Case No: 2301220/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr M Haynes

Respondent: Walton Heath Golf Club (1)
Mr A Woodward (2)
Mr M Mann (3)

Heard at: **Croydon (via CVP)** **On:** **2, 3, 4, 5, 6, 9 & 10 September 2024**

Before: **Employment Judge Leith**
Ms A Boyce
Mr M Cronin

Representation
Claimant: Mr Harris (counsel)
Respondents: Mr Proffitt (Counsel)

JUDGMENT

1. The complaint of direct age discrimination fails against all three Respondents and is dismissed.
2. The complaint of indirect age discrimination is dismissed upon withdrawal.
3. The complaint of unfair dismissal succeeds against the First Respondent.
4. The Claimant's basic award and compensatory award will be reduced by 50% to reflect his contributory conduct.

REASONS

Claims and issues

1. The Claimant claims direct age discrimination and unfair dismissal. The Claimant had previously claimed indirect age discrimination. That complaint was withdrawn at the start of the hearing, and we have dismissed it upon withdrawal.

2. A Preliminary Hearing for Case Management took place before Employment Judge Sudra on 21 June 2023. EJ Sudra's Case Management Orders adopted the list of issues agreed by the parties. The parties agreed at the start of the final hearing that it remained an accurate list, subject to

the withdrawal of the complaint of indirect age discrimination. The issues for us to determine were therefore as follows:

"Ordinary Unfair Dismissal – s.98 ERA 1996

1. Was the Claimant dismissed pursuant to section 95(1) ERA 1996?
2. Did the First Respondent have a potentially fair reason to dismiss the Claimant pursuant to section 98(1) and (2) ERA 1996?
3. If so, did the First Respondent act reasonably or unreasonably in all the circumstances in treating that reason as a sufficient reason for dismissing the Claimant and in accordance with equity and the substantial merits of the case pursuant to section 98(4) ERA 1996?
4. Did the Claimant's dismissal fall within the band of reasonable responses?
5. Did the First Respondent follow a fair procedure when dismissing the Claimant?
6. If the Tribunal finds that the Claimant was unfairly dismissed:

    6.1 Did the Claimant contribute to his dismissal by any culpable conduct?
    6.2 If the Tribunal finds that the dismissal was procedurally flawed in any way, would the Claimant have been dismissed in any event had the correct procedure been followed?

Direct Age Discrimination – s.13 EqA 2010

1. Did the Respondents treat the Claimant less favourably than it treated, or would treat, the relevant comparator in not materially different circumstances, by:

    1.1 Subjecting him to disciplinary action?
    1.2 Pre-determining the disciplinary action?
    1.3 Pre-determining the Claimant's dismissal?

2. If so, was the less favourable treatment because of the Claimant's age?

3. Who is the Claimant's comparator?

3.1 The Claimant relies on the Third Respondent, Michael Mann, as a comparator.

4. The Respondent does not rely on a proportionate means for achieving a legitimate aim.

Compensation

1. If the Tribunal finds that the Claimant was unfairly dismissed, what (if any) monies should be awarded in respect of financial losses, considering:

1.1 What is the basic award?
1.2 What is the compensatory award?
1.3 Has the Claimant taken reasonable steps to mitigate his losses?
1.4 Should there any be any reduction in any award for loss of earnings to account for any contributory fault and, if so, by how much?
1.5 Should there any be any reduction in any award for loss of earnings to account for any date when the Claimant would have been fairly dismissed in any event and, if so, by how much?

2. If the Tribunal finds that the Claimant has been discriminated against, what (if any) monies should be awarded in respect of injury to feelings?

3. If the Claimant is awarded any compensation, should there be any uplift or decrease in the amount awarded to reflect any failure to comply with ACAS Code of Practice? If so, by how much?

4. Is the Claimant entitled to any interest on any award and, if so, at what rate?"

Procedure, documents and evidence heard

3. On behalf of the Claimant, we heard evidence from:
   3.1. The Claimant;
   3.2. Ian Foster, a plant instructor employed by an external training company who provided training to the First Respondent's staff (including the Claimant);
   3.3. Jason Woodger, who was formerly employed by the First Respondent as First Assistant Greenkeeper;
   3.4. David Newlands, a former Director and Chairman of the First Respondent; and
   3.5. William Christie, who was formerly employed by the First Respondent as an Assistant Greenkeeper.

4. On behalf of the Respondents we heard evidence from:
   4.1. Michael Mann, the Third Respondent, who is employed by the First Respondent as Course Manager;
   4.2. Alexander Woodward, the Second Respondent, who is employed by the First Respondent as Chief Executive;
   4.3. Allan Wright, a Non-Executive Director of the First Respondent; and
   4.4. Andrew Brown, a former Chairman of the First Respondent.

5. Each of the witnesses gave their evidence by way of a pre-prepared witness statement, on which they were cross-examined.

6. The Respondents additionally tendered a statement from David Clark, Non-Executive Director and Treasurer of the First Respondent. Mr Clark did not

attend the hearing to be cross-examined (and there was no application for the hearing to be postponed). Accordingly, we give his statement limited weight.

7. At the start of the hearing, the Respondents applied to adduce two further witness statements, from Andy Gill and Graham Goldup. We declined to admit those statements, for the reasons we gave orally at the time.

8. We had before us a bundle of 821 pages, an agreed chronology, and a cast list (which was not agreed). Two further documents were adduced by agreement during the course of the hearing.

9. While there was an issue at the start of the trial regarding page numbering within the bundle, the bundle itself appeared to be entirely compliant with the Presidential Guidance on Remote and In Person hearings. The pagination of the PDF file was consistent with that of the bundle, there was a clickable index, documents were bookmarked, and the bundle had been subjected to Optical Character Recognition. Regrettably, that is not always the case with bundles in this jurisdiction. It is therefore only right that we express our thanks to the legal teams for the well-presented bundle we received in this case.

10. At the conclusion of the evidence, we heard submissions from Mr Proffitt and Mr Harris (augmented in Mr Proffitt's case by written submissions). We are grateful to both Counsel for their assistance.

11. For ease of readability, throughout the remainder of these reasons we refer to the First Respondent as "the Respondent", and the Second and Third Respondents by their names. References in [square brackets] are to page numbers in the bundle.

Fact findings

12. We make the following findings on balance of probabilities. We have not dealt with every area canvassed before us; rather, we have focused on those necessary to reach a conclusion on the issues in the claim.

13. The Respondent is a members golf club situated in Tadworth, Surrey. It is a company limited by guarantee. The club has two golf courses – the Old Course and the New Course.

14. The Claimant was born on the 16th of May 1966. He commenced employment with the Respondent on 26 June 1982, as a Greenkeeper. He was subsequently promoted to Deputy Course Manager. In that role, he was the second most senior employee in the greenkeeping team.

15. At the relevant times, the Respondent had in force an Employee Handbook. The handbook contained a disciplinary and grievance procedure [521]. The procedure defined three different levels of misconduct – minor misconduct, serious misconduct, and gross misconduct. It contained an illustrative (and

non-exhaustive) list of examples of the type of conduct falling within each category. Gross misconduct was defined as follows:

> "Gross misconduct is that which is so serious in relation to its impact upon the work of the Club, its Members, other employees or the public that it cannot be tolerated under any circumstances and thus is likely to result in the termination of employment.

16. The list of examples of gross misconduct included:

> "Failure to comply with the Club Health Safety and Hygiene Policy"

17. At the end of the list of examples of gross misconduct, the policy said this:

> "Dismissal without notice is given in cases of gross misconduct."

18. The procedure was set out as follows [526]:

> "a) When matters relating to conduct and/or performance need to be handled by arranging a formal disciplinary hearing, the manager will carry out a thorough investigation before the meeting.
>
> The employee will be invited to the meeting in writing. Clear allegations will be identified in the letter together with details of the date, time and place of the meeting and the right to be accompanied.
>
> b) If the employee or accompanying person cannot attend another meeting will be arranged within five days of the original proposed date.
>
> c) The manager will give the employee copies of any information to be used at the meeting.
>
> d) Should the employee wish to submit information to be used at the meeting, it must be received by 9.00 am at least 2 working days prior to the meeting date.

19. The procedure then set out what would occur at the disciplinary meeting. It started by saying this "At the disciplinary meeting the manager will:", then set out a list of steps to be undertaken.

20. While the policy did not expressly provide that the manager at the disciplinary hearing would be a different manager to the one who had carried out the investigation, we find that bearing in mind the ACAS Code of Practice, that was the intention of the policy.

21. The procedure then provided for a right of appeal to the Club Secretary (or another Director). Where the sanction was dismissal, the procedure then provided for a further right of appeal to the Club Chairman [527]. The Club Secretary was the previous name for the Chief Executive Officer.

22. The Handbook contained a section entitled Health and Safety. That policy cross-referred to the Respondent's Health, Safety & Hygiene Manual [531].

23. There was in evidence before us a document entitled the Staff Safety Manual ("the Manual") [459]. The Claimant accepted in evidence that that was the document referred to in the Health and Safety section of the handbook, and by extension that it was the document referred to in the example list of gross misconduct offences.

24. The Manual said this [463]:

> "To deliberately and intentionally contravene guidance in this manual will be considered a disciplinary action by the golf club".

25. We consider that that statement did not override the examples of misconduct given in the disciplinary policy. That is, it was not the case that only a deliberate and intentional contravention of the Manual would be considered a disciplinary action. The examples of gross misconduct in the policy set out a non-exhaustive list of conduct the Respondent considered to be gross misconduct, which included a failure to comply with the Manual (although the deliberateness of any breach would be a potentially relevant factor in assessing its seriousness).

26. The Manual indicated that there were three "Appointed Persons", who were not first aiders but would take charge of a situation (by implication, a situation engaging health & safety). Those were Mr Mann, the Claimant, and Robert Crosbie.

27. The Manual then said this:

> "Record Keeping / Accident
> An accident near / miss book is kept by the club, all incidents must be logged in the book, records must be kept for 3 years
>
> Record Keeping / Near Miss
> A near miss is an incident or event that could have caused injury or ill health, they are often trivial, however informing the club does give us the ability to prevent future accidents. All members of staff have a duty to inform the club of any such incidents so that the golf club can take preventative measures."

28. The Claimant's contract of employment was in evidence before us. It referred to a mandatory retirement age of 65.

29. The Claimant's normal working day started early in the morning, and finished at around 2.30pm. From April 2003, he lived in a property owned by the Respondent. He was a keyholder for the Respondent's premises, and was required to respond to any incidents which arose out of hours.

30. Michael Mann was appointed Course Manager on 5 November 2015. In that role, he became the Claimant's line manager. The Claimant would deputise for Mr Mann when he was absent from work.

31. The Claimant and Mr Mann shared an office.

32. The Respondent owned a number of pieces of equipment which were used by the greenkeeping team, including two 360 diggers. The small of those weighed around 2.5 tonnes, and the larger weighed 7.5 tonnes.

33. The Claimant had been trained by an external trainer in the use of 360 diggers. His evidence was that he first received external certification and training in around 2005, although he had operated the diggers prior to that but without formal training. The Claimant was a an experienced digger operator. His external certification was renewed every five years (although as of February 2021, his recertification was apparently overdue). At the relevant times, the Respondent employed one other certified digger operator, Will Christie.

34. The Claimant had provided informal guidance to a number of other members of the Respondent's greenkeeping team in operating the diggers.

35. On 10 August 2021, an incident occurred on the respondent's site. Mr Woodger was using the 7.5 tonne digger to load top dresser. Mr Woodger over extended the arm of the digger, which caused the digger to start falling towards the top dresser. Mr Haynes came into the yard and observed the incident. He was able to give Mr Woodger instructions to right the digger.

36. Mr Woodger had not had any formal external training or been certified to operate the digger. He had nonetheless been operating the 360 diggers for some years (including prior to Mr Mann commencing employment with the Respondent).

37. Following that incident, Mr Mann contacted Arco Training, the Respondent's training provider, to arrange for training for a number of the greenkeeping staff (including Mr Woodger). The initial contact was made by Mr Mann on the day of the accident, and dates were proposed on that day, although the formal booking confirmation was not made until a few weeks later. The specific training programme was described as "novice training", because none of the operators being trained had any previous formal external training.

38. Mr Mann also recorded the incident in the Respondent's accident book as a "near miss", after discussing it with both Mr Woodger and Mr Haynes. Mr Mann's evidence was that he did that on the same day. Mr Woodger's evidence in his witness statement was that that was not done until a week after the incident. He accepted in cross-examination that he did not actually know when the entry had been made, and that he had simply drawn an inference from the fact that Mr Mann had had a further conversation with

him about the incident around a week later. We find that it was recorded on the same day.

39. Mr Mann's evidence was that there was no practical implication in the difference between reporting an incident as a near miss and an accident. That is, there was no difference in the way they would be followed up.

40. In September 2021, Mr Woodward started as Chief Executive Officer.

41. In the early part of his employment, Mr Woodward undertook a review of all of the Respondent's contracts of employment. On 18 October 2021, he emailed the Respondent's external HR provider, Gap HR, attaching a copy of the Claimant's contract of employment, and saying this: [133]

> "Please find attached one of the great one's to start things off (hasn't been renewed in 30 years) and speaks of retirement at 65! Mick Haynes — Deputy Course Manager.
>
> He lives in one of our properties too, so have included his STA.
>
> Very interestingly, he claims not to have to work weekends on rotation, which | can find no evidence of and everyone else in his department does (excluding mechanics).

42. Mr Woodward's evidence, which we accept, was that he sent 15 employment contracts in total to GAP HR on that day. His evidence was that the reference to the retirement age in the contract was because it showed how outdated the contract was, in that it provided for automatic retirement at the age of 65.

43. The training organised after the August 2021 incident took place on 1 – 4 November 2021. It was delivered by Ian Foster of Arco Training Services. At the end of the second day of the training, Mr Foster spoke to Mr Mann to update him regarding the training. Mr Mann made note of their conversation at the time. His note said this regarding the exchange with Mr Foster [134]:

> "As well as the progress report Ian stressed the importance of training to avoid any more accidents. He talked about the importance of wearing seat belts and said Mick Haynes had been very lucky with his accident that he hadn't been seriously hurt or worse. I was a little surprised as I wasn't aware of any accident involving Mick.
>
> Ian went on to say that Matt Crawley (also in the training) had shown him some pictures of the incident where the excavator had tipped cab side down. Ian expressed again how lucky it was that no one had been hurt and such a situation, without a seat belt, could potentially be fatal. Ian asked Matt to send him the pictures as he wanted to use them in future training to explain the dangers and help others avoid this happening.

> I was even more surprised about this as nothing had been reported. I asked Ian to send me the pictures, Ian was hesitant and showed me his phone where the picture sending had failed. Ian didn't have the photos on his phone."

44. Mr Mann's evidence was that the conversation was as set out in his contemporaneous note. Mr Foster's evidence was that:
    44.1. He had seen photographs of the resting point of the digger, as well as a video of the digger being recovered (using the larger digger);
    44.2. The event was not a serious one, and no one was in danger at any stage;
    44.3. It could not be regarded as a serious health and safety issue, and would not have prompted him to believe that additional training was needed;
    44.4. While he had told Mr Mann that without appropriate training people could be injured or an accident could be fatal, this was not directed at the Claimant, and in particular, he did not suggest that the Claimant was lucky he was not injured in the incident or that it could have been fatal.

45. We find that Mr Foster did tell Mr Mann that the Claimant was "lucky". We bear in mind that Mr Mann's note was taken at the time, whereas Mr Foster had (unsurprisingly) not taken any contemporaneous note at the time. He had first seen Mr Mann's note, on his own evidence, around 2.5 years after the conversation took place. Given that it was a relatively informal conversation we consider that there is no particular reason he would have recalled it in any detail.

46. We do consider that Mr Foster may well have meant the word "lucky" somewhat less seriously than Mr Mann took it. But Mr Mann was clearly concerned by the suggestion that one of his employees had been involved in an incident where he was "lucky" he had not been injured.

47. Mr Mann decided to investigate the February 2021 incident. He checked the worksheets to see who had been working with the Claimant on that day. He then interviewed the relevant staff.

48. On 9 November 2020, he interviewed Matt Crawley [783]. The meeting commenced at 12:50pm. Notes of the meeting were taken by Wendy Showell, receptionist. The notes were in evidence before the Tribunal. At the start of the meeting Mr Mann explained that he was investigating the incident, and had seen some pictures of it. He explained to Mr Crawley that he had had no knowledge of the incident before being told about it by Mr Foster.

49. Mr Crawley explained that he was aware of the incident, and he described it to Mr Mann. He explained to Mr Mann that the large digger was already on site, and that it had been used to right the small digger. When asked why

the incident had not been reported, the notes recorded Mr Crawley's response was "perhaps embarrassment". Mr Crawley confirmed that he had photographs of the incident, but that he was uncomfortable forwarding them to Mr Mann.

50. On the same day, Mr Mann interviewed the Claimant [135]. Notes of the meeting were taken by Ms Showell. The notes recorded that the meeting commenced at 1:30pm. The notes recorded that Mr Mann explained to the Claimant that he had not been aware of the incident until Mr Foster had advised him of it. The Claimant responded "I am sure I told you because I had to send someone across to get the other digger".

51. There was some discussion of the incident. Mr Mann reiterated that he had not been told about it at the time by the Claimant. The Claimant reiterated that he believed he had sent Mr Christie to get the large digger in order to rescue him.

52. Mr Mann asked the Claimant about his knowledge of the process for reporting an accident. The Claimant responded by asking Mr Mann if he was sure that he had not mentioned it to him. He then went on to say this:

> "Michael Haynes stated that he did not think it was much of an incident and he thought he had spoken to Michael Mann about the digger falling down the hole. Michael Haynes said that when the digger fell on its side it was supported by the arm of the digger."

53. Mr Mann asked the Claimant if the incident was being covered up, and he described Mr Crawley has having been "cagey" when he discussed the incident with him. The Claimant explained that there was no reason for anyone to cover the incident up.

54. Mr Mann explained that if the February incident had been known about at the time, more training may have been identified which might have avoided the August incident. In response, the notes recorded that the Claimant said this:

> "Michael Haynes stated that Jason's accident would still have occurred even if he had done training because even he knew that you do not swing the arm out that far. He believed that what Jason was doing was wrong and even with training it would still have been wrong."

55. There was then some further discussion about whether Mr Christie had been sent to retrieve the second digger in order to rescue the Claimant. Mr Mann concluded by saying that he would speak to Mr Barton. Given the reference to Mr Crawley's comments, we consider that it was clear at the meeting that Mr Mann had already spoken to Mr Crawley, and would later be speaking to Mr Barton.

56. Later the same day, Mr Mann interviewed Dan Barton [786]. Once again, notes of the meeting were taken by Ms Showell, and the notes were in evidence before the Tribunal. The notes recorded that at the start of the meeting, Mr Mann said this:

> "Michael Mann advised Dan that he had very little knowledge of the event until Ian Foster the trainer had mentioned it. Ian Foster was keen to use the incident as an example of the importance of wearing a seat belt in the machinery to avoid a fatal accident. Michael Mann stated that he had a duty of care."

57. Mr Barton explained that he had not been present, but that he had been sent pictures of the incident "as a joke".

58. Having taken HR advice, Mr Mann decided that disciplinary action was required against both the Claimant and Mr Crawley. He passed the matter to Mr Woodward.

59. On 15 November 2021, Mr Woodward wrote to the Claimant to invite him to a disciplinary hearing [143]. The invitation letter set out two allegations:

> "Serious breach of the Health and Safety policies and procedures.
> - Not following reporting procedures following an incident on 01 February 2021 in which an excavator tipped over
> Serious negligence which causes or might cause unacceptable loss, damage or injury.
> - A further similar incident took place on 10 August 2021 and a requirement for training identified to avoid similar incidents. This incident may have been avoided as [*sic*] the first incident been reported correctly."

60. The letter went on to note that the allegations constituted gross misconduct. It noted that therefore, the outcome of the hearing could result in the termination of the Claimant's employment. The letter informed the Claimant of his statutory right to be accompanied.

61. Enclosed with the letter were:

    61.1. The record of Mr Mann's conversation with Mr Foster
    61.2. The notes of the Claimant's investigation meeting with Mr Mann
    61.3. A photograph of the incident
    61.4. The Claimant's Health and Safety Training Records.

62. The Claimant was not sent a copy of the notes of Mr Mann's investigation meetings with Mr Crawley or Mr Barton. Nor was he sent them at any later stage in the process – he saw them for the first time in disclosure within these proceedings. That is despite the fact that Mr Woodward had a copy of those notes.

63. On 19 November 2021, the Claimant emailed Mr Woodward a statement he had prepared for the disciplinary hearing. The statement ran to five pages. He made, among other things, the following points:

    63.1. He said that he was "sure" he told Mr Mann about the incident and that he was aware of it at the time. He also noted that it was unfair that Mr Mann had carried out the investigation, given that it was (effectively) his word against Mr Mann's.

    63.2. He noted that the Manual referred to "deliberately and intentionally" contravening its contents being considered to be a disciplinary action, and asserted that the implication of that was that contravention that was not deliberate and intentional would not be considered disciplinary action.

    63.3. He accepted that the 1 February 2021 incident could be classed as a near miss.

    63.4. He asserted that the allegation against him could, at most, be classified as serious misconduct rather than gross misconduct.

    63.5. He noted that dismissal was not an inevitable consequence of a finding of gross misconduct, and referred by way of mitigation to his long service as an employee of the Respondent.

    63.6. He concluded by saying this, under the heading "Mitigation":

    > "If this meeting were to decide that dismissal is an appropriate penalty, then it should go on to consider issues of mitigation.
    >
    > I have been a faithful employee of this Club for nearly 40 years. I love this Club and have spent my life in its service. I have a clean disciplinary record. If I were to be dismissed, not only would I lose my livelihood but also my wife and I would lose our home. I can assure this meeting that I have learned a lesson and will never fail to report any incident again. I would welcome any additional training that is felt necessary."

64. He also included statements from the following:

    64.1. William Christie. His statement said that:

        64.1.1. When the incident on 1 February occurred, the Claimant sent him back to the yard to bring the big digger to pull the small digger out of the trench.

        64.1.2. On 2 February 2021, he asked the Claimant if he had told Mr Mann about the small digger falling into the trench. The Claimant told him that he had done so the previous afternoon.

        64.1.3. That afternoon, he saw Mr Mann inspecting a piece of damaged turf where the incident had occurred.

    64.2. Matthew Crawley. His statement said that:

        64.2.1. When the incident on 1 February 2021 occurred, the Claimant asked Mr Christie to get the big digger from the shed so it could be used to manoeuvre the small digger back into an upright position. Regarding reporting, he said this:

> "In line with the requirement to report all accidents, I expected Mick to inform Michael Mann ('Michael') of the incident the same day and complete an entry in the accident book. It was my expectation that Michael would then speak to me and the other members of the team if he required any further information.
>
> My understanding is that if an injury renders a person unable to make an entry in the accident book, a witness or someone who is able to enter an account of the incident should make the entry. The affected persons account must then be entered as soon as possible after the event."

64.2.2. Regarding what was said during the training in November 2021, he said this:

> "During the week of 1st November 2021, I was taking part in Excavator and Telehandler. training. As part of a discussion about the incident involving Jason Woodger, I spoke about a similar incident involving Mick earlier this year and showed the Trainer, Ian Foster ('Ian') photographs on my mobile phone. Ian asked me to send him the photographs so he could use them in future training sessions. I confirm that I shared the photographs with Ian."

64.3. Liam Matthews. His statement said that:

64.3.1. The Claimant asked Mr Christie to go back to the yard to bring the big digger over to pull the little digger out of the trench.

64.3.2. On 2 February 2021, Mr Matthews asked the Claimant if he had told Mr Mann about the incident. The Claimant told him that he had, and Mr Mann's reply was simply to ask if there was any damage to the turf.

64.3.3. Later that day, Mr Mann inspected the damage, and had a conversation with Mr Matthews about which type of turf they would use to repair it (although Mr Matthews' statement did not suggest that there was any discussion of how the damage was caused).

65. The disciplinary hearing took place on 19 November 2021. It lasted approximately 50 minutes. The Claimant was accompanied by Robert Crosbie, a colleague. Mr Woodward was accompanied by David Clarke, Treasurer and Non-Executive Director, and by Ms Blatt of Gap HR. Wendy Showell attended to take notes. The meeting was recorded. Both Ms Showell's notes and a transcript of the recording were in evidence before us. Of particular relevance during the meeting:

65.1. There was some discussion of the incident. In answer to a question from Mr Woodward, the Claimant explained that he was not wearing a seatbelt. He explained that that was a "culture".

65.2. There was some discussion of whether the big digger had already been on site, or whether Mr Christie had been sent to fetch it. Mr Woodward referred to the fact that Mr Crawley had said in his investigation meeting that the big digger had already been on site. The Claimant explained that the big digger was not on site, and Mr Christie had gone to fetch it.

65.3. Mr Woodward asked the Claimant to name the top three qualities of a Deputy Course Manager. His evidence to the Tribunal was that he was trying to explore the Claimant's views regarding the importance of health and safety. In the event, the Claimant did not refer to health and safety, although he referred to assisting the Course Manager. When Mr Woodward prompted the Claimant regarding health and safety, the Claimant explained that health and safety was part of assisting the Course Manager because that was part of his duties.

65.4. Mr Woodward asked the Claimant where he was when he reported the incident to Mr Mann. The Claimant replied "it would probably have been at the end of the day when we have a conversation that we tend to have at the end of the day." When probed about where the conversation took place, he said:

> "probably in the office, we tend to sit down and he would ask me about the job how it was going and I would explain what had happened that day and the reason why the big digger was over there and the little one was in a hole and so we had used it to pull it out. There would be no other reason for big the digger being there."

65.5. Ms Blatt put to the Claimant that he had admitted, in his statement, to not having reported the incident. The Claimant explained that what he meant was that he had failed to write it up in the accident book, not that he failed to report the incident at all.

65.6. The Claimant explained that he felt that his responsibility to report the matter had been discharged by reporting it to Mr Mann.

65.7. At the end of the hearing, the Claimant confirmed that he had nothing further to add.

66. Following the hearing, Mr Woodward further investigated by reviewing the accident book. He noted that the Claimant had entered five incidents in the accident book between November 2019 and November 2021. In some instances, those entries had been made while Mr Mann was also on duty. Some (but not all) were entries the Claimant had made for other colleagues (that is, where he had not personally been involved in the incident being reported).

67. Mr Woodward met the Claimant again on 25 November 2021. At that meeting he explained that he was dismissing the Claimant without notice. He handed the Claimant a letter which set out his decision [197]. The letter noted that:

67.1. Mr Woodward considered that the Claimant's explanation was "unacceptable".

67.2. Mr Woodward decided that the Claimant had failed to follow reporting procedures following the incident on 1 February 2021. It was not clear in the letter whether he accepted that the Claimant had reported the incident to Mr Mann verbally. His evidence to the Tribunal was that he had concluded that the incident had not been reported to Mr Mann, but that doing so would not have discharged the Claimant's reporting duties in any event.

67.3. Mr Woodward further decided that the incident on 10 August 2021 might have been avoided had the Claimant reported the February incident correctly.

67.4. The letter noted that the Claimant had not been wearing a seatbelt during the incident, and that the Claimant never wore a seatbelt while working on machines as this was the Club's work culture. That was, of course, not an allegation against the Claimant.

67.5. There were no sufficiently mitigating circumstances (although it was not clear in the letter what account was taken of the Claimant's previous service). The Claimant's statement ""I can assure this meeting that I have learned a lesson and will never fail to report any incident again" was taken as being an admission of guilt rather than mitigation.

67.6. Mr Woodward had consequently decided to summarily dismiss the Claimant on the ground of gross misconduct, because the trust and confidence placed in the Claimant had been completely undermined.

67.7. The Claimant had a right of appeal.

68. After handing the Claimant his dismissal letter, Mr Woodward escorted him from the site (accompanied by Mr Moses and Ms Showell).

69. Mr Crawley also attended a disciplinary hearing on 19 November 2021. He was given a final written warning for not reporting the incident [195]. Mr Crawley was born in 1974. So he was eight years younger than Claimant at the material time.

70. On 30 November 2021, the Claimant was served notice to vacate the premises he occupied. The notice was later found to be invalid, and a fresh notice was subsequently served.

71. On 2 December 2021, Phillips Solicitors wrote to Mr Woodward on behalf of the Claimant, appealing his dismissal [206]. The letter set out 12 numbered grounds of appeal. Those included that:

71.1. The original investigation was flawed, given that the first allegation came down to a conflict between the Claimant's word and that of Mr Mann.

71.2. The second allegation was based on pure speculation, and the incident was nothing to do with the Claimant.

71.3. There was no indication in the outcome letter that the Claimant's long service was taken into account in reaching the decision to dismiss the Claimant.

71.4. The Claimant's failure to wear a seatbelt was not mentioned in the disciplinary invitation letter, but was discussed in the disciplinary hearing.

71.5. The Claimant had obtained photos and a video of 3 other incidents which occurred in 2019 and 2020, which had not been entered in the accident and near miss book.

72. The letter referred to the possibility of a claim for discriminatory conduct and unfair dismissal, although it did not specifically refer to age discrimination.

73. Mr Woodward requested the evidence referred to in the Claimant's appeal letter, which he provided with an email of 9 December 2021 [210]. The Claimant's email described four incidents (and included photographs of the first three incidents):

73.1. An incident on 24 February 2020, when a tractor tried to drive up a bank but slipped down the bank, causing damage to the turf that needed to be repaired ("the Tractor incident").

73.2. An incident on 12 August 2020, when the draw bar on the tractor broke causing the bowser to slide along the ground, and causing a gouge in the path ("the Bowser incident").

73.3. An incident on 19 September 2019, when a Sidewinder ride-on mower was stuck on the edge of a bunker ("the Sidewinder incident").

73.4. An incident on 4 September 2021, where there was a near miss on the green of the 3rd hole of the new Course ("the 4 September incident"). There were no photographs of that incident, but the Claimant attached statements from three other colleagues – Sam Harper, Robert Crosbie and Gerry Glancy. The statements described that while Mr Harper was cutting the green, he got close to the right hand side bunker and the mower started to slip into it. He stopped the vehicle, and it had to be pulled out using an RTV. Mr Harper's statement indicated that he had disclosed the matter to Mr Mann at the time.

74. On 10 December 2021, Mr Woodward wrote to the Claimant to invite him to an appeal hearing on 16 December 2021. The invitation letter indicated that the meeting would be chaired by Stuart Southall, Chairman of the Respondent, and that Allan Wright, Non-Executive Director, would also be present as would a representative from the Respondent's HR provider. A second letter was then sent to the Claimant explaining that Mr Wright would in fact chair the appeal hearing.

75. In the interim, Josh Moses, the Respondent's Competitions and Handicaps Manager, was appointed to investigate the 4 September incident. Mr Woodward had decided that the other three incidents raised did not merit investigation. Mr Moses interviewed Mr Mann, Mr Crosbie, Mr Glancy and

Mr Harper. He noted that Mr Mann had decided at the time that the incident did not need to be recorded as an accident or near miss. He concluded that no further action was required [246]. His report was sent to the Claimant on 15 December 2021 [245].

76. The Claimant prepared notes for the appeal hearing. [248 – 250]. On the notes, he said this:

> "To summarise, I think I have been discriminated against. Age related?"

77. The appeal hearing took place on 16 December 2021. The Claimant was accompanied by Dan Barton. Allan Wright chaired the meeting, with HR support from Hayley Cassidy of Gap HR. Ms Showell attended to take notes. The meeting lasted approximately an hour and three-quarters. The notes showed that:

    77.1. There was some discussion of the September 2021 incident, and the conclusion reached by Mr Moses.
    77.2. There was a discussion regarding the grounds of appeal set out in the Claimant's appeal letter.
    77.3. The Claimant explained that he believed he had been discriminated against due to his age, and that there had been an agenda to get him out.

78. On 18 December 2021, Mr Wright met with Mr Mann [289]. Mr Wright kept notes of their discussion. He summarised what Mr Mann had told him as follows:

> "1. None of these incidents were reported at the time to MM as near misses or injury/lost time accidents.
> 2. He became aware of the Tractor issue, because of discussing the turf damage repair, and he knew that the bowser side bar had broken when the unit was returned to the yard. He had no knowledge, at the time or after, of the third incident where the greens mower was grounded
> 3. MM makes a judgement on whether to record a near miss, based on the potential to cause injury or harm to property
> 4. Given the photo of the incident on 1/2/21, there was clear potential for significant injury, given that no seat belt was worn, and the cab door was open"

79. Regarding the Tractor incident, Mr Mann told Mr Wright that he had never seen the tractor stuck in that position and that the incident was not reported to him as an accident or near miss.

80. Regarding the Bowser incident, Mr Mann told Mr Wright that he was aware of it at the time, but he did not regard it as an accident or near miss.

81. Regarding the Sidewinder incident, Mr Mann told Mr Wright that it had not been reported to him at the time.

82. Mr Wright then wrote to the Claimant on 21 December 2021 [299]. He did not uphold the Claimant's appeal. He responded on a point-by-point basis to each of the 12 points raised in the Claimant's grounds of appeal. He explained that he did not believe the Claimant's account of mentioning the 1 February 2021 incident to Mr Mann. He also dealt with the Claimant's assertion that his dismissal was related to his age – he concluded that it was not.

83. The Claimant exercised his second right of appeal [310]. He set out 10 numbered points within his second appeal letter. He also attached other documents containing his comments on the appeal outcome letter.

84. The second appeal was heard by Andrew Brown, former Chairman of the Respondent.

85. In advance of the second appeal hearing, the Claimant sent Mr Brown a list of questions he wanted to be asked of Mr Mann and Mr Moses, as well as a summary document for the appeal [336].

86. Mr Brown met with Mr Mann on 25 January 2022 [355]. The Claimant's questions for Mr Mann were divided into:

    86.1. Three general questions
    86.2. Seven questions about the incident on 1 February 2021
    86.3. 12 questions about the other incidents the Claimant had raised as comparisons, the final one of which was to ask why the Claimant's incident was considered to be gross misconduct when there had been no sanction attached to Mr Mann not entering those incidents in the accident book.

87. Mr Brown asked the first ten of the Claimant's questions, and asked some follow-up questions of his own. He did not ask the remaining questions. This was because he did not consider them to be relevant to the exercise he was carrying out. During the meeting, Mr Mann explained to Mr Brown that as far as he understood it, the cab door was open when the incident on 1 February 2021 occurred. He told Mr Brown that he had understood that from what Mr Foster had told him.

88. Mr Brown did not meet with Mr Moses.

89. The Claimant prepared a personal statement for the second appeal [370].

90. Mr Brown's evidence, albeit given for the first time in cross-examination, was that he had a conversation with Mr Woodward before the appeal meeting. That conversation was not minuted or noted. Mr Brown's evidence was that he could not recollect the contents of the conversation.

91. The second appeal meeting took place on 31 January 2022. The Claimant was accompanied by Dan Barton. Carolyne Wahlen attended to provide HR advice to Mr Brown. A transcript of the meeting was in evidence before the Tribunal.

92. During the appeal meeting, Mr Brown agreed that the cab door had been closed. The Claimant asked if Mr Mann had written a statement acknowledging that the door had been closed. The transcript then recorded this:

> "Carolyne [Wahlen]: No, he doesn't need to agree because we've got the factual evidence. So, it doesn't matter whether he thinks it was or not.
>
> Andrew [Brown]: I think he has got-- I am going to say confused between two conversations. One of which said if the door had been open, no seat belts, it would have been very dangerous. And he sort of transcribed that in his mind back to that. I think we can ignore that point. The door was closed.
>
> Carolyne: Yeah."

93. Mr Brown decided not to uphold the Claimant's appeal. He wrote to the Claimant on 4 February 2022 to set out his decision [428]. His outcome letter was 6 pages long. In summary, it said as follows:

    93.1. Mr Brown viewed the incident on 1 February 2021 as being categorised as an accident (he accepted in cross-examination that that characterisation was not in line with the Respondent's policy, which required actual injury or damage to property in order to meet the definition of an accident).
    93.2. He concluded that the Claimant either did not inform Mr Mann of the incident on 1 February 2021, or if he did so he did it in such a manner that Mr Mann would not have been aware of the seriousness of the incident. He set out his reasoning for reaching that conclusion in some detail.
    93.3. Mr Brown noted that the Claimant had made an entry in the accident book on 22 March 2021, 6 weeks after the incident, and that it was surprising that he had not then checked to see if the 1 February 2021 incident had been entered.
    93.4. Mr Brown thanked the Claimant for drawing the other incidents to the Respondent's attention. He did not, however, indicate that he had expressly considered whether they were inconsistent with the way the Claimant had been treated.
    93.5. He expressed his conclusions as follows:

> "1. That the incident on 1 February 2021 was a dangerous accident, which should have been reported and noted in the accident book;

> 2. That either you did not report the accident to MM or did so in such a way as to obscure the full seriousness of the accident;
> 3. That there was therefore no management response to this accident in the form of further training and the introduction of additional safety precautions;
> 4. That I am surprised that there were no comments, conversations or discussions between February and November, between yourself and MM and within the team, particularly your three colleagues who were at the accident, generally concerning this event despite there being a number of events which would probably have triggered recollections of this event. I do not know why this was, but it is possible that such conversations were suppressed. It is not believable that you all just forgot about the incident and therefore did not mention it again;
> 5. That this event constitutes a serious breach of Health & Safety policies and procedures;
> 6. That this situation is one that should not have been created by the Deputy Manager of the Greenkeepers department of the Club."

93.6. He concluded that the Claimant had committed gross misconduct by not reporting the incident.

93.7. He considered the Claimant's long service, but concluded that it meant that the Claimant should have known the importance of recording the incident.

93.8. The letter then said this:

> "You did not admit to the misconduct, and you did not show remorse for the situation."

93.9. And this:

> "After investigating this situation, the Club has no confidence that you would follow H&S rules when you were solely in charge of the greenkeeping team.
> […]
> "The possibility of this non-reporting happening again is high and the Club is unable to rely on your long service to ensure that you understand the importance of following H&S rules and that it will not happen again."

93.10. Mr Brown therefore concluded that the decision to dismiss the Claimant was within the range of reasonable responses.

94. Having dealt with the chronological sequence of events in the internal process, we now turn to make findings of fact on matters necessary for the

complaint of direct age discrimination, and for the questions of contributory conduct and *Polkey.*

"Younger and more dynamic workforce"

95. The Claimant's evidence in his witness statement was that he had heard from colleagues that Mr Woodward was aiming for a younger and more dynamic workforce. His witness statement did not name the colleagues from whom he claimed to have heard that. Mr Woodward denied making any such remark (or indeed aiming to have a younger and more dynamic workforce). The evidence before the Tribunal was that the Respondent had a cross-section of staff of different age groups, including considerably older than the Claimant.

96. In cross-examination, the Claimant's evidence (for the first time) was that the alleged comment had been relayed to him by Gerry Glancy.

97. Mr Glancy had, of course, given the Claimant a statement regarding the September 2021 incident. He had also been interviewed by Mr Moses. He did not mention age discrimination on either of those occasions. The Claimant was unable to explain why Mr Glancy had not done so, save to say that he was dealing a specific incident on both occasions.

98. When asked why he had not called Mr Glancy to give evidence on his behalf within the Tribunal proceedings, the Claimant said that he did not know where Mr Glancy was or how to contact him. Given that there were documents in the bundle with Mr Glancy's personal email address on them, that was a somewhat surprising answer.

99. The Claimant was asked in cross-examination who the other colleague or colleagues were, since he had referred to "colleagues" (in plural) in his witness statement. His response was that he could not remember any other names.

100. The Claimant did not mention alleged the "younger and more dynamic workforce" comment within either of his internal appeals, although he was arguing during them that his dismissal was discriminatory on the ground of age.

101. On the evidence we have heard, we do not find that any such comment was made by Mr Woodward, or that he had any intention to have a younger or more dynamic workforce.

The incident on 1 February 2021

102. The Claimant described the incident as follows:

> "…one of the tracks on the digger slipped on one side into the shallow trench I was digging. I was going really slowly but it was muddy and therefore got stuck. The digger was slightly tilted, slid slowly as far

as it could in the mud and could not tip any further due to the bank of earth that had already been dug out."

103. We were taken in evidence to photographs of the resting place of the digger. It was in a trench, at a pronounced angle. We were also shown a video of the recovery process. The recovery process involved the large digger pulling the small digger out of the trench and upright. During that manoeuvre, the Claimant was not directly in control of the small digger's movements. The Claimant agreed that he was not wearing a seatbelt, either during the incident or the recovery, although the door to the cab was closed throughout. The front window of the cab was partially open during the recovery to allow the Claimant to shout out instructions to be relayed to Mr Christie. The Claimant could have crawled out of the front window, although he chose not to do so.

104. The Claimants' evidence was that he had never been involved in a similar incident in all his years of operating diggers. Mr Foster's evidence is that he had been involved in one such incident.

105. Mr Foster, in his evidence, described the incident as a minor one. Mr Foster is not an expert witness. He is a witness of fact. He was not present at the incident. While he is an experienced trainer, we must be careful not to treat his evidence as expert evidence.

106. In the statement he produced for the original disciplinary hearing, the Claimant appeared to accept that the incident was properly characterised as a near miss. The Claimant's evidence in his witness statement was that there was no risk involved and no danger to anything or anyone. In his witness statement, he said that he had thought that Mr Mann would put the incident in the accident book "if he even felt it was necessary". In cross-examination, it was put to the Claimant that he had accepted within the internal process that the incident was a near miss. His evidence in response was that "it could be considered as a near miss".

107. Bearing in mind the definition in the Manual, we consider that the incident is one which ought to have been reported in the accident book as a near miss. It was not an everyday occurrence. The potential risks associated with a 2.5 tonne digger sliding into a trench and then having to be recovered meant that it merited being characterised as a near miss.

<u>What the Claimant told Mr Mann at the time</u>

108. We find that the Claimant did make some mention of the incident to Mr Mann at the time at their daily catch-up at the end of the day on 1 February 2021. We reach that finding for the following reasons:

108.1. The evidence of both the Claimant and Mr Mann was that they spoke regularly, including at the end of each day. They shared an office.

108.2. The Claimant had told two other colleagues the next day that he had mentioned it to Mr Mann. It would be surprising if he had done that if he had not mentioned it to Mr Mann at all.

108.3. Mr Mann inspected the damaged turf the next day. He did not question the cause of the damage. While he would have been expecting some turf damage given the nature of the works being carried out, we consider that if he had no idea that there was an incident at all, he might have had cause to question how the turf had been damaged in the way that it was.

108.4. The large digger was required on site to recover the small digger, which it would not otherwise have been.

109. Mr Mann did not recorded the matter in the accident book, nor reminded the Claimant that he should do so. We bear in mind Mr Mann's subsequent surprise when hearing how the incident was described to him by Mr Foster, and on seeing the photographs of it in November. Taking that into account, we infer that the described of the incident provided by the Claimant on 1 Feb 2021 led Mr Mann to conclude or assume that it did not meet the threshold of a near miss.

<u>Whether training would have been put in place which may have avoided the August 2021 incident if the 1 February 2021 incident had been reported at the time.</u>

110. We do not consider there is any real likelihood that additional training would have been put in place after the February 2021 incident if it had been reported in the accident book at the time. We reach that finding because:

110.1. The incidents were fundamentally different. The August incident involved a different digger, in very different circumstances. Actual damage occurred in the August incident, which did not in the February incident (beyond the turf damage).

110.2. Importantly, the February incident involved one of the Respondent's only two certified digger drivers, whereas the August incident involved an operator who was not certified. We consider that it is very unlikely that the Respondent would have thought to put training in place for the uncertified operators, having not done so previously, simply because one of the two certified operators had been involved in an incident.

<u>The other incidents</u>

111. In respect of the other incidents we were taken to, it is difficult to judge the severity of incidents in isolation and from limited evidence. An accident is clear-cut. A near-miss, as described in the Manual, is necessarily a concept with grey areas and uncertain boundaries. Doing the best we can with the evidence before us:

111.1. The Sidewinder incident (19 September 2019). The photographs appear to show the mower precariously balanced over

the edge of the bunker. While there were no statements from the staff involved, we consider that, given the risk of the mower tipping or sliding into the bunker, with the attendant risk of damage to the mower and injury to the member of staff, this would properly have been considered as a near miss.

111.2. Mr Mann's unchallenged evidence was that the incident was not reported to him as an accident or a near miss.

111.3. The Tractor incident (24 February 2020). The photographs appeared to show that all four wheels of the tractor were in contact with the ground. Attached to the rear of the tractor was a large piece of machinery which had dug some way into the ground. From the photos, it appeared not to be well balanced. Once again, while we did not have statements from others involved, we consider that the attendant risk to the equipment (in particular the piece of equipment on the rear of the tractor) meant that this would properly have been considered as a near miss.

111.4. Mr Mann's unchallenged evidence was that the incident was not reported to him as an accident or a near miss.

111.5. The Bowser incident (12 August 2020). The photographs appeared to show that the bowser had scored the ground in the middle of the track it was on. There was no suggestion from the photographs that the bowser had been at risk of hurting either people or property when it had come uncoupled. We consider on the evidence before us that this fell below the line to be characterised as a near miss. It was simply a mechanical failure, and there did not appear to be any risk of injury or damage to property arising from the failure.

111.6. Mr Mann's evidence (as given to Mr Wright in the internal process) was that he was aware of the incident at the time but did not regarding it as either an accident or near miss.

111.7. The September 2021 incident. We have seen no photographs of that incident. We have seen the statements of the members of staff involved. Based on the evidence before us, we consider that this may have met the threshold of a near miss, but in the circumstances, without the benefit of any photographs or any direct evidence, we are unable to reach a definitive view on it.

111.8. Both Mr Mann and Mr Moses reached the conclusion that the incident was not a near miss.

112. The claimant notified ACAS under the early conciliation process of a potential claim on 16 February 2022. ACAS Early Conciliation Certificates were issued in respect of all three Respondents on 29 March 2022. The claim was presented on 8 April 2022.

Law

113. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee:
   113.1. In the terms of employment;
   113.2. In the provision of opportunities for promotion, training, or other benefits;
   113.3. By dismissing the employee;
   113.4. By subjecting the employee to any other detriment.

114. In order to be subjected to a detriment, an employee must reasonably understand that they had been disadvantaged. An unjustified sense of grievance will not constitute a detriment (*Shamoon v Royal Ulster Constabulary* [2003] UKHL 11).

115. Age is a protected characteristic (s.5 EqA 2010)

Direct discrimination

116. The definition of direct discrimination is contained in section 13(1) of the Equality Act 2010:

> "(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."

117. The comparison may be to an actual or a hypothetical comparator. In either case, there must be no material difference between the circumstances relating to each case (s.23(1)). That is, the comparator must be in the same position in all material respects save only that he or she is not a member of the protected class *(Shamoon v Chief Constable of the RUC* [2003] ICR 337).

118. Where considering the treatment of a claimant compared to that of a hypothetical comparator, the Tribunal may draw inferences from the treatment of other people whose circumstances are not sufficiently similar for them to be treated as an actual comparator (*Chief Constable of West Yorkshire Police v Vento* [2001] IRLR 124). Tribunals may not, however, draw an inference of discrimination from the mere fact that the employee has been treated unreasonably (*Bahl v Law Society* [2003] IRLR 640).

119. In considering whether a claimant was treated less favourably because of a protected characteristic, the tribunal generally have to look at the "mental processes" of the alleged discriminator (*Nagarajan v London Regional Transport* [1999] IRLR 572). The protected characteristic need not be the only reason for the less favourable treatment. However the decision in question must be significantly (that is, more than trivially) influenced by the protected characteristic.

Burden of proof

120. Section 136 of the 2010 Act deals with the burden of proof as follows:

> "(2) If there are facts from which the [tribunal] could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the [tribunal] must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene that provision"

121. The provision prescribes a two-stage process. At the first stage, there must be primary facts from which the tribunal could decide, in the absence of any other explanation, the discrimination took place. All that is required to shift the burden of proof is at primary facts from which "a reasonable tribunal could properly conclude" on balance of probabilities that there was discrimination. It must, however, be something more than merely a difference in protected characteristic and the difference in treatment (*Madarassy v Nomura Internatiojnal PLC* [2007] EWCA Civ 33.

122. The burden of proof at that stage is on the Claimant (*Royal Mail Group v Efobi* [2021] UKSC 22). The employer's explanation is disregarded.

123. If the claimant satisfies that initial burden, the burden shifts to the employer at stage two to prove on balance of probabilities that the treatment was not for the prescribed reason.

124. The Court of Appeal gave guidance to tribunals the application of the burden of proof provisions in the case of *Igen v Wong* [2005] EWCA Civ 142 (the guidance was given in the context of the Sex Discrimination Act, but subsequent authorities have confirmed that it remains good law).

<u>Unfair dismissal</u>

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

126. Section 98 of the 1996 Act deals with the fairness of dismissals.

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

128. Misconduct is a potentially fair reason for dismissal under section 98(2).

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

130. In misconduct dismissals, there is well-established guidance for Tribunals on fairness in the decisions in *Burchell* [1978] IRLR 379 and *Post Office v Foley* [2000] IRLR 827. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation.

131. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones* [1982] IRLR 439, *Sainsbury's Supermarkets Limited v Hitt* [2003] IRLR 23, and *London Ambulance Service NHS Trust v Small* [2009] IRLR 563).

132. In considering fairness, long service is a potentially relevant factor, but in cases of serious misconduct length of service will not save the employee from dismissal (*Strouthos v London Underground Ltd* [2004] IRLR 636).

Polkey

133. In the case of *Polkey v AE Dayton Services Ltd* [1987] UKHL 8, the House of Lords set down the principles on which a Tribunal may make an adjustment to a compensatory award on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed. Further guidance was given in the cases of *Software 2000 Ltd v Andrews* [2007] ICR 825; *W Devis & Sons Ltd v Atkins* [1977] 3 All ER 40; and *Crédit Agricole Corporate and Investment Bank v Wardle* [2011] IRLR 604.

134. In undertaking the exercise of determining whether such a deduction ought to be made, the Tribunal is not assessing what it would have done. Rather, it must assess the actions of the employer before it, on the assumption that the employer would this time have acted fairly though it did not do so beforehand: *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274 at para 24.

Contributory fault

135. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.

136. Section 122(2) provides as follows: "Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."

137. Section 123(6) then provides as follows: "Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

138. In order to found a reduction, the Claimant's conduct need not be gross misconduct – it must however be culpable or blameworthy (*Nelson v BBC (No.2)* [1979] IRLR 346)

139. The EAT suggested in the case of *Hollier v Plysu Ltd* [1983] IRLR 260 that reductions could fall into one of four categories:

139.1. 100% (wholly to blame)
139.2. 75% (largely to blame)
139.3. 50% (equal blame)
139.4. 25% (slightly to blame)

140. When considering making a reduction to the compensatory award, the Tribunal can only take into account conduct that the employer took into account in reaching the decision to dismiss (*Nejjary v Aramark Ltd* UKEAT/0054/12)

Conclusions

Direct Age Discrimination

141. The Claimant relies upon three factual allegations – subjecting him to disciplinary action, pre-determining the disciplinary action, and pre-determining his dismissal.

142. First, we should say that we do not consider that the outcome of the disciplinary process or the Claimant's dismissal were pre-determined. That was not put to Mr Woodward in terms in cross-examination . We will come on to consider the Claimant's criticisms of the disciplinary process. But we do not consider that the accusation that it was pre-determined is well founded. We shall in any event consider the second and third allegations as though the reference to process and the dismissal being "pre-determined" was removed – that is, on the basis that the Claimant's complaint is about

the process and the outcome rather than the allegation it was pre-determined.

143. The Claimant relies, as a comparator, in Mr Mann. We consider that the relevant circumstances in terms of the Claimant's involvement in the 1 February 2021 incident, for the basis of comparison, are that:

143.1. The Claimant was subjected to disciplinary action (and subsequently dismissed) for an allegation of failing to report an incident in the accident book.

143.2. The incident was one which was properly categorised as either an accident or a near miss in accordance with the Respondent's procedure.

143.3. The Claimant was both involved in the incident, and was the most senior employee present at the time of the incident.

144. In respect of the 1 February 2021 incident, Mr Mann is not an apt comparator. He was neither involved nor present at that incident. He was not in materially in the same circumstances as the Claimant.

145. Nor do we consider that any of the other incidents raised by the Claimant within the disciplinary process make Mr Mann an apt comparator. Mr Mann was not present at any of them. The only one that Mr Mann was aware of in any detail at the time was the bowser incident. But once again, he was not present, and we have found that the incident was not one which ought properly to have been categorised as a near miss. So Mr Mann was not in materially the same circumstances as the Claimant in respect of any of those incidents.

146. The only incident we were referred to where Mr Mann was present, for at least part of it, was the 10 August 2021 incident. Mr Mann promptly reported that incident in the accident book (albeit as a near miss rather than an accident). So once again, he was not in materially the same circumstances as the Claimant was in respect of the 1 February 2021.

147. The list of issues did not refer to a hypothetical comparator. We have nonetheless considered the position of a hypothetical comparator who was involved in an incident which was the same as the 1 February 2021 incident, who did not report it in the accident book, and who was the most senior employee present at the incident.

148. In that regard, we draw an inference from the position of Mr Crawley. Mr Crawley is eight years younger than the Claimant (and closer in age to Mr Woodward). He was present at the incident of 1 February 2021. He was not the most senior employee present (that was the Claimant). He was not directly involved in the incident. Unlike the Claimant, he was not a named "responsible person" within the Manual. Notwithstanding all of that, he was subjected to disciplinary action and given a Final Written warning for failing to report the incident in the accident book. We consider that is powerful evidence that a comparable employee in the Claimant's position would have been treated in the same way as the Claimant. Mr Crawley was, on any

account, considerably less culpable than the Claimant. But he was nonetheless disciplined, and given a sanction only one step below dismissal.

149. We therefore conclude that the Claimant was not treated less favourably than a hypothetical comparator would have been in being subjected to disciplinary action and then dismissed. So the complaint of direct age discrimination cannot succeed. We do not need to consider the position in respect of each of the three Respondents separately.

150. We should say for completeness that we could not in any event see anything to enable the Claimant to surmount the initial burden upon him, to show a *prima facie* case of discrimination. We have found that Mr Woodward did not, as alleged, make any comments about looking for a "younger and more dynamic" workforce. We consider also that Mr Woodward's email to HR attaching the Claimant's contract was simply expressing his (understandable) concern about the unlawful mandatory retirement provision in the contract.

151. We will come on to deal with the dismissal in due course. But unreasonableness on its own does not, without more, support an inference of discrimination. And in this case, we are not satisfied that there is anything more. So taking all of that into account, we would in any event have found that the Claimant had not shown facts from which a reasonable Tribunal could conclude, without explanation, that the reason for the disciplinary action or for his dismissal was his age.

152. It follows that the complaint of direct age discrimination fails and is dismissed.

Unfair dismissal

153. We are satisfied that the reason for the dismissal was misconduct. Having dismissed the complaint of direct age discrimination, there was no evidence to suggest that there was a different reason.

154. We are satisfied that the Respondent (and particularly, Mr Woodward, Mr Wright and Mr Brown) had a genuine belief that the Claimant had committed misconduct.

155. We consider also that they had reasonable grounds for that belief, because:

155.1. In respect of the first incident, the policy provided that failure to report incidents in the accident book constituted gross misconduct.

155.2. All three decision-makers concluded that the Claimant had failed to report the matter. In respect of the accident book, that was self-evidently correct. And in respect of the Claimant's suggestion that he had reported it to Mr Mann, all three preferred Mr Mann's

evidence to that of the Claimant. In Mr Brown's case, he also expressed an alternative conclusion that if the Claimant had told Mr Mann, he had not told him enough to appreciate the seriousness of the incident.

155.3. We do consider that the Respondent had no reasonable grounds for believing that the second allegation gave rise to a separate act of misconduct. The second allegation was, in essence, that the August incident might have been avoided had the Claimant reported the February incident correctly. That was, in our judgment, nothing more than speculation. None of the decision-makers appeared to have considered what training might have been put in place, and how that training might have stopped the second incident occurring. And in any event, it was not in reality a separate allegation of misconduct – at most it was no more than a potentially aggravating feature of the allegation of failing to report the February 2021 incident. So they cannot reasonably have concluded that it constituted an act of misconduct in its own right. But that does not affect our conclusion that they had reasonable ground to believe the Claimant had committed misconduct in respect of the first allegation.

156. We then turn to consider the investigation that the Respondent had carried out. Before reaching the initial decision to dismiss the Claimant, the Respondent had:

156.1. Determined who was present at the time of the incident in February 2021.

156.2. Interviewed the Claimant and two other members of staff (although not Mr Mann).

156.3. Acquired the photographs and video footage.

156.4. Held a reasonably lengthy disciplinary meeting with the Claimant at which he was able to ventilate his evidence regarding the allegations.

157. During the course of the appeal process, the Respondent had:

157.1. Interviewed Mr Mann twice (once at each appeal stage); and

157.2. Investigated one of the four incidents the Claimant suggested as comparable to his in terms of the requirement to be reported in the accident book (although not the remaining three).

158. The Respondent did not conduct a more detailed interview with Mr Foster. We must be careful not to view Mr Foster's comments to Mr Mann with the benefit of hindsight, having heard and seen his evidence to this Tribunal. Mr Haynes did not at any point in the internal process suggest that Mr Foster should be interviewed again. So it was not apparent at the time that there was any dispute about Mr Mann's account of his conversation with Mr Foster. Mr Foster was not an employee of the Respondent. It would have been good practice to interview Mr Foster; but it was not unreasonable in the circumstances for the Respondent not to do so.

159. There were, however, other flaws with the investigation and with the process more generally:

159.1. The Respondent did not investigate the remaining three incidents that the Claimant relied upon as being comparable, because Mr Woodward decided without formal investigation that they did not meet the relevant threshold. Given that the Claimant raised those points on appeal, and that he was appealing Mr Woodward's decision, we consider that it was wrong that Mr Woodward tipped the scales in that way.

159.2. The notes of the investigation meetings with Mr Crawley and Mr Barton were never given to the Claimant, although they were seen by Mr Woodward, Mr Wright and Mr Brown. That denied the Claimant sight of some of the evidence that was used in the disciplinary process, which we consider was fundamentally unfair. And it is not a mere technical unfairness. There were two specific points in those notes which may have assisted the Claimant to present his case during the internal process:

159.2.1. Mr Crawley said in his interview that the large digger was already on site, which was at odds with the other evidence. The question of whether the large digger had to be fetched was potentially relevant to whether Mr Mann was aware of the incident at the time – a point on which all three decision-makers did not accept the Claimant's evidence. All three decision-makers had therefore seen a piece of information which appeared to undermine the Claimant's account, but which the Claimant had not seen.

159.2.2. The notes of Mr Barton's interview recorded that at the start of the meeting, Mr Mann said that he had "limited knowledge" of the February 2021 incident at the time. That may simply have been a manner of speaking; but it did, on the face of it, support the Claimant's account that he had told Mr Mann.

159.3. Throughout the process, the language used by the individuals involved on behalf of the Respondent sought to exaggerate and maximise the seriousness of the incident. By way of example:

159.3.1. Adding the second allegation, which at most could have been no more than an aggravating factor. It could not sensibly be described as a separate allegation of wrongdoing in its own right. Including it as a separate allegation gave it a status which it did not merit.

159.3.2. Mr Brown finding that the incident should be categorised as an "accident", and repeatedly referring to it as such in his decision (including referring to it as a "dangerous accident").

159.3.3. Mr Mann consistently referring to the cab door has having been open, despite the fact that he had seen photographs of the incident which clearly showed that the cab door was closed.

159.3.4. Mr Woodward referring to the fact that the Claimant had not been wearing a seatbelt in his outcome letter, which

was not one of the allegations against him (albeit that Mr Wright on appeal remedied that).

159.3.5. Mr Wright referring to the incident in his outcome letter as "the very serious incident", in a paragraph that was otherwise about whether the Claimant had reported it to Mr Mann.

159.3.6. There were inconsistencies in the description of the final resting place of the digger, which also exaggerated the seriousness of the incident (for example, describing it as "tipping over", or in Mr Brown's case as being "almost horizontal" [428]).

159.4. We take care not to take an overly forensic approach to the specific words used by those involved, or to analyse the outcome letters with a fine tooth-comb. In respect of some of the examples given above, the witnesses were commendably willing in evidence to accept that they had mischaracterised matters at the time (for example, Mr Mann in respect of the cab door and Mr Brown in respect of the use of the word "accident"). Rather, we step back and look at the larger picture, which was that in our judgment there was a persistent use of language which overstated the seriousness of the incident. In essence, the process appeared to snowball and gather its own momentum, rather than at each stage the decision-maker dispassionately addressing the factual material before them.

159.5. Mr Mann conducting the initial investigation. He was the Claimant's line manager. In that context, he was the right person to start the investigation. But self-evidently, he could not fairly investigate the case where there was a dispute between his evidence and that of the Claimant about a material point. And the question of whether the Claimant had told him about the incident in February 2021 was a material point. So once it became apparent that was an issue, Mr Mann ought to have handed over the investigation to someone else.

159.6. We have carefully considered whether the Respondent righted that point on appeal, by interviewing Mr Mann at both appeal stages. We consider that it did not. We reach that conclusion because:

159.6.1. None of the three decision-makers appeared to question Mr Mann about the ambivalent comment he had made at the start of the interview with Mr Barton. It would have been particularly important that they do so given that the Claimant had not seen Mr Barton's interview notes.

159.6.2. Mr Brown effectively accepted during the second appeal meeting that Mr Mann had oversold the risk attached to the situation by referring to the cab door being open (which it was not). But he did not appear to go on from there to consider whether that undermined Mr Mann's credibility more generally.

160. Of course, that is not to say that the process was wrong from start to finish. It was not. There was much about the process which was fair:
    160.1. The Respondent conducted an investigation.
    160.2. They wrote to the Claimant inviting him to a disciplinary hearing, setting out the allegations against him
    160.3. The Claimant was allowed him to be accompanied at that meeting.
    160.4. The Respondent kept notes of the meeting and shared those with the Claimant.
    160.5. Mr Woodward took time after the meeting to consider the outcome, and set out his decision with (albeit reasonably brief) reasons in writing.
    160.6. The Claimant was allowed the opportunity to appeal Mr Woodward's decision.
    160.7. His appeal heard by a Non-Executive Director, which was appropriate given that the decision being appealed was made by the Chief Executive.
    160.8. The Claimant was again allowed to be accompanied at the appeal meeting.
    160.9. The appeal officer, Mr Wright, carried out some further investigation.
    160.10. Having done so, he explained his decision to the Claimant in writing, dealing with each of the numbered points raised in the appeal.
    160.11. The Claimant was then allowed a further right of appeal.
    160.12. Once again, the Claimant was allowed to be accompanied at that second appeal meeting.
    160.13. Mr Brown conducted some further investigation based on the Claimant's grounds of appeal.
    160.14. Once again, he provided the Claimant with a detailed outcome letter explaining his decision.

161. We bear in mind that the Respondent is a relatively small employer. We are not considering what we would have done, nor are we looking for perfection in the process followed. Rather, we are considering whether the process the Respondent followed was, as a whole, within the range of reasonable responses open to a reasonable employer.

162. Stepping back, we consider that the investigation, and the process as a whole, fell outside the range of reasonable responses. The flaws we have identified were fundamental ones. Put another way, the things that the Respondent did right within the process did not cure or overcome the unfairness caused by the procedural flaws identified. It follows that we conclude that the dismissal was procedurally unfair.

163. We then turn to consider the decision to dismiss. Once again we are looking not at what we would have done in the circumstances, but at whether the decision reached by the Respondent fell within the range of reasonable responses. In that regard:

163.1. The Claimant had failed to record the incident in the accident book. The Manual required him to do so. Under Respondent's own policy, failing to comply with the Manual was defined as gross misconduct.

163.2. The underlying incident itself was not blameworthy. There was no suggestion that any culpable error on the Claimant's part led to the situation arising.

163.3. The Claimant had 39 years' service, with a clean disciplinary record, and no previous recorded health and safety violations. That is a factor which cuts both ways. On the one hand, his long record of clean service ought to carry weight in mitigation. The Claimant had worked for the Respondent for his entire adult life. On the other hand, his length of service and the seniority of his role meant that he ought to have been very well aware of the duty on him to record the incident in the accident book.

163.4. The Claimant accepted, in the statement he wrote prior to the disciplinary hearing, that he ought to have recorded the matter in the accident book. He explained in the same statement that he would learn from the situation, and would not make the same mistake again. So it was not the case that he had shown no insight, or that he had given cause to suggest that he would repeat the conduct in question.

163.5. There was no real evidence that any of the decision-makers weighed up the possibility of an alternative sanction for the Claimant. Mr Woodward's evidence, given for the first time in the face of the Tribunal, was that he considered demotion (but ruled it out). Demotion was not a sanction which was provided for within the Respondent's disciplinary policy, so it was not clear on what basis he would even have considered it.

163.6. There was no real explanation on Mr Woodard's part of why he had lost trust in the Claimant, given his apparent contrition in the statement he produced for the disciplinary hearing. Nor was the loss of trust explained by either Mr Wright or Mr Brown. Indeed Mr Brown went rather further than Mr Woodward did in describing the loss of trust in the Claimant. The stark words he used appeared disproportionate bearing in mind the nature of the misconduct and the Claimant's contrition at an early stage in the process.

164. In all of the circumstances, we consider that the decision to dismiss the Claimant fell outwith the range of reasonable responses open to a reasonable employer. It was not merely harsh; it was unreasonable.

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165. We have found that the dismissal was substantively unfair. It follows that even if the Respondent had followed a fair process, they could not have fairly dismissed the Claimant for the conduct in question.

166. For completeness, there was no evidence before us regarding whether the Respondent might have dismissed the Claimant in any event for not wearing a seatbelt (or indeed for any other reason). So there is no evidential basis to found a conclusion that they may have done so fairly, had they not dismissed in the circumstances in which they did.

Contributary conduct

167. We find that there was blameworthy conduct on the Claimant's part. He was under a duty to record the February incident in the accident book. He did not do so. That is the conduct for which he was dismissed. It is conduct which the Respondent's policy described as gross misconduct.

168. We have found that the decision to dismiss the Claimant fell outwith the range of reasonable responses open to the Respondent. That is, his failure did not, in all of the circumstances, justify dismissing him. But that does not mean that his underlying conduct was not culpable.

169. The responsibility to record the incident in the accident book fell on the Claimant, as an employee present and involved in the incident. But his failure to do so was rendered considerably starker because of his role. He was in a senior, responsible position as second in command of the Greenkeeping team. He deputised for the Course Manager; he was one of the three nominated "appointed persons" in the Manual. He had recorded incidents in the accident book previously, both on his own behalf and on behalf of more junior members of staff. He ought to have been have been well aware of what was required of him. Merely mentioning the incident to Mr Mann did not absolve him of his responsibility to record it. Put colloquially, he should have known better.

170. We consider that the Claimant was therefore moderately culpable for his dismissal. We find that his share of the blame for his dismissal, having regard to all of the circumstances, was 50%. And we conclude that it is therefore just and equitable that we reduce both his basic and compensatory awards by that percentage.

Employment Judge Leith
27 September 2024

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/