’s names. Could be any name like, you know….they had nicknames I can’t remember…they called me factory cat because never away from the place” having originally denied that he had “no idea” of his nickname including “Tommy the bank” as the claimant had previously worked in the bank for 25 years.

9. The claimant’s evidence was unsatisfactory and this was not a case involving miss-recollection. The claimant was found to be a less than credible historian.

10. Turning to Mr Murphy, the Tribunal accepted on the balance of probabilities that he did not dismiss the claimant because he was 60 years old, and it found there was no connection with the claimant’s age in the manner by which Mr Murphy dealt with the claimant and failed to respond to the 20 and 20 January 2023 letters he sent. Mr Murphy’s evidence that he had other employees in the workforce older than the claimant. i.e. one employee over the age of 70 had recently left because of lung cancer, was not disputed by the claimant. The claimant accepted that two people were the same age as him, when in fact they were older and the evidence relating to the age of the workforce came from Bernard Wilcox’s questions on cross-examination when he referred to meeting up with Peter Murphy in or around November 2023 (months after the alleged discrimination) to discuss the case, noting “lads all seem very young” a statement denied by Peter Murphy who maintained scaffolding was a “dangerous game” and needed experienced workers. The claimant has failed to establish any basis on which the Tribunal could be satisfied that there was an appropriate hypothetical comparator, preferring Peter Murphy’s evidence that he did not limit the age of workers to 20 to 30, the age group relied upon by the claimant.

11. The Tribunal did not find Bernard Wilcox’s evidence that he only became involved in the case much later on, i.e. November 2023 taking into account the factual matrix in this case including the fact that it appears there was family involvement including at the claimant’s Mother’s funeral, but nothing hangs on this.

12. Peter Murphy’s evidence relating to the letters dated 20 and 30 January 2023 was not credible, and the Tribunal also found him to be an inaccurate historian. The Tribunal does not accept the validity of Peter Murphy’s evidence that he attempted to contact the claimant by phone three times to discuss the letter, concluding he had not and there was no reason why at the very least, communication could not be by text (using the predictive text) or his wife (who was responsible for the respondent’s paperwork) could have helped him to write a letter in response. Peter Murphy did nothing, and the Tribunal accepts on the balance of probabilities that the reason for this was he believed the claimant was looking after his Mother who was dying and he did not need the claimant for picking up the lads because he already had the van, which was being used by someone else, and accepted that the claimant was taking time off from work.

13. In the well-known case of Gestmin SGPS SA v Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm) [16] – [22]. a number of principles that are highly relevant to the case before the Tribunal, were set out and highlighted. The key principles are::

a. “We are not aware of the extent to which our own and other people’s memories are unreliable and believe our memories to be more faithful than they are;
b. **Memories are fluid and malleable, being constantly rewritten whenever they are retrieved**;

c. External information can intrude into a witness's memory as can his or her own thoughts and beliefs; both can cause dramatic changes in recollection;
d. **Memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions** about an event in circumstances where his or her memory is already weak due to the passage of time;
e. e. **The best approach for a judge to adopt is to base factual findings on inferences drawn from the documentary evidence and known or probable facts**" [the Tribunal's emphasis].

14. In short, when it came to the conflicts in the evidence, the Tribunal had difficulty in accepting the evidence given by the claimant and Mr Murphy on a number of matters, partly due to the unreliability of their memories that were constantly re-written to suit the case both had to meet. Bernard Wilcox was unable to cast any light on the events leading to the constructive dismissal as he was not an employee/worker of the respondent and nor was he present at the time.

List of issues

15. A list of issues was prepared in draft and amended following discussions and agreement with the parties prior to evidence being heard as follows;

1. Unfair dismissal

Dismissal

1.1 Can the claimant prove that there was a dismissal? If so, what is the effective date of termination? In relation to this allegation the claimant through Bernard Wilcox confirmed that he was no longer relying on an express dismissal and the case was exclusively concerned with an actual dismissal on the basis that Peter Murphy's conduct amounted to a fundamental breach of contract of employment and the claimant resigned as a result of this. It was confirmed that the claimant is not relying on an express breach of the contract of employment. The breaches relied on are set out below.

Constructive dismissal

1.1.1 Did the respondent do the following things (the breaches of contract taken individually and cumulatively):

1.1.1.1 Make comments about the claimant's age.

1.1.1.2 Employees called the claimant "old Tommy" and "the old goat."

1.1.1.3 When the claimant reached 60 on the 4 June 2022 Peter Murphy stated he was too old to be working as a labourer and driving such a big wagon.

1.1.1.4 26 December 2022 Peter Murphy collecting the company van keys from the claimant and not returning them.

1.1.1.5 Peter Murphy failed to call the claimant at the end of the Christmas holidays with details of when he was to begin work.

1.1.1.6 Tell employees that the claimant was not working for the respondent and they were not to pick him up.

1.1.1.7 Someone else drove the claimant's van.

1.1.1.8 Peter Murphy did not return the claimant's phone calls or respond to the 20 January 2023 and 30 January 2023 letters.

1.1.1.9 Showed the 2 letters to "mutual acquaintances" and laughed at them.

1.1.1.10 Peter Murphy never told the claimant that he wanted him working for the respondent.

Trust and confidence case

1.1.2 Did that breach the implied term of trust and confidence? Taking account of the actions or omissions alleged in the previous paragraph, individually and cumulatively, the Tribunal will need to decide:

1.1.2.1 whether the respondent had reasonable and proper cause for those actions or omissions, and if not.

1.1.2.2 whether the respondent behaved in a way that when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.

1.1.3 Was the fundamental breach of contract a reason for the claimant's resignation.

1.1.4 Did the claimant affirm the contract before resigning, by delay or otherwise? The Tribunal will need to decide whether the claimant's words or actions showed that he chose to keep the contract alive even after the breach.

<u>Reason</u>

1.2 Has the respondent shown the reason or principal reason for dismissal [*constructive dismissal only* the reason or principal reason for the fundamental breach of contract]?

1.3 Was it a potentially fair reason under section 98 Employment Rights Act 1996?

[Section 98 cases - general]

1.4 If so, applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?

2. Remedy for unfair dismissal

2.1 Does the claimant wish to be reinstated to their previous employment?

2.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

2.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

2.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

2.5 What should the terms of the re-engagement order be?

2.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

2.6.1 What financial losses has the dismissal caused the claimant?

2.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

2.6.3 If not, for what period of loss should the claimant be compensated?

2.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? (To be decided at liability stage).

2.6.5 If so, should the claimant's compensation be reduced? By how much? (To be decided at liability stage).

2.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

2.6.7 Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]?

2.6.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

2.6.9 If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct? (To be decided at liability stage).

2.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion? (To be decided at liability stage).

2.6.11 Does the statutory cap of fifty-two weeks' pay or [£105,707] apply?

2.7 What basic award is payable to the claimant, if any?

2.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent? (To be decided at liability stage).

3. Wrongful dismissal / Notice pay.

3.1 What was the claimant's notice period?

3.2 Was the claimant paid for that notice period?

3.3 If not, can the respondent prove that the claimant was guilty of gross misconduct which meant that the respondent was entitled to dismiss without notice?

4. Direct age discrimination (Equality Act 2010 section 13)

4.1 The claimant's age group is 60 and over and he compares herself with people in the age group 20-30 years of age.

4.2 What are the facts in relation to the following allegations (the claimant did not include the alleged comments about his age as a separate act of age discrimination and relied on them to show that he was dismissed after he had turned 60 years old and was considered too old to labour and drive a large HGV:

4.2.1 Dismissing the claimant

4.3 If so, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances *of a different age* was or would have been treated? The claimant says he was treated worse than the workforce aged 20-30 years of age.

4.4 If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of *age?*

4.5 If so, has the respondent shown that there was no less favourable treatment because of *age*?

4.6 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were: this is not pleaded and is not an issue.

4.7 The Tribunal will decide in particular:

4.7.1 Were the aims legitimate and of a public interest nature;

4.7.2 was the treatment an appropriate and reasonably necessary way to achieve those aims;

4.7.3 could something less discriminatory have been done instead; and

4.7.4 how should the needs of the claimant and the respondent be balanced?

5. Remedy for discrimination

5.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

5.2 What financial losses has the discrimination caused the claimant?

5.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

5.4 If not, for what period of loss should the claimant be compensated?

5.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

5.6 Should aggravated damages be ordered?

5.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

5.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

5.9 Did the respondent or the claimant unreasonably fail to comply with it by [*specify breach*]?

5.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

5.11 By what proportion, up to 25%?

5.12 Should interest be awarded? How much?

6. **Holiday Pay (Working Time Regulations 1998)**

6.1 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

[Schedule 5 Employment Act 2002 cases]

6.2 When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?

6.3 If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

6.4 Would it be just and equitable to award four weeks' pay?

16. The Tribunal was referred to a bundle of documents and having considered the oral and written evidence and the oral submissions (which we do not intend to repeat here but have attempted to incorporate the points made by the parties within the body of this judgment with reasons), we have made the following findings of the relevant facts.

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Facts

17. The respondent provides scaffolding services primarily for the domestic market with a small amount of commercial work. Peter Murphy is the sole director, his wife deals with paperwork. Peter Murphy described himself as dyslexic, he is able to read but has difficulties spelling, and his communications with the workers including the claimant are largely by phone and sometimes text. He does not communicate by written letters and would not think to post a letter to anybody in his workforce. In short, Peter Murphy has difficulty dealing with paperwork in the business, which he left to his wife who had a part time job in a national supermarket store. Peter Murphy worked primarily with men in a physical environment and he did not need to write letters. The men who worked for the respondent were self-employed as agreed with HMRC, including the claimant who employed his own accountant to prepare tax returns at the time. It is an important point in this case that during the relevant period Peter Murphy genuinely believed the claimant was self-employed, capable of coming and going as he wanted, and as far as he was concerned the respondent was not bound by any employment obligations, statutory or otherwise. It did not cross Peter Murphy's mind that the claimant had a contract of employment and within that contract there existed an implied term of trust and confidence.

18. At a preliminary hearing held on the 28 February 2024 Employment Judge Batten found the respondent would only engaged individuals on the CIS scheme accreditation with the result that all individuals, including the claimant, were treated as self-employed and believed that they were self-employed. This state of affairs had important implications on the working relationship between the respondent via Peter Murphy, who was in total control of the company and the men who worked for it. On the evidence before it at this liability hearing the Tribunal found it was undisputed between the parties that the claimant could take breaks as and when he wanted without reference to Peter Murphy, he had taken a break from the respondent in the past when he wanted more money that resulted in additional pay and the claimant returning to work. The claimant in the past had also worked for other companies and the respondent.

19. As far as Peter Murphy was concerned, the respondent was not required to comply with any of the laws and regulations protecting employees, including the ACAS Code of Practice and he took the view that he could run his business in whatever way he wanted, including picking up and dropping self-employed workers as and when the amount of work generated a need taking into account the undisputed lack of reliability of the scaffolders who did not always turn up to work despite arrangements having been made.

20. At the time of the claimant's employment it is undisputed the respondent engaged between six and nine people, depending on the work available at the time. It ran two pickups that were used to pick up and drop off people before and after work as the premises had moved from Trafford in Manchester to Lymm, a less convenient location for some workers including the claimant who according to Google maps would be required to travel 1 hour 58 minutes each way to get to work, which the claimant was never prepared to do due to cost and time. In contrast, when the respondent was originally based at Trafford Park the claimant could walk to work. The change in location made working for the respondent less attractive to the claimant, who either required the use of the works van or a pick up and drop off from other workers failing which he would not have turned up for work, and so the Tribunal found.

21. The respondent's premises moved to Lymm in or around 2022, although the date of this was not possible to determine with any clarity. It is not disputed however that the van was purchased and used to transport people to and from work as a result of the change in

location approximately 6 to 9 months before Christmas 2022. Over the 2022 Easter break there is an issue as to whether the claimant retained the van parked at home unable to use it for private use as it was only insured for business use. There is no satisfactory evidence either way to assist the Tribunal in determining whether the van was retained by the claimant over the Easter holidays or kept in the respondent's yard. It is undisputed other employees also used the van, and the claimant did not have sole access to the van, and nor was he responsible for picking up employees when he did not have the van. In that situation the claimant would make arrangements with the driver of the van to be picked up, or in the alternative, an employee who was driving his own car as the claimant did not have access to his own vehicle. The Tribunal is satisfied given the undisputed evidence from the claimant that he could not have used the van over the Easter break when he was not working, and whilst this factor is not determinative, it would make no sense for the claimant to retain the van standing on his drive when he was on holiday.

22. In addition to both vans the respondent had three wagons that required HGV drivers; two 7.5 tonne and one 18 tonne wagon. The claimant, who had a HGV licence could drive all the respondent's vehicles, as could one other employee. Peter Murphy was limited to driving the two 7.5 tonne wagons, and his evidence that he found it difficulty attracting HGV drivers was credible. The claimant, in his capacity as a HGV driver, was valuable to the respondent and given Peter Murphy's evidence that he was a good employee, could be depended on to turn up for work, drive a team of three people and carry out labouring work was credible, pointing away from any age discrimination. In short, the claimant was a integral member of the "gang" and this was reflected by his long hours and long days highlighted by his nickname "factory cat", when he would step in to the breach if someone failed to turn up to work on a particular day. Peter Murphy had no intention of "letting go" of the claimant's services, there was no issue with his age and so the Tribunal found.

23. The claimant gave evidence that the reason he went to work for the respondent was when they were holidaying in New York Peter Murphy "mithered him" because he had nobody to drive the wagon, and part way through his second trench of employment the claimant's wages were increased when he took a week off and negotiated a higher rate of pay. The fact the claimant had turned 60 years old was irrelevant to Peter Murphy, who had the opportunity to dismiss the claimant/bring his self-employment to an end following a road traffic accident and it did not occur to him to do so because the claimant was a valuable worker in the business and this included his HGV licence.

24. The claimant and Peter Murphy did not have the usual employer and employee relationship. Both met each other socially, for example, in a concert, other family events and in New York as Peter Murphy was close friends to the claimant's brother and was known to the family, sharing the same community and religion. The claimant is his evidence attempted to play this down, and in oral evidence stated Peter Murphy did not go to his Mother's funeral, when the fact of the matter is that Peter Murphy did turn up for the funeral and was refused access, no mention of this was made by the claimant who gave the impression that Peter Murphy was not telling the truth.

25. The claimant's Father had died in 2021, and by Christmas 2022 the claimant's Mother was ill and dying. Peter Murphy was aware of the position. The last day of work before the Christmas close down was 22 December 2022, and it is undisputed the claimant had decided not to go for a Christmas drink (as was the usual practice at Christmas time) because he wanted to get home to his Mother and in order to do so, took the van and dropping off a number of employees on the way. There is an issue as to whether Peter Murphy told the claimant and/or other employees that they were to return to work on the 4

January 2023. The Tribunal was shown no written communications/documents to this effect. The claimant's case is that he was not told, Peter Murphy is clear that people including the claimant were informed because he had to arrange his business. On the balance of probabilities the Tribunal preferred Peter Murphy's evidence that the claimant and other men were informed when the business was re-starting after the Christmas break on the 4 January 2023, and the claimant's evidence was not credible, especially when key workers are required to drive the HGV wagons. It did not make sense that Peter Murphy would not inform the people important to the business when it was re-opening after Christmas in order that plans could be made, ensuring there was a workforce and men did not go to work for other scaffolding companies which was a problem in the industry.

26. The Tribunal finds that the claimant was aware he could return to work on the 4 January 2023, and the claimant chose not to do because he was looking after his Mother, who was close to death. During the period of his Mother's last weeks travelling to and from the business was not a factor because the claimant was not going to return to work, whether he had the van or not. It is notable that on cross-examination when it was put to the claimant had he not been informed of the return date the claimant would have asked Peter Murphy, "his boss" when he was coming back, to which the claimant responded that he was not going to ask when "you're the boss and it's down to you to tell me." It is not credible that the claimant did not know he was to return to work on the 4 January 2023, and so the Tribunal found, satisfied that he did.

27. Peter Murphy gave oral evidence that he informed the claimant on the 22 December 2022 that the van would be collected from him as it was needed by his wife whose car had broken down. There is no reference to this in Peter Murphy's witness statement, and he accepted the Witness Statement of Elizabeth Wilcox that on the 26 December 2022 he had called the landline number of the house owned by the claimant's Mother, Elizabeth Wilcox had answered and he had asked to speak to the claimant. On being told that the claimant could not leave his Mother's side Peter Murphy said he needed to collect the van, which he did later than day. The keys were handed to Peter Murphy by Elizabeth Wilcox and the claimant did not attempt to speak with him or discuss a return to work, the return of the van and how he would get to work. The Tribunal concluded on the balance of probability that Peter Murphy's perception was the claimant was concerned with looking after his dying Mother, he did not expect the claimant to return to work and was unconcerned about the amount of time the claimant would be absent as a result of his Mother's illness, given the claimant was close to his Mother, he was not being paid by the respondent for any days that were not worked and the respondent had the van. It is notable that the claimant's evidence was also that he was not concerned about returning to work or arranging with Peter Murphy a lift to the work premise in Lymm either on or around the 4 January 2023 as the claimant needed time with his Mother, who was dying. On the 4 January 2023, the claimant made no attempt to contact any of his colleagues about a lift to work or discuss with Peter Murphy a return to work either than day or in the future, in the knowledge that it was a return to work day. The claimant's perception was that there was no issue with Peter Murphy for him remaining off work and not communicating his intention to do so.

28. Sixteen days after the anticipated return to work the claimant out of the blue typed a letter to the respondent dated 20 January 2023 which he sent to Chorlton Scaffolding with proof of postage. It is not clear whether the letter was sent first or second class. Neither party have satisfied the Tribunal of the date when the letter was likely to have been received. The claimant did not ordinarily communicate with Peter Murphy in this way, and he like Mr Murphy usually spoke on the telephone or occasionally sent a message by phone. There is no satisfactory evidence before the Tribunal that the claimant and Peter Murphy attempted to

ring each other during the claimant's absence save for the one call on the claimant's Mother's landline arranging the pick up of the van. On the balance of probabilities the Tribunal found that both parties were content with the status quo; the claimant choosing not to work and spend time with his family and Mother, and Peter Murphy accepting the claimant would not be working whilst his Mother was ill. Against that factual matrix the claimant's letter was surprising, not least taking into account it was an unusual method of communicating with Peter Murphy who had difficulty reading and writing.

29. It is undisputed that the 20 January was received by Peter Murphy who did not respond. The Tribunal found this surprising given the claimant had written "You came and took the van away on Boxing Day when I was busy looking after my Mum and then after the holidays you've not been in touch about starting work again. I saw one of the lads in Chorlton and they asked me why I wasn't working for you anymore. They had apparently been told not to pick me up. I've called you and you haven't called me back and so I'd just like to know where I stand."

30. There are differences between the 20 January letter, the claimant's written statement and his oral evidence. In the letter the claimant refers to "one of the lads," in his witness statement "some of the other employees" suggesting it was more than one and in oral evidence the claimant stated he did not know their names.

31. Peter Murphy did not respond, and the Tribunal finds that even had he rung and the claimant had not returned his call, he could have asked his wife to help him write a letter in response or at the very least send the claimant a phone message using predictive text which helped Peter Murphy. At the time Peter Murphy was upset that the claimant had sent him a letter, and he felt threatened by it bearing in mind his communications with the claimant (and other workers) were by phone and occasional text message. Peter Murphy could read the letter but he was unable to write a correctly spelt letter, and so he ignored it. By this stage the claimant had not worked for 16 days from the date of the anticipated return without any attempt to make contact beforehand, despite the claimant maintaining that he did try by telephone, evidence which the Tribunal does not accept as credible.

32. If Peter Murphy was in any doubt that there was an issue as far as the claimant was concerned, by the handwritten letter dated 30 January 2023 he was put fully in the picture. The Tribunal does not know whether the letter was sent first class or second, and when the letter was received by Peter Murphy whose recollection was that he opened the handwritten letter first. This is possibly correct because the claimant attached a copy of the 20 January letter to the 30 January 2023 letter. There is no doubt Peter Murphy received the letter written 2 days before the claimant's Mother died on the 1 February 2023. The claimant wrote "I wrote you this letter over a week ago now and I still haven't heard off you. I just wanted to know where I stand. I'm going to assume that if I don't hear off you by this Friday that you don't want me working for you anymore."

33. The deadline date was after the claimant's Mother's death on the 3rd February 2023. The contents of the claimant's letter, viewed objectively, was difficult to put in context. The claimant was intending to be off work for the duration of his Mother's illness, she was near death and yet he was pressing Peter Murphy for a return to work date when the understanding of both was that the claimant would remain off work until it suited him to look after his Mother. Peter Murphy believes that the letters were an attempt to build up a case against him, and yet he did not respond a second time and was unable to give the Tribunal an unsatisfactory reason for why his wife could not have drafted a response on his behalf and/or he could have sent the claimant a phone message inviting him to attend work and/or

meet up to discuss. It was not credible that Peter Murphy had rang the claimant either on the landline number he originally used to recover the van or mobile, and the Tribunal concluded Peter Murphy ignored the letters because he did not know what to do about them, expected the claimant to make contact by phone when he needed to be picked up for work and as the claimant was self-employed thought he did not have to do or say anything. Peter Murphy's failure was his lack of communication with the claimant during this period, even taking into account his understanding that the claimant was self-employed and could regulate his own work. It did not even cross-his mind that the respondent had a contract of employment with the claimant and under that contract there existed an implied term that employers will not, without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence or trust between employer and employee.

34. Between the second letter being sent and received by Peter Murphy the claimant's Mother died and a funeral took place in February 2023. Peter Murphy decided that he should attend the funeral, and continued to ignore the first and second letter with the result that by the 3 February 2023 the deadline had passed and claimant took part in ACAS early conciliation on the 8 March 2023 before issuing proceedings on the 20 April 2023 claiming he was an employee and had been dismissed on the 26 December 2022. In the details of claim the claimant refers to being an employee and dismissed on the 26 December 2022 when Peter Murphy picked up the van. The Tribunal has taken into account the claimant's confusion as to the date when the dismissal took effect. In the claim form it was the 26 December 2022 the day the van was taken away on the basis that, according to the claimant, Peter Murphy had decided he should not return because he had turned 60 earlier that year. The claimant had no basis to make this assertion and the Tribunal found it could not possibly have bene the case. In the claimant's witness statement there were numerous dates, and Bernard Wilcox, who represented the claimant, stated it was the 22 December, the 4 January or the 10 January 2023. The effective date of termination could not have been on any of these dates. Based on the information before the Tribunal the effective date of termination was the 3 February 2023 the deadline date for Peter Murphy to respond and failed to do so thus breaching the implied term of trust and confidence.

35. After the 3 February 2023 deadline date the claimant had no communication with the respondent/Peter Murphy and Peter Murphy had no contact with the claimant and so the Tribunal found. The claimant did not inform the respondent that he had resigned following a constructive dismissal and the Peter Murphy did not approach the claimant to see when he wished to return to work and whether there were any barriers to this. The Tribunal found on balance that following the 3 February 2023 deadline the claimant terminated the employment contract by his conduct when he failed to return to work after the 3 February 2023, underwent early ACAS conciliation on the 8 March 2023 and issued proceedings as a result of Peter Murphy's failing to communicate with him as requested. The Tribunal found the claimant had resigned because he was unhappy the van had been taken away on the 26 December 2022, he was unhappy with the amount of travelling to and from work, which he would not have done had he not been given access to a van or lifts from colleagues, and he was unhappy that Peter Murphy had not been in contact with him about the two letters he had sent with proof of delivery.

36. The effective date of termination was 3 February 2023 at the earliest.

RESERVED

Law; Direct discrimination

37. S.13(1) EqA provides that direct discrimination occurs where "a person (A) discriminates against another (B) if, because of a protected characteristic [race] A treats B less favourably than A treats or would treat others.

38. An actual or hypothetical comparator is required who does not share the claimant's protected characteristic and is in not materially different circumstances from him. Para 3.23 of the EHRC Employment Code makes it clear that the circumstances of the claimant and comparator need not be identical in every way, what matter is that the circumstances "which are relevant to the [claimant's treatment] are the same or nearly the same for the [claimant] and the comparator."

39. The Tribunal was unable to formulate a hypothetical comparator based on the evidence before it as the claimant did not rely on any named comparators that could assist the Tribunal formulate any comparator, the reference made by Mr Wilcox to a "young workforce" months after the event was irrelevant. In short, the claimant offered up no cogent evidence to assist the Tribunal formulate a hypothetical comparator; Chief Constable of West Yorkshire v Vent o (No.3) [2003] ICR 318 CA and Da'Bell v National Society for the Prevention of Cruelty to Children [2010] IRLR 19, EAT. In Vento, the tribunal considered the circumstances of four other police constables (not all of whom were male) whose situations were not identical but were not wholly dissimilar either. It concluded that the claimant had been treated less favourably than a hypothetical male comparator. The EAT held that this was a permissible way of constructing a picture of how a hypothetical male comparator would have been treated. This approach was later approved by the House of Lords in the well-known case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL.

40. Section 13 EqA requires not just consideration of the comparison (the less favourable treatment) but the reason for that treatment and whether it was because of the relevant proscribed ground. These two questions can be considered separately and in stages; or they can have intertwined: the less favourable treatment issue cannot be resolved without deciding the reason why issue. As was observed by Lord Nicholls in Shamoon at paragraph 11: "…tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? … If the former, there will … usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable then was or would have been afforded to others." In Mr Wynne's case the Tribunal was not satisfied from the facts in the case that the reason for claimant's treatment was on the proscribed ground.

41. A Tribunal should not assume a finding of unlawful discrimination from a finding that an employer acted unreasonably; there may be other explanations (if only simply human error): Bahl v Law Society [2004] IRLR 799 CA. More is required than simply a finding of less favourable treatment and a difference in the relevant protected characteristic. Where there is a comparator, the 'something more' might be established in circumstances where there is no explanation for the unreasonable treatment of the complainant as compared to that comparator; see per Sedley LJ in Anya v University of Oxford [2001] ICR 847 CA, and the discussion of those dicta in Bahl , per Maurice Kay LJ, observing (paragraph 101) that the

inference of discrimination would not then arise from the unreasonable treatment but from the absence of explanation.

Objective justification

42. The respondent has not argued the defence of objective justification.

Burden of proof

43. Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

44. In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply, as affirmed in Ayodele v CityLink Ltd [2018] ICR 748. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that it did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondent and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case age], failing which the claim succeeds. Mr Wynne has not succeeded in discharging the burden of proof.

Constructive unfair dismissal

45. Section 95(1)(c) of the Employment Rights Act 1996, as amended ("the ERA") states that there is a dismissal when an employee terminated his or her contract, with or without notice, in circumstances that he or she is entitled to terminate it without notice by reason of the employer's conduct.

46. "In order for the employee to be able to claim constructive dismissal, four conditions must be met:(1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach. (2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting a repudiation in law. (3) He must leave in response to the breach and not for some other, unconnected reason. (4) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract" - Harvey on Industrial Relations and Employment Law.

47. The Tribunal's starting point was the test laid down by the Court of Appeal in Western Excavating (ECC) Ltd –v- Sharp [1978] ICR 221 whether the employer was guilty of conduct which is a repudiatory/significant breach going to the root of the contract. The issues to be decided upon in this respect were: Was there a fundamental breach on the part of the

employer? Did the claimant terminate the contract by resigning? Did the claimant prove that the effective cause of her resignation was the respondent's fundamental breach of contract? In other words, what was the effective cause of the employee's resignation? Did the claimant delay and therefore act in such a way that is inconsistent with an intention to treat the contract as an end? The Court of Appeal "made it clear that questions of constructive dismissal should be determined according to the terms of the contractual relationship and not in accordance with a test of 'reasonable conduct by the employer."

The implied term of trust and confidence

48. There is an implied term in every contract of employment to the effect that the employer will not without reasonable and proper cause, conduct itself in a manner likely to destroy, or seriously damage the relationship of confidence and trust between employer and employee. In order to constitute a breach of the implied term it is not necessary for the employee to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it; or put another way, the vital question is whether the impact of the employer's conduct on the employee was such that, viewed objectively, the employee could properly conclude that the employers were repudiating the contract. The correct test of repudiatory conduct by an employer is set out in the Court of Appeal judgment in the case of Paul Buckland V Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, and this is an objective test.

49. The House of Lords in Malik v Bank of Credit; Mahmud v Bank of Credit [1997] UKHL 23, held that the breach occurs when the proscribed conduct takes place. The employee may take the conduct as a repudiatory breach, entitling him to leave without notice. If the employee stays, the extent to which staying would be a waiver of the breach depends on the circumstances. Lord Steyn referred to the implied obligation covering a diversity of situations in which "a balance has to be stuck between an employer's interests in managing his business as he sees fit, and the employee's interest in not being unfairly and improperly exploited," and to the impact of the employer's conduct being objectively assessed to ascertain whether objectively considered, it is likely to destroy or cause serious damage to the relationship between employer and employee. If it is found to be so, then a breach of the implied obligation may arise.

Course of conduct

50. A course of conduct can cumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal following a "last straw" incident. The last straw itself does not need to amount to a breach – Lewis v Motorworld Garages Limited [1986] ICR 157 CA. Glidewell LJ said at para 169F "The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, although each individual incident may not do so. In particular, in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?"

51. The Court of Appeal decision in Omilaju v Waltham Forest London Borough Council [2005] ICR 481 the Court of Appeal held that the act constituting the last straw need not be the same character as the earlier acts, nor must it constitute unreasonable or blameworthy

conduct, although in most cases it will do so. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final last straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive on his or her own trust and confidence in the employer. The Tribunal was satisfied in Mr Wynne's case that failing to respond to two letters questioning the employment relationship's continuance could amount to a course of conduct.

Employee must resign in response to repudiatory breach.

52. The employee must leave in response to a breach committed by the employer. This breach may be an actual breach or an anticipatory breach … it is not enough that the employee expects the employer to repudiate the contract and leaves in anticipation.

53. In the well-known EAT case of Walker v. Josiah Wedgwood & Sons Ltd [1978] ICR 744, IRLR 105 the EAT held "… it is at least requisite that the employee should leave because of the breach of the employer's relevant duty to him, and that this should demonstrably be the case. It is not sufficient, we think, if he merely leaves … **And secondly, we think, it is not sufficient if he leaves in circumstances which indicate some ground for his leaving other than the breach of the employer's obligation to him**" (per Arnold J). The Tribunal's emphasis as this point is relevant to Mr Wynne's case as it took the view the claimant left for a number of reasons including the alleged breaches of contract.

Waiver of breach

54. Weston Excavating cited above; The employee "must make up his mind soon after the conduct of which he complains; for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged."

55. In the well-known EAT case of W.E. Cox Toner (International) Ltd v. Crook [1981] ICR 823 IRLR 443, EAT an employee censured by employer in July 1980 for taking leave without previously advising the employer. He demanded the withdrawal of the censure letter. He was informed on 6 February 1981 that the letter would not be withdrawn. He left four weeks later. The EAT held that he was precluded from claiming for unfair dismissal because he had remained for four weeks after it had become clear that his grievance would not be remedied and consequently must be taken to have affirmed the contract. This was not an issue in Mr Wynne's case as he made it clear that he would treat the employment at an end if the respondent failed to reply to his letters.

Conclusion – applying the law to the facts.

Unfair dismissal

56. With reference to the first issue, the claimant accepted during the final hearing that there was not an express dismissal and his claim was for constructive unfair dismissal only. Turning to the constructive dismissal, the questions to be answered are whether the respondent committed the breaches alleged as follows:

56.1 Made comments about the claimant's age (also relevant to the direct age discrimination claim): the Tribunal applying the burden of proof found the burden had not shifted to the respondent and the claimant has failed to establish on the balance

of probabilities that comments were made about his age when unnamed employees had allegedly called the claimant "old Tommy" and "the old goat" and when the claimant reached 60 years old on the 4 June 2022 Peter Murphy stated he was too old to be working as a labourer and driving such a big wagon. It is notable that these allegations arose for the first time in these proceedings, and were not referenced in the two letters sent in January 2023 and the events did not take place. As indicated above in its findings of facts, the Tribunal found the inclusion of the age discrimination was an attempt to bolster up the claim and support the allegation that the claimant had been dismissed because of his age. It brought into question the claimant's credibility and whether his resignation by conduct had been caused by the breach of contract in question, or if there was an ulterior motive to the resignation, such as the one put forward by Peter Murphy who argued he had been set up by the claimant who had decided he no longer wanted to work for him intending to issue these proceedings to recover damages.

56.2 With reference to the allegation, namely, that Peter Murphy had on the 26 December 2022 collected the company van keys from the claimant and had not returned them, the Tribunal found he was entitled to do as it is undisputed the claimant did not have exclusive use of the van, which he shared with others, and it was envisaged by both that the claimant would be absent looking after his dying Mother, which is what transpired with the consequence that Peter Murphy was entitled to make use of the van during the claimant's absence, bearing in mind the claimant was unable to drive it for any other purpose other than work related business. The claimant was not entitled contractually to the use of a company van, and the act of taking the van away on the 26 December 2022 was not a breach of contract, objectively accessed, and not is it capable of amounting to a cumulative breach of the implied term of trust and confidence taking into account Peter Murphy's failure to respond to the two January 2023 letters as the last act.

56.3 With reference to the allegation that Peter Murphy had failed to call the claimant at the end of the Christmas holidays with details of when he was to begin work, the Tribunal found on the balance of probabilities that Peter Murphy had informed the claimant of this on the 22 December 2022, and both he and the claimant was happy for the claimant to remain off work unpaid for an indefinite period having returned the van. This is no breach of contract in respect of this allegation.

56.4 With reference to the allegation that Peter Murphy had told employees (plural) that the claimant was not working for the respondent and they were not to pick him up, the Tribunal found on the balance of probabilities this was not said and did not happen. Peter Murphy had the opportunity to dismiss the claimant in November 2022 as explored above, and he had not done so because the claimant was valued albeit on a self-employed basis which was the understanding of both concerning the relationship at the time. In the decision of Judge Batton sent to the parties on 13 March 2024 at paragraph 4 reference was made to "the way the working relationship ended when the claimant was compelled to take time off work over Christmas to look after his ill Mother…it appears this caused the respondent difficulties and angered Mr Murphy who then sought to dispense with the claimant's services in a peremptory manner on Boxing Day. That scenarios flies in the face of the respondent's suggestion that the claimant could come and go as he pleased and decide when to, or not, to work." At the final hearing this was not how either party put their cases, and nor was there any evidence to this effect before the Tribunal. There was no time off over Christmas, a holiday period for the respondent until business re-started on the

4 January 2023. On his own admission the claimant did not work and was unconcerned about the lack of contact with Peter Murphy because it suited him to be off work spending time with his dying Mother. The reality is that the claimant chose to take that time off work without reference or agreement from the respondent, and due to Peter Murphy's relationship with the claimant, his brother and the family, Peter Murphy had no issue with this and fully understood why the claimant, who he believed was self-employed, chose not to turn up to work. It is notable that in the claimant's witness statement he records on 14 January "bumping" into employees who allegedly told him that they were told not to pick him up, this was 10 days after the claimant was due to return to work, and 6 days before the claimant wrote the letter dated 20 January 2023, undermining the claimant's pleaded case that he was dismissed on the 26 December 2022. There is no breach of contract in respect of this allegation.

56.5 With reference to the issue, someone else drove the claimant's van, on the claimant's own case it was not his van, he shared use with others and he was not entitled to retain it. This is not breach of contract in respect of this allegation, and the claimant knew at the time that he did not have use of the van other than for business travel, and as he was not working could not have made use of the van. It is notable that the claimant did not work from 23 December 2022 and made no specific request to return to work on a certain date at any time, either orally or in writing, the claimant's main concern expressed in the 20 and 30 January 2023 letters being "I'd like to know where I stand" in relation to Peter Murphy and working for the respondent (see below). There is no breach of contract in respect of this allegation.

56.6 With reference to the issue, namely, Peter Murphy did not return the claimant's phone calls the Tribunal found on the balance of probabilities that the claimant did not make those phone calls as he now maintains despite the reference in the 20 January 2023 letter "I've called you and you haven't called me back." As reference above, the Tribunal found the claimant and Peter Murphy were less than credible witnesses when it came to the telephone calls both said they made and yet failed to document and/or produce any evidence of whatsoever. Neither left messages, neither sent text messages on the phones and the claimant made no attempt to contact his work colleague who was either driving the van and/or used his own car to make arrangements to be picked up, and this was because the claimant had no intention of working during the period of his Mother's illness. There is no breach of contract in respect of this allegation.

The breach of contract - failing to respond to the 20 and 30 January 2023 letters and Peter Murphy never telling the claimant that he wanted him working for the respondent.

56.7 The key issue for the Tribunal is the respondent failing to respond to the 20 January 2023 and 30 January 2023 letters, which Peter Murphy did not take seriously at time and ignored the possible consequences because he was so used to treating the people who worked for the respondent as self-employed, he expected the claimant not to be working and took exception to the fact written letters were sent to him. Peter Murphy's evidence that he could not have written a return letter because he did not have a return address was not credible, given he had visited the property to pick up the van and he had lived at the claimant's Mother's address in the past.

56.8 With reference to the allegation that Peter Murphy showed the two letters to "mutual acquaintances" and laughed at them, the claimant produced no satisfactory evidence. The "mutual acquaintances" who allegedly reported to him that Peter Murphy had laughed at the letters were not acquaintances at all. In oral evidence the claimant gave less then credible evidence. At first when asked who the acquaintances were he answered "they've gone." When pressed on cross-examination he admitted that it was his brother and a friend. There was no statement from the brother or the friend called Martin, and in submissions (not in evidence) Mr Wilcox attempted to explain that the claimant's brother did not want to get involved. This was not the claimant's evidence. Taking into account that a brother is not a mutual acquaintance, and the claimant's general lack of credibility, the Tribunal concluded this allegation had no basis and the incident did not happen as described. There is no breach of contract in respect of this allegation.

56.9 Finally, with reference to the issue that Peter Murphy never told the claimant that he wanted him working for the respondent, Peter Murphy did not make the position clear because he failed to respond to the letters, and by the time the claimant's family told him to leave their Mother's funeral in public, it was too late because by the stage both the claimant and Peter Murphy adopted intransigent positions. The claimant believed understandably that Peter Murphy did not want him working for the respondent and Peter Murphy believed the claimant had shamed him in public in front of the whole community even though it was another member of the claimant's family that had prevented him from attending the funeral. In short, this allegation has the cumulative effect of breaching the implied term of trust and confidence. The relationship between the respondent and the claimant as an employee is based on mutual trust and confidence between each other, which does not apply to the self-employed who are usually in business on their own account. The fact that it did not occur to Peter Murphy at the time that the respondent was under a duty to comply with this implied term and not conduct itself in a manner "calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties" does not assist him - Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84 EAT.

57. When Peter Murphy failed to respond to the 20 and 30 January 2023 letters and never told the claimant that he wanted him working for the respondent, the Tribunal found objectively assessed, looking at Peter Murphy's conduct as a whole, its effect was such that the claimant cold not have expected to put up with it and in the particular circumstances of this case against the backdrop of the claimant absent from work looking after his dying Mother, the respondent through the actions of Peter Murphy was in breach of the implied term of trust and confidence. It is irrelevant that Peter Murphy had not knowledge of the implied term or that it applied to the claimant in his capacity of an employee as it is not necessary to show that he intended any repudiation of the contract. The Tribunal's role is to objectively assess the position and whether the test is met – Buckland above.

58. With reference to the next issue, namely, taking account of the actions or omissions alleged in the previous paragraph, individually and cumulatively, the Tribunal decided:

(a) Peter Murphy did not have reasonable and proper cause for those actions or omissions when he failed to respond to the January 2023 letters that clearly required a response, not

least, dealing with the claimant's inquiry as to whether he wanted him working for the respondent "anymore" within the timeframe set out– Malik above.

(b) behaved in a way that when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. Peter Murphy should have responded to those letters, either by text or with the assistance of his wife, who worked for the respondent and was responsible for its documents bearing in mind Peter Murphy's inability to deal with them, making it clear that the claimant was needed and wanted in the business and agreeing an arrangement for a return to work after the lengthy absence on a mutual suitable date bearing in mind that both were happy for the claimant not to be working during his Mother's illness and the aftermath. The claimant's evidence in respect of the earlier death of his Father was that he had taken time off then and returned to work after the funeral, and Peter Murphy was aware of this and the possibility that the claimant would have returned to work after his Mother's funeral.

59. With reference to the issue, namely, was the fundamental breach of contract a reason for the claimant's resignation, the Tribunal had difficulties in assessing whether the respondent's failure to respond to the two letters was the reason for the claimant's resignation, or the claimant's belief that he was entitled to retain the use of the van and had concerns about the time it would take to get to and from work, concluding all of these factors impacted on the claimant's decision to resign including the assumption that Peter Murphy, a family friend and the "gaffer", had not contacted him following the 30 January 2023 with confirmation that he did want to the claimant working for the respondent. In order to succeed in a claim of constructive dismissal the claimant must establish that there was a causal link between the respondent's breach and his resignation, His evidence on this issue has not been credible in respect of the claimant's initial position that a dismissal had taken place on the 26 December 2022 when Peter Murphy took the van, which was not a breach of contract. In the "Details of Claims" the claimant relies on a number of alleged breaches which are not well-founded as a reason for his resignation, leaving Peter Murphy's failure to respond to the letters and confirm he wanted the claimant to work for the respondent as the only repudiatory breaches of contract, following which the claimant was not invited to return to work and nor did he return to work.

60. The problem for the Tribunal lies in the possibility that the claimant would not have returned to work after the van had been taken on the 26 December 2022 and the credibility of his evidence concerning the alleged age discrimination which suggests an underlying reason for the resignation after the claimant uncharacteristically wrote to Peter Murphy retaining evidence of postage used in the litigation which followed weeks after as a basis for a claim predicated on the argument that the claimant was an employee. Peter Murphy, despite arguing that the claimant was essentially setting up this litigation when he wrote the letters, has not persuaded the Tribunal that the ulterior motive on the part of the claimant was to build up a case, despite the inclusion of a number of allegations which the Tribunal did not find was the case. The problem for Peter Murphy is that he does not know if litigation was an underlying or ulterior motive because he failed to respond to two very important

letters, and had he done so, the outcome of this litigation may have been more favourable to the respondent. In short, the effective cause of the claimant's resignation, whilst there were other factors in play including possibly future litigation, was Peter Murphy's failure to respond. The claimant had forewarned Peter Murphy that if he did not hear from him "you don't want me working for you anymore" and when he heard nothing the claimant considered himself to have been constructively dismissed and entered into ACAS early conciliation.

61. With reference to the issue, namely, did the claimant affirm the contract before resigning, by delay or otherwise, there was no evidence that the claimant did and the Tribunal was satisfied that the claimant's words or actions did not show he chose to keep the contract alive even after the breach. There was no affirmation.

62. With reference to the issue, namely, was there a potentially fair reason under section 98 Employment Rights Act 1996 for the claimant's dismissal, the Tribunal found that there was not.

63. With reference to the issue, namely, if the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct, the Tribunal finds that he did not. The respondent does not say that he was annoyed with the claimant not turning up for work in the circumstances of his mother's illness and death. Peter Murphy only got upset when he was told to leave the funereal and before that date he did not think there was a problem with the claimant's absence on his own evidence. It is not just and equitable to deduct the compensatory award. As recorded above the allegations of misconduct made by a client that was totally unrelated to this contract of employment had no bearing on this litigation, and only served to emphasise that there was no blameworthy conduct on the part of the claimant.

64. With reference to the issue, namely, would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal, the Tribunal held that it was not. It disagreed with Peter Murphy that the alleged incident of the claimant intimidating the daughter if a client in August 2014 was not relevant, and the road traffic accident that occurred in 2022 was relied on by Peter Murphy as evidence successfully defending the direct age discrimination complaint and was not an argument on contributory fault.

Wrongful dismissal / Notice pay.

65. With reference to the issue on unpaid notice pay, it is undisputed the claimant was dismissed without notice and he was entitled to 4 weeks statutory notice assessed at £580 gross, £483 net per week which remained unpaid to trial. The respondent has not proved that the claimant was guilty of gross misconduct which meant that the respondent was entitled to dismiss without notice and it is ordered to pay to the claimant damages for unpaid notice in the sum of £1932.00 net (4 weeks x £483).

Direct age discrimination (Equality Act 2010 section 13)

66. The claimant's age group is 60 and over and he compares herself with people in the age group 20-30 years of age.

67. With reference to the issue, namely, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances *of a different age* was or would have been treated, the Tribunal found for the reasons set out in its findings of facts and

credibility issues with the claimant's evidence, that the claimant had not proven facts from which the Tribunal could conclude that he was treated less favourably ((treated worse) than the workforce aged 20-30 years of age because he was 60 years of age. The Tribunal found the burden of proof had not been discharged by the claimant and it had not shifted to the respondent – Igen above. If it is wrong in its assessment of the burden of proof the Tribunal would have gone on to find that Peter Murphy's evidence was untainted by age discrimination, and the respondent has shown that there was no less favourable treatment because of age. In short, the claimant has produced no evidence relating to direct age discrimination, he has failed to prove facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances between the age of 20-30 would have been treated. The claimant relies upon a hypothetical comparison, however, he has produced no evidence by which the Tribunal can understand how a hypothetical comparator would have been treated, and no material from which an adverse inference can be drawn.

68. With reference to was the treatment a proportionate means of achieving a legitimate aim, the respondent has not pleaded this defence and is not an issue in the case which the Tribunal can decide on in the alternative.

Conclusion

69. In conclusion, the claimant's claim of unlawful direct age discrimination brought under section 13 of the Equality act 2010 is dismissed. The claimant was not treated less favourably than a comparator because of the protected characteristic of age, his claim for age disability discrimination brought under section 13 of the Equality Act 2010 fails and is dismissed.

70. The respondent was in breach of the implied term of trust and confidence and the claimant's claim of constructive unfair dismissal brought under section 95(1)(c) of the Employment Rights Act 1996 as amended is well-founded and adjourned to a remedy hearing at the Liverpool Employment Tribunal on the **17 October 2024**. A separate Notice of Hearing will be sent to the parties.

71. The claimant, who was employed form the 12 February 2018 to was wrongfully dismissed and his claim for unpaid notice pay is well-founded. The respondent is ordered to pay to the claimant the sum of £1932.00 net.

Remedy for unfair dismissal and case management orders

1. At the next hearing the Tribunal will decide the remaining issues dealing with remedy including the amount of the compensatory award having found there was no chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason following submissions made by both parties. In short, there should be no reduction in the claimant's basic and compensatory award.

2. During the hearing it became apparent that there was an issue concerning the claimant's failure to mitigate his loss and the confirmation he gave that he had not renewed his HGV licence. It was explained to the parties that if the claimant failed to

mitigate his loss by seeking alternative employment as a HGV driver, for which there was and is a shortage according to the evidence given by both parties (and known in a wider nationwide context by the Tribunal) this could reduce the amount of the compensatory award. The parties will come prepared to deal with this issue, and to assist them the following case management orders are made:

1.1 The claimant will send to the respondent and copy to the Tribunal no later than **16 August 2024** documentary evidence relating to his attempts to find HGV driving roles, both permanent and agency work and relinquishing his HGV licence including letters sent to and received from the DVLA. This evidence will be in addition to that already contained in the final hearing bundle.

1.2 The claimant will produce a witness statement explaining what attempts he has made to find alternative work, and he will also explain how he calculates his schedule of loss for his unfair dismissal claim. The schedule of loss will be changed to reflect the only remaining claim, which is damages for unfair dismissal. Judgment has been given in respect of all other claims. The claimant will send his witness statement and updated schedule of loss to the respondent and copy to the Tribunal no later than **16 August 2024.**

1.3 The respondent will send to the claimant and copy to the Tribunal a counter-schedule of loss setting out what figures in the schedule of loss are agreed and/or disagreed with, and the reasons why, no later than **6 September 2024**.

1.4 The respondent will send to the claimant and copy to the Tribunal a witness statement dealing with the claimant's attempts to find alternative employment and HGV vacancies and other vacancies it believes were suitable for the claimant following the date of termination to the remedy hearing on the 17 October 2024, no later than the **6 September 2024.**

1.5 The respondent will prepare an agreed remedy bundle by sending the claimant a proposed index of documents that will be agreed no later than 20 September 2024 and a hard copy of the agreed bundle on the 4 October 2024. When this is done both parties will write to the Tribunal marked for the attention of Employment Judge Shotter and confirm that the case is ready for the remedy hearing.

1.6 The remedy hearing has been listed for 3 hours and it will be in person at the Liverpool Employment Tribunal. The respondent will arrange for 4 hard copies of the Remedy Bundle that will contain all the documents ordered above, and any other relevant documents, to be delivered to the Liverpool Employment Tribunal 5-days before the remedy hearing.

Employment Judge Shotter

12.7.24

RESERVED

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

19 July 2024

FOR THE SECRETARY OF THE TRIBUNALS

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990
ARTICLE 12

Case number: **2404564/2023**

Name of case: **Mr T Wynne** v **Chorlton Scaffolding Limited**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 19 July 2024

the calculation day in this case is: 20 July 2024

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note: www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.