Case No:- 3313419/2023.

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Walter Bachler	v	(1) Solarlux Systems Limited; (2) Mr Stefan Holtgreife; (3) Mr Scott Leeder; and (4) Mr Christopher Harrison.

Heard at: Norwich (by CVP)

On: 11 – 15 August 2025
18 – 22 August 2025

Before: Employment Judge M Warren

Members: Ms J Buck and Mr D Hart

Appearances:
For the Claimant: Mr P Wilson, Counsel
For the Respondent: Mr M Rudd, Counsel

JUDGMENT having been sent to the parties on 10 September 2025 and written reasons having been requested in accordance with Rule 60(4) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The background to this matter is that Mr Bachler was employed by the First Respondent between 12 November 2015 and 16 August 2023. After Early Conciliation with regard to the four Respondents on various dates running between 4 October and 10 November 2023, he issued these proceedings on 24 November 2023 claiming unfair dismissal, age discrimination and breach of contract.

2. The case was managed at a Case Management Preliminary Hearing before Employment Bansal on 25 July 2024. There was a Public Preliminary Hearing before Employment Judge Alliott on 18 December 2024.

List of Issues

3. We were provided with an agreed List of Issues by the parties, which they confirmed we could rely upon as set out below.

Time Limits

1. Were all of the Claimant's discrimination claims presented within the time limit provided by s.123 Equality Act 2010? Given the date the Claimant complied with the requirement to contact ACAS for Early Conciliation, any act of discrimination that occurred before 5 July 2023 is in principle out of time.

2. If not, were they part of a course of conduct extending over a period together with a claim that was presented in time?

3. If not, is it just and equitable to extend time?

Direct age discrimination – section 13 Equality Act 2010

4. The Claimant's age is 65. At the material time of the claims he was aged between 60 and 64. The age group relied upon by the Claimant in his claims is between 60 and 65 years of age.

5. Did the Respondent treat the Claimant in the following ways:

    5.1. In May 2019 did Steven Ferrie, the First Respondent's then Sales Director, offer the Claimant the option of either being made redundant or of being demoted from Senior Project Manager / Surveyor to the role of Installation, Training and Support, with a reduction in salary from £54,500 to £40,000, then later revised to £47,000 when the Claimant stated he would accept redundancy? [paragraph 10 to 14 particulars of claim]

    5.2. In or about February / March 2020 did the First Respondent conceal the opportunity from the Claimant and instead recruit Mr Jeffrey Smith to the role of Project Manager behind the Claimant's back? [paragraph 18 to 20 particulars of claim]

    5.3. Did the First Respondent, acting through Simon Davies, its Operations Manager:

        - Not assist the Claimant to become involved in project work from September 2020 onwards;

        - Try to prevent the Claimant from attending a sales meeting with a client (Mulalley Construction) in September / October 2020; and

        - On or about 16 November reprimand the Claimant for contacting sub-contractors to check their availability when the pre-work on the Meadowlands project had started? [paragraphs 24 to 34 of the particulars of claim]

    5.4. In the period November 2020 and subsequently, did the First Respondent (in particular, Mr Davies and Mr Ferrie) fail to reinstate the Claimant to the role of Senior Project Manager / Surveyor and to the salary he had previously enjoyed in that role and he was to be subordinate to Mr Smith? (It is the Claimant's contention that Mr Smith had no experience of field based project

delivery. It is the Respondent's' contention that Mr Smith was suitably qualified for the role). [paragraphs 35 to 41 of the particulars of claim]

5.5. Did the First and Second Respondents after an online group meeting on 7 June 2021, when it had been agreed there would be an additional meeting to discuss the Claimant's pay review involving the Second Respondent, instead pass the pay review to Mr Daniel Dödtmann, whilst the Second Respondent left the meeting and then caused the pay review meeting to be delayed for a further 3 months? [paragraphs 44, 45 and 50 of the particulars of claim]

5.6. Did the First and Second Respondent, acting through Daniel Dödtmann state he did not know the value the Claimant brought to Solarlux and refuse the Claimant a pay rise on 20 August 2021? [paragraph 46 of the particulars of claim]

5.7. Did the First and Second Respondent acting through Daniel Dödtmann on 19 October 2021:

- Only increase the Claimant's salary by £3,000 per annum to £50,000;
- Attempt to back date the increase only to September 2021; and
- Not reinstate the Claimant to the role of Senior Project Manager / Surveyor and to an equivalent salary for that role? [paragraphs 50 and 53 to 55 of the particulars of claim]

5.8. On and before 3 July 2023 did the First, Third and Fourth Respondents decide that the Claimant would not be receiving a pay increase and when the Claimant said he had been working, since his demotion in 2019 at a level above his pay grade, did the Fourth Respondent tell the Claimant that he had been contracted to do whatever work was necessary for the business and that the Claimant was at the top of his pay grade and would not be receiving any increase to his salary? [paragraphs 68 to 69 of the particulars of claim]

5.9. Did the First, Third and Fourth Respondents before the pay review meeting on 3 July 2023 propose that Jeffrey Smith take on a major part of the Claimant's field based Project Manager role, behind the Claimant's back, without the role being advertised and without Jeffrey Smith having the relevant competency for a field based role? [paragraphs 78 to 82 of the particulars of claim]

5.10. Did the First, Third and Fourth Respondents from 3 July onwards subject the Claimant to a disciplinary investigation and spurious disciplinary proceedings without cause and with a view to dismissing the Claimant with effect from 16 August 2023? [paragraphs 73 and 83 to 132 of the particulars of claim]

6. If so, was it less favourable treatment of the Claimant in comparison to another person? That person must have been in materially the same circumstances as the Claimant but not of the same age or not of the same age group. The Claimant relies upon the following persons as comparators:

6.1. Mr Justin Spires;

6.2. Mr Jeffrey Smith; and

6.3. A hypothetical comparator.

7. If so, was the reason for the less favourable treatment age?

8. If so, have the relevant Respondents established that the treatment was a proportionate means of achieving a legitimate aim? The legitimate aim(s) relied upon by the Respondents are:

8.1. A genuine redundancy situation arose due to the fall in direct projects;

8.2. The commercial situation of the First Respondent; and

8.3. The skills and requirements required for each vacancy that arose.

Unfair dismissal – sections 94 and 98 Employment Rights Act 1996

9. The Claimant was dismissed by the First Respondent when the decision was communicated to him via a letter he received on 16 August 2023. That date is the effective date of termination.

10. Has the First Respondent proven what the reason (or principal reason) for dismissal was? The First Respondent asserts that the reason related to the Claimant's conduct, or in the alternative, some other substantial reason (SOSR) of a kind such as to justify the dismissal of an employee holding the position which the Claimant held, namely a breakdown in the employer / employee relationship as referenced in the second response of the First Respondent.

11. Was it a potentially fair reason?

12. If the First Respondent has proven a conduct related reason for dismissing the Claimant, did it act reasonably or unreasonably in all the circumstances, including the First Respondent's size and administrative resources, in treating that reason as sufficient reason to dismiss the Claimant? The Tribunal's determination of whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular, whether:

12.1. The First Respondent actually believed the Claimant was guilty of misconduct;

12.2. There were reasonable grounds for that belief;

12.3. That at the time the belief was formed the First Respondent had carried out a reasonable investigation;

12.4. The First Respondent otherwise acted in a procedurally fair manner; and

12.5. The dismissal was within the range of reasonable responses.

13. If the reason was the SOSR reason, did the First Respondent act reasonably or unreasonably in all the circumstances, including the First Respondent's size and administrative resources, in treating that reason as sufficient reason to dismiss the Claimant? The Tribunal's determination of whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case.

Wrongful dismissal

14. Under the contract of employment, to what period of notice of the termination of employment was the Claimant entitled?

15. It is accepted by the First Respondent that the Claimant was summarily dismissed, without notice.

16. Was the First Respondent entitled to dismiss the Claimant without notice, in circumstances where the Claimant had acted in fundamental breach of the contract of employment?

17. If the First Respondent was not entitled to dismiss without notice, has the Claimant mitigated his loss?

18. In what sum should damages for breach of contract be assessed?

Remedy for unfair dismissal

19. The Claimant does not seek reinstatement or re-engagement. The remedy for unfair dismissal is therefore compensation.

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

    20.1. What financial losses has the dismissal caused the Claimant?

    20.2. Has the Claimant taken reasonable steps to replace his lost earnings, for example by looking for another job?

    20.3. If not, for what period of loss should the Claimant be compensated?

    20.4. Was there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

    If so, should the Claimant's compensation be reduced? By how much?

    20.5. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did either party unreasonably fail to comply with it?

    20.6. If so, is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion (up to 25%)?

    20.7. If the Claimant was unfairly dismissed, did he cause or contribute to his dismissal by blameworthy conduct?

    20.8. If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

    20.9. Does the statutory cap of 52 weeks' gross pay apply?

21. What basic award is payable to the Claimant, if any?

22. 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?

Remedy for discrimination

23. What financial losses has the discrimination caused the Claimant?

24. Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

25. If not, for what period of loss should the Claimant be compensated?

26. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

27. Is there a chance the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

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

29. Did either party unreasonably fail to comply with it?

30. If so, is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion (up to 25%)?

31. Should interest be awarded? If so, how much?

Aggravated Damages (ET1 page 16)

1. Would it be appropriate to award aggravated damages, in particular, did the Respondents act in a high-handed, malicious, insulting, or oppressive manner in committing the alleged discriminatory acts or in the way they were handled? The Claimant relies on the following matters:

    1.1 The Second Respondent delaying the data subject access request made by the Claimant by first waiting a month and then asking for the maximum extension allowed of two months? Then when this deadline was reached, claiming that he did not need to comply with the request?

    1.2 The Second Respondent giving the Claimant "the run-around" and delaying the process using his authority as the overall business owner of the parent company Solarlux GmbH and as Managing Director of Solarlux Systems Ltd to prevent the Claimant from legitimately accessing essential information he had requested for his case?

    1.3 The Fourth Respondent's unreasonable intimidating behaviour which caused the Claimant and his wife to suffer increased and continued stress and anxiety by refusing to postpone the disciplinary hearing, which went ahead without the Claimant, when he had just been signed off sick for four weeks by his GP for work-related stress. The Claimant had never had a day off sick previously in his nearly eight years with Solarlux.

    1.4 The Claimant raised a grievance with Solarlux for the unfair dismissal and was advised an investigation and report would be forthcoming. No such report has been received by the Claimant.

    1.5 The Claimant also submitted an appeal for his dismissal and was told this would be completed after the grievance had been investigated. No date for an appeal was forthcoming.

Evidence

4. We had witness statements for the Claimant from:

    4.1. Mr Bachler himself;

    4.2. Mr Jeff Smith;

    4.3. Mr Lee Witchelo;

    4.4. Mr Robert Walton; and

    4.5. Mrs Theresa Connolly.

5. We had witness statements for the Respondents from:

    5.1. Mr Stefan Holtgreife, the Second Respondent;

    5.2. Mr Scott Leeder, the Third Respondent;

    5.3. Mr Christopher Harrison, the Fourth Respondent; and

    5.4. Mr Daniel Doedtmann.

6. Two of the Claimant's witnesses, Mr Witchelo and Mr Smith, attended under a Witness Order. We did not hear evidence from Mr Walton, but we were asked to read his witness statement and attribute to it such weight as we considered appropriate, having regard to the fact that he was not here to have that evidence tested under cross examination.

7. The Tribunal notes that we did not hear evidence from two individuals who worked for the Respondent, who feature quite prominently in the matrix of facts, that is Mr Davies and Mr Ferrie. Other than the fact that they no longer work for the Respondent, we did not have an explanation as to why they did not give evidence.

Papers before us today

8. We had before us a bundle of documents running to page 1,519. Just by way of comment for future reference, Tribunals like their bundles to be assembled in chronological order. This bundle was assembled with documents under a series of different sub-headings, which was confusing and at times, made it difficult to find documents. It doesn't matter, we got through fine, but it would have been better for us if the documents had simply been assembled in chronological order. It would also have helped if all of the documents, where possible, had optical character recognition. Both those points are in accordance with the President's Practice Directions about electronic bundles.

9. We also had from Mr Bachler, his own mini bundle.

10. We had from the Respondents a chronology, a cast list and a reading list.

11. We had from Mr Bachler a reading list with the documents that he wanted us to read attached and embedded within the document.

12. We should note at this point that during evidence, Mr Bachler conceded that a particular document, a 2019 Business Case for Redundancy, which he had argued was a forgery, was in fact genuine. This concession was made on Mr Doedtmann referring to 2019 emails that had not been previously disclosed, when he was giving evidence; those emails were disclosed over a luncheon adjournment. It is in light of those emails, which showed that the document was genuine, that the concession was made.

13. Before closing submissions, Mr Wilson sought leave to recall Mr Bachler. He had noted in those 2019 emails, a reference to a person we will refer to as KS, also being potentially redundant at the same time. Mr Bachlar instructed Mr Wilson that he recalled she was made redundant and was of a similar age to himself. He acknowledged that at the time, he knew she had been made redundant. On instructions, Mr Rudd confirmed that KS was aged 64 and was made redundant. Mr Wilson accepted, after taking instructions, that he had all that he needed to make his submissions on the point and it was not necessary to recall Mr Bachler.

The Law

14. I have prepared a detailed exposition of the relevant Law in relation to age discrimination and unfair dismissal which I am not going to read out here, as it would simply extend the length of this Judgment by twenty minutes or so. A recap for the benefit of the non-Lawyers present is as follows.

15. Direct discrimination on the grounds of age would be where a person has been treated worse than an individual of a younger age, (in this case) would have been treated in the same circumstances.

16. In relation to unfair dismissal, it is for the Respondent to satisfy us as to the reason for dismissal and that it was one of a number of potentially fair reasons set out in the Employment Rights Act 1996, which might include some other substantial reason or conduct.

17. If the employer satisfies us that the reason for dismissal was potentially fair, we must then decide whether that it was in fact fair in all of the circumstances to dismiss for that reason. The decision must have been within the range of reasonable decisions that a reasonable employer might have made on the facts of the case.

18. A lawyers explanation of the law appears in the paragraphs below.

Age Discrimination

19. The relevant law, as to the case for discrimination, is set out in the Equality Act 2010.

20. Age is one of a number of protected characteristics identified at section 4

21. Mr Bachler says that he was directly discriminated against because of his age, direct discrimination is defined at s.13(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".

22. In relation to age in particular, s.13(2) provides for the potential defence of justification on the part of the respondent as follows:

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

23. Section 5 provides further clarification of what is meant by the characteristic of age:

(1) In relation to the protected characteristic of age—

(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;

(b) a reference to persons who share a protected characteristic is a reference to persons of the same age group.

(2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages.

24. Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the Claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the Claimant, but not having his protected characteristic, or it may be a hypothetical comparator, constructed by the Tribunal for the purpose of the comparison exercise. The Claimant must show that he has been treated less favourably than that real comparator was treated or than the hypothetical comparator would have been treated.

25. The leading authority on when an act is because of a protected characteristic is Nagarajan v London Regional Transport [1999] IRLR 572, (the protected characteristic in that case was race). Was the reason the protected characteristic, or was it some other reason? One has to consider the mental processes of the alleged discriminator. Was there a subconscious motivation? Should one draw inferences that the alleged discriminator, whether he or she knew it or not, acted as he or she did, because of the protected characteristic? - (see paragraphs 13 and 17).

26. The protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, "significant influence":

"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the

activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."

27. The treatment of non-identical comparators in similar situations can also assist in constructing a picture of how a hypothetical comparator would have been treated: Chief Constable of West Yorkshire v Vento (No. 1) (EAT/52/00) at [7].

28. S.39(2)(c) proscribes an employer from discriminating against an employee by dismissing the employee or, at (d) by subjecting the employee to any other detriment.

29. Detriment was defined in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285; the Tribunal has to find that by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had been disadvantaged in the circumstances in which he or she had thereafter to work.

30. Section 136 deals with the burden of proof:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if (A) shows that (A) did not contravene the provision.

31. It is therefore for the Claimant to prove facts from which the tribunal could properly conclude, absent explanation from the Respondent, that there had been discrimination. If he does so, the burden of proof shifts to the Respondent to prove to the tribunal that in fact, there was no discrimination. The reason for this is that the evidence about the reason for prohibited conduct is generally, in the hands of the employer. See Lord Legett in Efobi v Royal Mail Group Limited [2021] IRLR 811.

32. The appeal courts' guidance under the previous discrimination legislation continues to be applicable in the context of the wording as to the burden of proof that appears in the Equality Act 2010. That guidance was provided in Igen Limited v Wong and others [2005[IRLR 258, which sets out a series of steps that we have carefully observed in the consideration of this case.

33. This does not mean that we should only consider the Claimant's evidence at the first stage; a Tribunal should consider all the evidence at the first stage in order to make findings of primary fact and assess whether there is a *prima facie* case. There is a difference between factual evidence and explanation, (which is considered at the second stage). See Madarassy v Nomura International plc [2007] IRLR 246 CA.

34. What is involved in that first stage was explained by Mummery LJ in Madarassy at paragraphs 57 and 58:

57. Could conclude' in s.63A(2) must mean that 'a reasonable tribunal

could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by s.5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.

58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim.

Mummery LJ also explained:

"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination, they are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination"

Unfair Dismissal.

35. Section 94 of the Employment Rights Act 1996 contains the right not to be unfairly dismissed. Section 98 at subsections (1) and (2) set out five potentially fair reasons for dismissal, one of which at subsection (2)(b) is the conduct of the employee, or at Section 98(1) (b) *"some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held"*. Section 98(4) then sets out the test of fairness to be applied if the employer is able to show that the reason for dismissal was one of those potentially fair reasons. The test of fairness reads:

"*Where the employer has fulfilled the requirement of subsection (1) the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)*

(a) depends 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

(b) shall be determined in accordance with equity and the substantial merits of the case."

36. We have guidance from the appeal courts on how to apply that test where the grounds for dismissal relied upon by the employer is misconduct. The first is the test set out in the case of British Home Stores v Burchell [1980] ICR 303. The Tribunal must be satisfied that the employer holds a genuine belief, based upon reasonable grounds and reached after a reasonable investigation. It is for the employer to show the genuine belief, the burden of proof in respect of the reasonable grounds and the investigation is neutral.

37. If the employer is able to satisfy that test, the Employment Tribunal must go on to apply the test set out in Iceland Frozen Foods Ltd v Jones [1982] IRLR 439. The function of the Tribunal is to determine whether in the particular circumstances a decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. If a dismissal falls within the band the dismissal is fair, if the dismissal falls outside the band it is unfair. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

38. The band of reasonable responses test also applies to the question of whether or not the employer's investigation into the alleged misconduct was reasonable in all the circumstances. See Sainsbury v Hitt [2003] IRLR 23.

39. Usually then, in accordance with the ACAS Code, one would expect, except in a case of gross misconduct, to see an employee to have received a warning that their conduct, if it continues, might result in dismissal. Such a warning would normally be expected to last for a set period of time, within which a repeat of such conduct would likely result in dismissal.

40. The investigation should be into what the employee wishes to say in mitigation as well as in defence or explanation of the alleged misconduct.

41. Mitigation must be actively considered by the decision maker.

42. We should look at the overall fairness of the process together with the reason for dismissal. It might well be that despite some procedural imperfections, the employer acted reasonably in treating the misconduct as sufficient reason for dismissal. We should not be distracted by questions such as whether an appeal is a rehearing or a review, see Taylor v OCS [2006] IRLR 613.

43. In this case, the Respondents say that Mr Bachlar was guilty of gross misconduct justifying dismissal without warning. The test for gross

misconduct, or repudiation, is that the conduct must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in its employment, see Neary v Dean of Westminster Special Commissions [1999] IRLR 288.

44. More serious allegations, which might have more serious consequences if upheld, call for a more thorough an investigation. The ACAS 2014 Guide to Discipline and Grievances at Work, (not the code of practice) advises as such and the EAT confirmed as such in A v B [2003] IRLR 405.

45. In this case, the Respondent relies, in the alternative to the potentially fair reason of conduct, upon a break down in confidence between employer and employee, which is a substantial reason justifying dismissal. Such cases must be approached by Tribunals with care, so as not to allow employers to use such a justification for dismissal as a convenient label to stick on any situation where an alternative potentially fair reason is not available, (per Mummery LJ in Leach v Office of Communications [2012] ICR 1269 CA). It is not an, "automatic solvent of obligations" (Per Underhill P in Mc Farlane v Relate Avon Ltd [2010] ICR 507 EAT).

46. Nor, in such cases, should the Tribunal simply conclude that if the employer/employee relationship has broken down and there is a loss of trust and confidence, that is the end of the matter. In considering the fairness of the dismissal the Tribunal may consider the surrounding circumstances behind that loss, (see Perkins v St George's Healthcare NHS Trust [2005] IRLR 934).

47. In The Governing Body of Tubbenham Primary School v Sylvester [2012] EWCA Civ 1525 , (Deputy Head teacher dismissed for, some other substantial reason in maintaining a friendship with a convicted paedophile which the Head Teacher found unacceptable) Kay LJ expressly approved the following paragraph from the Employment Tribunal's Judgment:

> *"...many of the principles applicable to cases where misconduct is alleged were equally applicable to ensure fairness in this case. We could see no good reason why an employer in the position of the Respondent should be in a position where it might apply a lower standard of procedural fairness to an employee by invoking 'some other substantial reason' for the dismissal when that reason is, in reality, no more than the corollary of some form of conduct to which the employer has taken exception."*

48. That was said to be an, "unassailable proposition". It seems to us that ACAS and appellate guidance on what is a fair process in a conduct case may, (depending on the facts of the case) provides a helpful, (not prescriptive) background to assessing what a reasonable employer might do in acting fairly and in accordance with the test of s98(4).

49. Section 207(2) of the Trade Union & Labour Relations Act 1992 provides that any Code of Practice produced by ACAS under that Act which appears to an Employment Tribunal to be relevant shall be admissible in evidence and shall be taken into account.

50. In the case of Polkey v A E Dayton Services Limited [1988] ICR 142 it was

made clear that employers can not argue that a procedurally improper dismissal was none the less fair because it would have made no difference had a fair procedure been followed, save in wholly exceptional cases where it could be shown that following a proper procedure would have been, "utterly useless" or "futile". At paragraph 12 of that Judgment, Lord Mackay of Clashfern adopted the reasoning of Browne-Wilkinson J in Sillifant v Powell Duffryn Timber Limited [1983] IRLR 91 later helpfully summarised by Lord Bridge of Harwich at paragraph 28 as follows:

> *"If an employer has failed to take the appropriate procedural steps in any particular case, the one question the Industrial Tribunal is* not *permitted to ask in applying the test of reasonableness posed by s.57(3) is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of s.57(3) this question is simply irrelevant. It is quite a different matter if the Tribunal is able to conclude that the employer himself, at the time of the dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under s.57(3) may be satisfied."*

Findings of Fact

51. The Respondent is an English subsidiary of a German parent company, Solarlux GMBH. The Solarlux Group of companies employs about 850 people worldwide. Their business is architectural glass and glazing products, which are manufactured in Germany and sold worldwide.

52. Mr Bachler previously had his own business called BAC Construction Limited, a building contractor which operated between approximately 2004 and 2014.

53. Mr Bachler's employment with the Respondent began on 16 November 2015 as a Senior Project Manager / Surveyor. His contract is at page 274:

    53.1. His salary at that time was £46,500.

    53.2. There is a provision in the contract under the heading of 'Pay' that the company is entitled to reimbursement for private usage of mobile phones or other company equipment.

    53.3. His hours of work were said to be between 8.30am and 5pm, 37.5 hours per week.

    53.4. At the end of the contract, reference is made to Company Rules, Appendix B to this document, setting out rules the employee is expected to observe.

    53.5. Under a heading 'Disciplinary Procedure' reference is made to the

procedure set out in Appendix C to this document.

53.6. Appendix B is at page 314. Relevant provisions include:

53.6.1. Non-exhaustive examples of gross misconduct, including at 1.3 breach of confidence, that is the divulging of confidential information relating to the company, its employees or customers to any third party; 1.10, flagrant failure to follow Company Documentary Systems and Procedures; and 1.11 use of electronic information systems to receive or display material which is illegal or offensive.

53.6.2. At 2.7 under 'Employee's Duties' there is a requirement to devote one's whole time and attention to the company business and a requirement to obtain written permission to do any other kind of work that might be prejudicial to or in competition with the Respondent.

53.6.3. At 2.9 there is an obligation not to conduct oneself in a way that is detrimental to the interests of the company, its relations with its customers and that might be damaging to its public image.

53.6.4. At 2.11 it states that private work may be carried out on the company's premises or in working time only with management approval.

53.6.5. At 2.16 that the misuse of company hardware / software is a disciplinary offence.

53.6.6. At 2.19 the unauthorised disclosure of confidential information relating to the company, its affairs or personnel will be treated as gross misconduct and may warrant summary dismissal.

53.7. Appendix C is at page 318. At page 320 we see examples of gross misconduct including, 1.3 breach of confidence and at 1.11 misuse of electronic information.

54. Mr Bachler says that he was not provided with these Appendices. That seems to us unlikely. They are referred to as being part of the document that is the contract of employment and even if they were not included in that document, he is on notice as to their existence having signed the contract itself. He was aware of their content.

55. The Company Handbook starts at page 280. It is acknowledged that the Company Handbook was not physically provided to employees and it was not provided to Mr Bachler. It was available on the intranet. It was not specifically signposted in any way that we were told and there is no evidence that Mr Bachler was told where to find the Company Handbook. That is poor employee relations practice. We find that Mr Bachler was not provided with the Company Handbook at the time, (he was later).

56. Mr Bachler's duties originally included, we find, firstly commercial projects; that is where clients were construction companies, house builders and the like and product was sold direct to the client rather than via an intermediary. These would involve the Respondent taking responsibility for project management of the installation of the product. His role also entailed dealership sales. The Respondent had their own and third party dealerships through whom product was sold direct to the public or to smaller construction business, typically for residential or smaller commercial properties. Mr Bachler would be involved in training the installers engaged by the dealerships. There were a small number of incidents of sales direct to the public by the Respondent.

57. Mr Bachler says that the work on commercial projects and dealership sales amounted to the same thing. The Respondent says not and that there were specific responsibilities in relation to commercial projects; such as responsibility for installation, bringing with it potential liability for problems in installation. We accept that the Respondent's distinction that being responsible for complex installations is a very different challenge to training and assisting dealers, where responsibility falls elsewhere.

58. The Team in which Mr Bachler worked consisted originally of Mr Witchelo who was Contracts Manager, a Mr Newbold who was Projects Sales Manager, a Mr Spires who was Project Manager. Mr Bachler held the title of Senior Project Manager / Surveyor.

59. In 2019 there was a significant reduction in project work and that remained the case throughout the remainder of Mr Bachler's employment. Such work did not significantly pick up. Evidence to that effect was given to the Tribunal by Mr Bachler's own witnesses, Mr Witchelo and Mr Smith.

60. On 18 February 2019 Mr Davies, the Operations Manager and Mr Bachler's then Line Manager, sent an email to Mr Ferrie, who was the Sales Director at the time, (page 1174). He referred to conversations that they had been having about Mr Bachler's future and referring to Mr Bachler currently assisting with service and warranty work in addition to ongoing project site work and also physically installing systems on a particular location. He writes that although Mr Bachler's job title is Senior Project Manager / Surveyor, it needs further discussion as it does not actually reflect their current work requirements. The email also refers to Mr Bachler's background on site work as being very valuable. It refers to Mr Bachler being willing to start work early, to work away from home and to work long hours without complaint. It refers to their trust in him and his skills. It refers to his salary as being quite high relative to his current position. It refers to one single project being the only project currently on order which would require Mr Bachler's involvement. Mr Davies goes on to write that he is unsure what work Mr Bachler will be doing from May onwards.

61. On 4 March 2019, Mr Ferrie wrote to the Commercial Director of the German parent company, Mr Roloff, (page 330). He wrote that there was value in keeping Mr Bachler as they had discussed in previous meetings, but in a different role and on a reduced salary. He proposes a salary of £40,000 per annum and suggests that if he is not prepared to accept that

as an option, they would need to think about making him redundant, as the role for which he was employed is no longer the role he was actually doing.

62. That brings us to the next page in the Bundle, page 331, this being the 2019 business case for redundancy document which previously Mr Bachler had said was fraudulent and which he now accepts is genuine. This refers to Mr Bachler's role as having been to co-ordinate the installation of projects, remaining on site during the duration of installation, supervising sub-contractors and ensuring projects on site ran smoothly. It refers to the project element of the business being found to be loss making. It refers to a downturn in project business. There are no new orders in the pipeline. It refers to survey requirements being covered by Mr Spires who was a qualified Surveyor, and they conclude that the role of Senior Project Manager / Surveyor is redundant. It refers to Mr Bachler's recent work being warranty and minor services and they suggest that he should be offered a role of Service / Warranty Engineer on a salary of circa. £38,000.

63. The decision makers were Mr Ferrie and Mr Roloff, who concluded that it should be explained to Mr Bachler that he faced potential redundancy but that he was offered alternative employment in the new role.

64. By 25 April 2019, Mr Bachler had decided to accept the proposal. Mr Davies wrote to Mr Ferrie on 26 April 2019 to say that Mr Bachler had agreed to accept the new role with the title Installation Training and Support. The annual salary was in fact to be £47,000; he had been offered £40,000 but had successfully negotiated £47,000. He was to receive pension contributions of 7% and was to be provided with a vehicle.

65. The agreed terms are set out in a letter dated 14 May 2019, at page 335.

66. Mr Bachler says that he agreed to this change on the basis that he was promised he would be able to return to the role of Senior Project Manager. That may perhaps be so, but it would have been on the basis that project work picked up and there was such work to be done as would justify that role.

67. As we have heard, we now know that at about the same time somebody else, KS aged 64, was also made redundant. She was not a Project Manager.

68. Mr Witchelo left the Respondent in January 2020. His title had been Contract Manager and he described his job as providing quotes to the Sales Manager and if those quotes were accepted by the customer, to administer the job to the point when it was ready to go live. Mr Smith was recruited to replace Mr Witchelo in March 2020 on a salary of £44,000 per annum, less, one should note, than Mr Bachler's salary. He was given the job title Project Manager. His role was primarily office based and would entail meeting customers, pricing jobs and doing all the work required in preparing for installation. Once they were ready for installation, he would hand over to Mr Bachler, who would supervise installation.

69. On the question of recruitment, Mr Smith came to be recruited when a

customer of his in his previous employment put the Respondent in touch with him. He submitted a CV and underwent two interviews before his appointment.

70. On 15 September 2020, Mr Bachler wrote to Mr Davies to express his surprise that he had been told by Mr Smith that he, Mr Smith, was the overall Project Manager. He had thought they were to work side by side as equals. This email is at page 337.

71. Mr Davies replied in clear terms to explain that was not the case, (page 336). The content of this letter pertains to Issue 5.3.1 and warrants a detailed recital so I will quote, Mr Davies wrote:

> "I explained very clearly that Jeff is employed by Solarlux as a Project Manager with overall responsibility for the projects Solarlux chooses to undertake. I explained that you would be responsible for the installation work on site as you did successfully with [naming two particular projects] and that this would require a close working relationship with Jeff.
>
> It is unfortunate that there has clearly been some misunderstanding but I am happy to clarify the roles and responsibilities again in order to help avoid any further confusion. …
>
> Thank you for taking the time to outline how you see your role and responsibility going forward and I will have a look at this in the coming days. In the meantime, I would like to clarify that your current role and responsibilities that have worked so well during the past 18 months continue unchanged with addition of your assistance to survey the direct sales orders as you were doing this afternoon and the start of your re-involvement of the project business with Jeff. I see this only as a step forward? …
>
> I appreciate that you are excited at the prospect of becoming involved in project work again and after the recent void in project work, and I would do everything I can to encourage and assist with this but it cannot be at the expense of the work you have been doing during the past 18 months and the work you will continue to do for the future.
>
> We are collectively experiencing the next period of adjustment at Solarlux with recent emergence of project business and direct business but we also have our existing work to maintain and your involvement on site installation, training, warranty work and case service work is an essential part of that."

72. Mr Bachler says that Mr Davies tried to prevent him from attending a meeting with an important customer who we will call M1. There is no documentary evidence on this, or none that we were referred to. We have Mr Bachler's account beginning at paragraph 189 of his witness statement, which is not contradicted by any evidence from the Respondents. Mr Bachler produced a witness statement from a Mr Walton, who did not attend the hearing. He was at the time working under the title Project Sales Manager. We have had to treat his witness statement with circumspection, not just because he was not here to have his evidence tested, but also because one of Mr Bachler's other witnesses, Mr Witchelo, was not entirely happy with the witness statement Mr Bachler had apparently produced on his behalf and also because we

heard that Mr Smith's witness statement had left out some important and relevant information.

73. Mr Walton's witness statement on the issue was hearsay. He just recited what he said he had been told by Mr Bachler about Mr Davies' attitude on this question.

74. The meeting with M1 was set for 10 September 2020. Mr Walton asked Mr Bachler to speak to Mr Davies and asked if he, Mr Bachler, could attend that meeting. Mr Davies told Mr Bachler that he, Mr Bachler, was too busy. Mr Bachler then asked Mr Ferrie to intervene, which he did and as a result, Mr Davies changed his mind, writing as Mr Bachler himself quotes in his witness statement at paragraph 203,

> "Walter offered to attend the meeting with Rob. All is good. The earlier Walter can get involved with these larger projects, the better it will be for us and also for the client. … I am very encouraged by this sort of internal discussion and co-operation between our colleagues."

75. On 3 November 2020, there was an email exchange between Mr Davies and Mr Bachler about his attending another meeting with prospective customers. These begin at page 422. One has to scroll upwards. Mr Bachler suggests on 3 November 2020 to Mr Davies that he should attend a site meeting, (this is not with M1, it is with somebody else) and Mr Davies replies to say that he understands and says that so long as it does not affect his work on something else, he is content for him to join that other meeting, although he invites him in the future to direct his queries to Mr Smith.

76. We then see later on 3 November 2020, Mr Bachler writes to Mr Smith copying in Mr Davies, to say that he had agreed that he would be attending this particular meeting and makes reference to them both being Project Managers. In the footer of his email he has inserted as his job title, 'Project Manager'.

77. Mr Davies wrote to him on 4 November 2020,

> "I want to make it clear yet again that Jeff is the Solarlux Project Manager not a QS and your role is installation, training and support which also involves the management of all installation work.
>
> From my perspective the division of roles and responsibilities between you and Jeff are crystal clear but being honest, I am growing increasingly concerned that you think otherwise. Please feel free to call me if this is not an accurate representation of your role because we can't keep having these conversations about roles and responsibilities every time a new project is secured.
>
> Whilst we are on the subject of roles and responsibilities, at some point around 8 October you decided to add Project Manager to your job title without consultation. I wasn't intending to mention this but given the above I am interested to know why you felt this was necessary. … Without doubt your skills and experience are a great asset to Solarlux project work, so too are Jeff's but you, Jeff and I need to work together coherently for obvious

reasons. If you don't / can't agree on the roles and responsibilities that are already being clearly defined, then that is a problem."

78. Mr Bachler also complains, Issue 5.3.3, that Mr Davies reprimanded him for contacting the contractors that might be involved in another project with a customer, N2. There are no documents on this either. Mr Bachler gives an uncontradicted account at paragraphs 206 – 215 of his statement. He says that Mr Davies reprimanded him for contacting installers on a prospective project in Scotland known as N2, telling him that this was Mr Smith's role. We find Mr Davies probably did reprimand him; that would be consistent with Mr Davies email of 4 November 2020 quoted above.

79. In his witness statement at paragraph 2.1.6 Mr Bachler says that he spoke to Mr Ferrie, Sales Managing Director, complaining about Mr Davies' management style and said that he wanted more autonomy. He says that Mr Ferrie agreed that he could amend his title to Project Manager and he says that he followed this up with an email to Mr Ferrie on 14 January 2021, proposing a reorganisation which would place him as Senior Project Manager over the rest of the team, (page 423).

80. Mr Ferrie replied on 9 February 2021, (page 342) confirming it was agreed that Mr Bachler's new job title would be Project Manager (Installation Support and Training). He writes that Mr Bachler is to work alongside Mr Smith and they are to fully support each other, but he is to understand that Mr Smith will have overall responsibility for delivering all Solarlux projects and his Line Manager is Mr Davies.

81. On 7 May 2021, (page 358) Mr Bachler wrote to Mr Davies setting out his case for a pay review and reinstatement to his previous role of Senior Project Manager. In particular, at point 3 of that letter, (page 359) he writes that his job title had been changed in January 2020 to Project Manager, even though he had been operating at a more senior level than his pay grade for many months. He was now seeking a salary of £58,000 per year as a minimum. This was calculated at the rate of £55,000 from his previous Senior Project Manager role with an uplift of 2% to reflect inflation. He says he appreciated that a £10,000 hike in pay may seem high, but he emphasises it is not a request for a pay rise from his previous role but in the ballpark for the new senior role that he wants to be reinstated to.

82. This is a convenient point to record the turnover figures for project work at the Respondent set out in the Grounds of Resistance, which were put to Mr Bachler and which are not disputed, those figures are in relation to the relevant period:

- 2017 – £1,300,000;
- 2018 – £600,000;
- 2019 – £400,000;
- 2020 – £175,000;
- 2021 – £438,000;

- 2022 – £62,000; and
- 2023 – £97,000.

83. Mr Bachler says these figures do not include dealership work, which requires project management and which work was buoyant.

84. Mr Bachler's email of 7 May 2021 to Mr Davies was forwarded to Mr Ferrie and then to Mr Doedtmann by Mrs Claire Milazzo, who worked in accounts at the First Respondent. She passed on information about his remuneration history.

85. On 26 May 2021, Mr Bachler wrote to Mr Davies, (page 386). They had obviously had a conversation about his pay review, he was pleased that things were moving forward and he expressed his concern about his pay review being considered by accountants, a reference to Mr Doedtmann. He sees accountants as, "bean counters" and refers to somebody called Daniel who is, he thinks, likely to drive down any salary increase in order to save costs.

86. We see Mr Davies' reply (page 385) in which he expresses his understanding that Mr Bachler might be concerned about a salary review conducted by bean counters. It refers to his setting up a meeting with somebody called Bjorn to discuss the salary review.

87. On 27 May 2021, Mr Davies writes to Mr Bachler that he has a meeting with Mr Doedtmann on 3 June 2021 regarding the salary review.

88. On 7 June 2021, (page 393) Mr Bachler wrote to Mr Holtgreife and to Mr Kaus Roloff suggesting, it seems, that a meeting had been set up with Mr Holtgreife. He says,

> "I look forward to catching up with you tomorrow morning to discuss my pay review."

89. What was in fact scheduled for the next day was a company wide or group wide Teams meeting, at which Mr Holtgreife was to be present. He asks for a short time on his own with Mr Holtgreife to share some of his thinking with regard to his pay review request.

90. So, there was a whole company wide remote meeting by Teams on 8 June 2021. At the end of that meeting, Mr Doedtmann stayed online to speak directly to Mr Bachler. He explained that he would deal with Mr Bachler's request for a pay review, but that he would also need to involve Mr Davies in a meeting to discuss the same. Mr Bachler portrays this as a pay review meeting that did not go ahead and was abandoned by Mr Holtgreife. It was not set up as a pay review meeting. Mr Doedtmann just said that he would discuss the matter with Mr Davies and get back to him. There was no pay review meeting set up with Mr Holtgreife.

91. On 16 June 2021, Mr Davies chased Mr Doedtmann for an update (page 396) and then on 29 June 2021, Mr Bachler chased Mr Doedtmann, (page 397). With that email he forwarded a list of projects that he had been provided with by Mr Walton. We heard evidence about that from Mr

Smith, because it looks like there is a lot of projects in the pipeline. Mr Smith explained that they priced for a lot of projects, but very few of them came to fruition. In respect of those appearing in this particular case, of six referred to, only two became confirmed orders.

92. A meeting does go ahead with Mr Doedtmann on 20 August 2021. Mr Doedtmann agrees that in this meeting, he told Mr Bachler that he would not be able to award him a pay rise due to a lack of project works and that he was already on a very good salary. Mr Bachler says he was told that he was at the top of his pay band. There are no pay bands, so that seems unlikely, but if he did say such a thing, it was probably a language miscommunication. Mr Bachler followed up that meeting with an email, (page 403). There he wrote that he was not after a pay increase, but he was after reverting to his previous role as Senior Project Manager on a commensurate salary of £55,000 per annum. Mr Doedtmann replied that he was going to have a conversation with Mr Holtgreife and Mr Roloff and that he would get back to him.

93. There was a further follow-up email from Mr Bachler to Mr Doedtmann on 10 September 2021, (page 404) in which Mr Bachler refers to their previous conversation, in which he quotes Mr Doedtmann as having said to him he did not know what value he brought to the Respondent. He then proceeds to set out some arguments in that regard. This corroborates Mr Bachler's allegation that in a meeting on 20 August 2021, Mr Doedtmann said he did not know what value Mr Bachler brought to the First Respondent. Mr Doedtmann accepts that he may well have said that and he explains that English is not his first language, it was a language miscommunication and he did not mean it in the pejorative sense, but in the genuine sense of his not having clear understanding of the role that Mr Bachler performed for the Respondent.

94. On 10 September 2021, Mr Doedtmann met with Mr Holtgreife and Mr Roloff to discuss Mr Bachler's request for a pay review / role review and for Mr Doedtmann to give to them feedback on his meeting with Mr Bachler. The outcome of the discussion between those three was that they agreed to increase Mr Bachler's salary by £3,000 per annum as a gesture of goodwill so that his new annual salary would be £50,000. Mr Doedtmann arranged to meet with Mr Bachler on 27 September 2021. There are no notes of that meeting. Mr Doedtmann proposed that this increase in salary should be back dated to 1 September, Mr Bachler objected that the backdating should be to 1 May and Mr Doedtmann agreed.

95. There was a follow up email, (page 344) in which Mr Bachler thanks Mr Doedtmann for his time and expresses that he is pleased they had come to a satisfactory conclusion with regard to his pay review. Final confirmation is provided by the Respondent in a letter, (at page 345).

96. We note that there is now a two year gap between any matters pertaining to the issues in this case, namely allegations of discrimination.

97. We pick things up again on 1 August 2022. Mr Scott Leeder was appointed to the Respondent as Sales Director. He conducted what he

calls an 'inner review' with those working for him, including Mr Bachler. The note of this is at page 444 and we see that question 17 asks Mr Bachler what he would do when he retires, (not a particularly wise question to have asked). Mr Bachler was clear in his reply that he does not want to retire for a while.

98. Mr Bachler wrote to Mr Leeder on 23 January 2023, (page 429). He wrote proposing a new role for himself.

99. Mr Harrison joined the Respondent as Operations Manager on 15 May 2023. (Mr Smith had been acting up in that role, but was unsuccessful in applying for the post.) Mr Harrison formulated a plan for a revised structure. There is a portrayal of this, (page 1445) where we see roles proposed 'Project Sales Manager / Sales Manager' and 'Field Project Manager'.

100. Mr Bachler alleges that the role of Field Project Manager was offered to Mr Smith. We find that Mr Harrison did not offer the role to Mr Smith, but he did tell him that he thought that he would be best suited for the field based Project Manager role that he had in mind for the new structure that he was formulating, (page 1445). It is a role that Mr Smith did not want. He did not want to be field based and he could see that was the way, "the wind was blowing" and that his own role was at risk. He found other employment at the end of June 2023.

101. Mr Spires was promoted in June 2023 to Technical Manager.

102. In April 2023, Mr Bachler sought a meeting with Mr Leeder, looking for reinstatement to his previous role or title, (page 412 and 411). They had apparently had a discussion on Teams and Mr Bachler writes to Mr Leeder that it was not about pay review, apologising if there is any confusion, but what it was about was reverting to his previous role as Senior Project Manager, which is at a higher pay grade.

103. Mr Leeder replies on 7 April 2023, saying that he is more than happy to meet to discuss this, but it should be face to face and there should be an agenda, describing the situation as frustrating. He goes on to write,

> "One thing I would like to make clear at this stage before we do move forward is that we do not currently have a need for the position you mention. Which is probably why your position has changed in the past."

104. On 22 May 2023, Mr Bachler sent an email by mistake to Mr Leeder. It was intended for another Scott, who was the builder working on the home of some friends of Mr Bachler, the Connolly's, (page 441). The subject matter of the email is Mr and Mrs Connolly and their home, 28 Sheldon Road, Chippenham. It is an email discussing the design for a kitchen to be installed in those premises. It was been sent from Mr Bachler's work email and at the footer he has signed it off "many thanks, Waller (BAC Construction)". He gives a mobile telephone number which is the mobile number of his work telephone. Below that is another email to some kitchen designers in which Mr Bachler describes Mr and Mrs Connolly as his client and which he again signs off, this time as "Walter Bachler (BAC Construction)" with the same mobile telephone number.

105. A couple of days later on 24 May 2023, he emailed Mr Leeder, having realised the mistake he had made. He wrote,

> "My apologies for copying you into this email in error, I am helping my good friends to get a new kitchen as they used to be in the trade and do it FOC as otherwise they would struggle."

106. In the meantime on 12 June 2023, Mr Bachler wrote to Mr Leeder, (page 409) with an agenda for their meeting. The meeting took place on 3 July 2023. Notes of the meeting are at page 413. In attendance were Mr Leeder, Mr Harrison and Mr Bachler. Mr Bachler went through his employment history and he referred to his desire for reinstatement to his previous role. Mr Harrison explained there is a new role that they had in mind, Field Project Manager, which they expected to start at the beginning of 2024. It would be open for people to apply to and Mr Bachler was told that he would be welcome to apply.

107. They discussed the potential recruitment process for the new role, Mr Leeder told Mr Bachler that he researched salaries in the industry, he called it a salary range review and he said that Mr Bachler was already paid more than the role he performed warranted.

108. At the end of the meeting, Mr Harrison brought up the email that had been sent to Mr Leeder from BAC Construction and that it had been discussed in the background. He indicated that it was something that they would need to investigate.

109. The pay scales that Mr Leeder referred to in that meeting, (page 416) were a pay range for a Project Manager in the windows and doors industry from £30,000 to £65,000 and the pay range for installation training and support roles in the industry from £25,000 to £45,000.

110. Mr Bachler followed up this meeting with an email to Mr Harrison and Mr Leeder on the afternoon of 5 July 2023, (page 471). He sets out his arguments as to why he believes that he should be reinstated to his old role.

111. It is after this meeting on 3 July 2023, Mr Bachler says Mr Smith told him this new job had been offered to him and referred to it allegedly as largely Mr Bachler's old role. Our finding is that Mr Smith was not offered the role. It was explained to him by Mr Harrison that he was reorganising and that Mr Smith's role was likely to go also, that Mr Smith might be suited to the Field Project Manager. The role would have involved some of what Mr Bachler did and he told Mr Bachler about that.

112. At the end of June 2023, Mr Smith resigned.

113. We move on then to the dismissal. Because Mr Harrison had mentioned investigating the circumstances surrounding the BAC Construction email, Mr Bachler prepared his own Investigation Report and sent it to Mr Leeder on 5 July 2023, (page 453). The report itself begins at page 454. He refers to occasional phone calls from the office which are the exception and the occasional email sent in office hours. He explains that he reopened an account with the kitchen suppliers Howdens so that he could

place a wholesale based order with them. Under a heading 'Complete Transparency' he wrote,

> "I would be very happy for Scott to take my laptop and look at my emails etc. to check this out for himself and to verify the above statements."

At the end of his report, Mr Bachler apologised unreservedly for taking up senior management time to complete this investigation.

114. Mr Bachler agreed in cross examination that he deleted a number of emails; exactly how many is disputed but it is not disputed that Mr Bachler deleted emails on 3 July 2023, the day that he was informed that he was going to be investigated and before he wrote his report. The report is dated 4 July 2023.

115. On 6 July 2023, Mr Bachler was invited to an investigatory meeting, (page 476). This refers to the concern being that he was working for another company inside of his working times for the Respondent and nothing else.

116. From Germany, Mr Doedtmann investigated Mr Bachler's emails, using the Respondent's server. He reported to Mr Leeder on 10 July 2023, (page 477). He reports finding 150 deleted emails. He reports from reviewing those emails, that Mr Bachler seemed to be mostly working for friends but said that it did not seem to be just in relation to a kitchen, rather to a complete house extension. He refers to finding more than a hundred deleted emails in relation to that project. He found a few emails regarding the kitchen which had been left in the inbox where he, Mr Doedtmann could easily find them. He said that it looked as if Mr Bachler had used his company email address to apply for other employment, that he had attended an interview during the working day, that he had sent a lot of emails to his wife for the apparent purpose of correcting his English but that he had also forwarded internal emails to his wife.

117. The next day, (page 479) Mr Doedtmann sent some uploaded emails to Mr Leeder, which included CVs and Mr Bachler offering his services on another project. Mr Doedtmann prepared a spreadsheet of deleted emails which is in the Bundle beginning at page 985; without counting them it looks like there are over 200 of them.

118. On 31 July 2023 at 20:23, Mr Bachler attended an investigatory meeting with Mr Leeder, (the notes of which are at page 458). The key points from this investigatory meeting are:

118.1. That Mr Bachler said that he never thought about asking the Respondent if it was okay for him to do some work for his friends,

118.2. That he had found it easier to use the company email rather than his own Gmail account,

118.3. What he was doing was not illegal and that he did not think he had done anything wrong.

118.4. He admitted that the work he was helping with included an extension with a bedroom upstairs.

118.5. It was noted that from January 2023 there had been 146 emails about Sheldon Road, of which 99 had been deleted. Mr Bachler wanted to see the emails and what time they were sent, but that information was never provided to him.

118.6. He did not acknowledge nor see that there was a problem with his leaving the Respondent's footer in some of his emails, because the work he was doing was voluntary and not commercial.

118.7. When asked about the deletions he had made in the context of offering his laptop for inspection, apparently undermining the investigation, the point being made the deletions were not mere deletions, they were deletions from the deleted file, he said that he was just trying to tidy things up as he was transitioning to use his own Gmail account. He acknowledged he could see the Respondent's point.

118.8. In relation to job hunting and emails to his wife, he said that his wife helped him with sense checking his written work because English was her first language, he also said it was not illegal to look for another job.

118.9. With regard to the suggestion he had sent during the investigation time period, 39 emails during office hours, he referred to the fact that he had an hour for lunch and he would need to see the emails to see when they were sent before he made comment.

118.10. It was suggested he had attended a job interview on 24 April 2023 during working hours and he said that he had done that during a late lunch.

118.11. He was accused of attending none work related site meetings on 28 April 2023 and 24 May 2023 during office hours; he asked for the timings so that he could check, referring to his lunch break.

118.12. It was put to him that the work he had assisted with in relation to Sheldon Road was much more than just a kitchen, that it would have taken up a lot of his time and would place him in breach of his contract with the First Respondent. He said that he did this work after hours, during the weekends and during his lunch break.

118.13. He acknowledged why the Respondent felt the need to investigate.

119. Mr Leeder produced an Investigation Report, (page 485). There are eight key points:-

119.1. That in relation to Sheldon Road 146 emails had been identified during 2023, including 99 that had been deleted, they related to management of the project and they were more than the odd email Mr Bachler had referred to in his own Report.

119.2. That emails had been sent using the Respondent's footer, implying the Respondent's involvement.

119.3. Mr Bachler deleted emails in the context of his inviting the Respondent to review his email account.

119.4. There were 35 emails relating to either Mr Bachler job hunting or personal emails to his wife.

119.5. There were 39 emails sent during working hours and 37 received.

119.6. That on 24 April 2023, he had attended for a job interview during working hours.

119.7. That on 28 April 2023 and on 24 May 2023, he had attended site meetings at Sheldon Road during working hours.

119.8. That whilst Mr Bachler said the work at Sheldon Road was a favour for a friend, it seemed to be a significant project, more than just a kitchen and it would have taken up a lot of his time placing, him in breach of his contract.

120. Mitigating factors were noted. Mr Bachler worked long hours away from home, he had never had a day off sick, he had worked for the Respondent for many years and he had always thought that some emails could permissibly be sent during work time.

121. On 4 August 2023, Mr Bachler was summonsed to attend a disciplinary hearing on 11 August 2023. The letter, (page 492) sets out three charges as follows:

> "1. Your behaviour / negligence has resulted in a fundamental breach of your contractual terms that irrevocably destroys the trust and confidence that is required as an employee.
>
> 2. Unauthorised use of the company's email system.
>
> 3. Not using best endeavours to promote the interests of the business during normal working hours, to devote the whole or your time, attention and abilities to the business and its affairs."

The letter refers to in closing, points 1 – 8 of the Investigation Evidence Summary, nothing else.

122. Mr Harrison could not remember what he had sent with the summons letter. We take the letter at its face value, what was sent to Mr Bachler was an exert from the Investigation Report setting out items 1 – 8 as we have just referred to. He was separately sent a copy of the Handbook, (page 493).

123. Mr Bachler became ill. He obtained a Fit Note from his doctor, (page 496) which certifies him as not fit for work due to work related stress for the period 8 August – 4 September 2023, (pages 496). We see an email, (page 495) from Mr Bachler to Mr Harrison referring to the Fit Note attached and requesting that the disciplinary hearing be postponed until

after his return to work on 4 September 2023. Mr Leeder, Mr Harrison, Mr Doedtmann and a Mr Homma, (International Sales Director) discuss this request and decide to proceed with the disciplinary hearing, but to hold it by Teams instead.

124. Mr Leeder says that he was told by another employee that Mr Bachler was continuing to work, even though he was signed off as unfit. The employee in question had received a telephone call from Mr Bachler. Mr Leeder did not put this to Mr Bachler or suggest to him that this indicated he was fit to attend the disciplinary hearing.

125. There is an example of Mr Bachler continuing to work at this time, (page 1238). This was an email he wrote to a customer on 8 August 2023 at 15:12 referring to a telephone conversation.

126. The Respondent notified Mr Bachler that the Disciplinary Hearing would now proceed as a Teams meeting on 11 August 2023, (page 500). Mr Bachler replied, (page 499) saying he did not think it was either fair or reasonable to expect him to attend a disciplinary hearing when he was unwell. Mr Harrison replied on 10 August 2023, (page 498) reiterating that the disciplinary hearing would proceed on 11 August 2023 by Teams and that his attendance was required. Mr Bachler replied, (page 498) protesting the unfairness of that and making reference to the ACAS Code of Practice, with reference to the guidance that,

> "A disciplinary procedure can be stressful and it is important that employers consider the wellbeing and mental health of its employees during the disciplinary procedure."

127. Mr Harrison proceeded with the disciplinary hearing in Mr Bachler's absence on 11 August 2023. He then sent an email to multiple parties, (page 502). He refers to recording the meeting for ten minutes to demonstrate that Mr Bachler did not attend. He asks for confirmation that the outcome letter can be issued and that the next step will be to dismiss Mr Bachler, "on the finding of the circumstances in the letter issued for the disciplinary hearing, (attached)". Once confirmed, he says he will issue the letter to Mr Bachler.

128. What happens next is that the same four individuals: Mr Leeder, Mr Harrison, Mr Doedtmann and Mr Homma had a meeting, discussed the situation and agreed between them that Mr Bachler should be dismissed. The outcome was confirmed in a letter of 14 August 2023, (page 506). The reasons given for why he was dismissed were the three reasons, cut and pasted, that had been set out in the summons to the disciplinary hearing.

129. On 22 August 2023, Mr Bachler says his wife prepared a very detailed document setting out allegations of age discrimination, (page 1109).

130. On 29 August 2023, Mr Bachler set out his appeal, again in a lengthy and extensive document that he said was prepared by his wife, (pages 1093, 1094 and 1096).

131. On 5 September 2023, Mr Bachler was invited to an appeal hearing on

15 September 2023, (page 1114). The hearing was subsequently rescheduled for 21 September.

132. Mr Bachler provided another lengthy document, (page 1116) in response to the Investigation Report and another, (page 1122) setting out the ACAS rules he says were not followed.

133. On 14 September 2023, Mr Bachler wrote, (page 1125) that he could not attend the appeal hearing on 21 September 2023 because he was seeking a new job and he needs to be available during the day, he said he was therefore unable to commit to daytime activities for the foreseeable future. He wrote that if the appeal is to be upheld, he does not want reinstatement to his previous position because it would not be possible for him to have trust and confidence in the Respondent as an employer. His final paragraph reads as follows:

> "As previously explained in my letter to Mr Leeder of 29 August I wish for the Appeal to be heard on the basis that I be given the opportunity to present my side of the story. However, if you are unable to proceed on this basis, then I regret to inform you that I will need to withdraw my request for an Appeal as I do not wish to be reinstated for the reasons outlined above."

134. Mr Bachler chases for a reply on 2 October 2023, (page 1127). Mr Homma proposes a grievance hearing on 3 November 2023, in a letter of 26 October 2023.

135. On 29 October 2023, Mr Bachler asks for the grievance to be dealt with in writing, (page 1128). The Respondents decline.

Conclusions

Direct Age Discrimination

136. Mr Bachler was aged between 60 and 64 at the relevant time. He places himself in the category of those aged between 60 and 65 and says that he was less favourably treated than a hypothetical comparator aged less than 60.

137. Mr Wilson rightly accepted that the Claimant's named comparators, Mr Spires and Mr Smith, were not actual comparators because their circumstances were materially different in that they were in different roles. A hypothetical comparator would have been in the same position as the Claimant, with the same skills and abilities, but aged less than 60. Mr Wilson submits that the way the comparators were treated should, however, be taken into account by the Tribunal in deciding how the hypothetical comparator should have been treated. That is permissible, see The Chief Constable of West Yorkshire v Vento.

138. Mr Spires was approximately 15 years younger than Mr Bachler and had been employed as Project Manager from six months before when Mr Bachler joined. His main role was to complete pre-installation surveys and draw up plans using Auto Cad. He was a qualified Surveyor. Mr Smith was also approximately 15 years younger than Mr Bachler, he replaced Mr Witchelo who had been Contracts Manager and Mr Smith was given the

title of Project Manager.

Issue 5.1

May 2019 relating to redundancy.

139. Notwithstanding the lack of evidence from decision makers at the time, we are satisfied that there was a genuine redundancy situation. The business case for redundancy document was persuasive. It was backed by the Meta Data and it looks genuine. Mr Bachler had to concede it was genuine after the late disclosure of 2019 email correspondence. The late disclosure of those emails, given that the Respondents knew the provenance of this document was disputed, reflects poorly on the First and Second Respondents. However, Mr Bachler's own witnesses confirmed that project work had diminished substantially and remained at a low level throughout.

140. Mr Bachler accepted the offer of alternative employment at the time. He did not complain that the options presented to him in 2019 amounted to age discrimination until after he was dismissed.

141. In respect of KS, we do not know what role she was in. Mr Bachler knew that she had been made redundant at or about the time that he was and he knew her approximate age. He did not complain of age discrimination at the time and it was not part of his pleaded case that her redundancy indicated a pattern of age discrimination. The Respondent has not provided evidence on KS's circumstances because that was not part of the case it had to answer. We cannot draw on this as something that might swing the burden of proof.

142. Mr Wilson points to the comparative treatment of Mr Spires. The bulk of Mr Bachler's work had been project management of installations on site, Mr Spires was not. Mr Bachler could not have done Mr Spires' job; he was not a qualified surveyor. They could not have been placed in the same pool for selection for redundancy. The evidence was, in fact, that Mr Bachler was a valued employee and the Respondent wanted to keep him. See Mr Ferrie's email of 18 February 2019, (page 1174) and the fact that the role offered was with a salary of £40,000: the Respondent agreed ultimately to pay him £47,000 when he indicated he was going to take the redundancy option.

143. We find that there are no facts from which we could properly conclude that Mr Bachler was given the option of either redundancy or demotion because of his age. The hypothetical comparator would have been treated the same way.

Issue 5.2

February / March 2020 concealing the Project Manager role.

144. Mr Bachler complains that the First Respondent concealed from him a Project Manager role and recruited Mr Smith into that role behind his back.

145. It would be odd to approach Mr Bachler and invite his interest in a role that

was going to be paid less than what he was on and that would entail losing his company vehicle and receive a lower pension contribution, particularly in the context of his just having taken a pay cut to avoid redundancy. Mr Smith's role as he described it to us, seemed to be the same as that of Mr Withchelo, the only difference being that he was given the title Project Manager.

146. There is no evidence of concealment and we find there was no concealment.

147. Mr Bachler did not complain at the time that the difference in treatment was that of title only and that was not less favourable treatment. Mr Bachler was treated more favourably than Mr Smith in the terms of his remuneration package. There are no facts from which we could properly conclude, absent explanation, that the reason Mr Smith was given the title Project Manager was that he was younger.

Issues 5.3, bullet points 1, 2 and 3

In September 2020 Mr Davies did not assist Mr Bachler in becoming involved in project work, that Mr Davies was in September and October 2020 trying to prevent him from attending meetings with M1 and that on 16 November 2020 he reprimanded him for contacting contractors regarding M2.

148. The email of 15 September 2020, Mr Davies to Mr Bachler, (page 336) shows that on signs that project management work might be picking up, Mr Davies was in fact encouraging Mr Bachler to be involved in project work in addition to his existing duties.

149. Mr Davies did not try to prevent Mr Bachler from attending the M1 meeting. He was unhappy to begin with because he felt Mr Bachler had other commitments but when the need was explained to him, he relented and was encouraging.

150. Therefore the first two allegations are not upheld on the facts.

151. Mr Davies probably did reprimand Mr Bachler for contacting contractors on the M2 work because that was contrary to the instructions Mr Davies had previously given him about his job role. It was a reasonable thing for Mr Davies to have done. There is nothing to suggest that it was because of Mr Bachler's age.

152. There are no facts from which we could properly conclude, without explanation, that the hypothetical comparator would have been treated any differently and that the reason for reprimand was Mr Bachler's age.

Issue 5.4

November 2020 onwards not reinstating Mr Bachler and putting him in a position that he was subordinate to Mr Smith.

153. There was no significant upturn in project based work. The work was not there to warrant reinstatement to Mr Bachler's old role. Mr Davies made

the distinction in his role from that of Mr Smith clear in his email of 15 September 2020, (page 336). Mr Smith did have overall responsibility for delivering of projects and that was also confirmed in Mr Ferrie's email of 9 February 2021, (page 242). It is not suggested that Mr Bachler was subordinate to Mr Smith. It is a matter of allocation of duties in light of the demands of the business at the time.

154. There are no facts from which we could properly conclude, absent explanation, that Mr Bachler was not reinstated to his old role because of his age, nor that any perceived distinction in status or title or in the allocation of duties was because of his age.

Issue 5.5

Mr Holtgreife passing the pay review onto Mr Doedtmann on 7 June 2021.

Issue 5.6

That on 20 August 2021, Mr Doedtmann said to the Claimant that he did not know what value he brought to the company and refused a pay rise.

Issue 5.7

That on 19 October 2021, when giving a pay rise of only £3,000 Mr Doedtmann had attempted to back date it to September 2021 only and would not reinstate Mr Bachler to Senior Project Manager.

155. Mr Holtgreife was never seized of the question of Mr Bachler's pay review. It was always to be dealt with by Mr Doedtmann. There was no arrangement in place whereby Mr Bachler was to meet Mr Holtgreife on 7 June. The pay review took three months for reasons other than that Mr Doedtmann dealt with it rather than Mr Holtgreife.

156. Allegation 5.5 is not made out on the facts.

157. Mr Doedtmann accepts he may have used the words quoted at Issue 5.6 but there are no facts from which we could properly conclude that the reason he used those words were because of Mr Doedtmann's age and in any event, we accept Mr Doedtmann's explanation that he meant to refer to the quality of the Claimant's work and what he did for the Respondent and that this was a language issue.

158. Mr Doedtmann did refuse Mr Bachler's pay rise in August 2021. There are no facts from which we could properly conclude that was because of Mr Bachler's age and in any event, we accept Mr Doedtmann's explanation that he took the view that the salary Mr Bachler was on in 2021 was commensurate with the job that he was doing.

159. The October 2021 agreed pay rise was favourable treatment because the Respondent's assessment was that Mr Bachler was already being paid the correct salary. It was an increase in salary that was more generous in percentage terms than the increases Mr Spires and Mr Smith received subsequently in January 2022.

160. We accept Mr Doedtmann's evidence that whilst he may have made a mistake and suggested the back dating should be to September 2021, he immediately agreed when asked that it should be to May 2021. That is not unfavourable treatment.

161. In respect of both these matters, the hypothetical comparator would have been treated the same way. It was not less favourable treatment. There are no facts from which we could have concluded otherwise, absent explanation from the Respondents.

162. There was insufficient project work to warrant reinstating Mr Bachler to his previous role. There are no facts from which we could properly conclude, absent explanation, that the failure to reinstate Mr Bachler to his old role had anything to do with his age. It was all to do with the work that was available.

Issue 5.8

That on 3 July Messrs Leeder and Harrison did not give him a pay rise, referred to him as being contracted to do such work as necessary and said he was at the top of his pay grade.

163. The question of pay and status re-emerges then two years later. As the undisputed figures (page 77) show, after an increase in project work in 2021 to £438,000 turnover, it had dropped again in 2022 to £62,000 and remained low evidenced by the 2023 figure of £97,000. The situation remained, therefore, that there was no business case for expanding Mr Bachler's role and remuneration to that which he performed and received during his job before it was changed in 2019.

164. Mr Leeder reviewed the industry salaries, (page 416). In respect of the role for which Mr Bachler was employed, (not the role he would have been capable of had the role been there) the top end of the industry standard was £45,000 and Mr Bachler was on £50,000. When Mr Leeder told Mr Bachler on 3 July that he was over the top end for his current role and that there would be no salary increase for him, he was entitled to say so and he had reason to say so. Mr Harrison was entitled to link his pay and his position to the needs of the business.

165. There are no facts from which we could properly conclude, absent explanation, that what was said to Mr Bachler in the meeting on 3 July about his role and his pay had anything to do with his age. The same would have been said to the hypothetical comparator.

Issue 5.9

(which comes before 5.8 in terms of timing)

Before 3 July 2023 meeting proposing to Mr Jeff Smith that he take on a major part of the Claimant's role.

166. Mr Harrison reviewed the Respondent's structure and produced the proposal at page 1445. It was formulative, he showed Mr Smith and suggested to him that he would be best suited to the field based Project

Manager role. He did not propose he take on the role. Mr Harrison also told the Claimant about the role in the meeting on 3 July 2023 and he told him that he would be able to apply for it.

167. Mr Smith told us in his witness statement that although he had seen his name penciled-in against Field Based Project Manager Domestic, he had also seen the Claimant's name penciled against Field Based Project Manager Commercial.

168. There is no less favourable treatment. To be clear, it was not the Claimant's old role that was being created here. There was still very little project work and in respect of the role that was being created, Mr Bachler was told he could apply for it. Mr Smith could also apply for it. There are no facts from which we could properly conclude without explanation, that age had anything to do with the approach Mr Harrison took to discussing the potential new role with Mr Bachler and with Mr Smith.

Issue 5.10

The disciplinary proceedings, the investigation and the decision to dismiss.

169. The disciplinary investigation and proceedings were not spurious. The Respondents had cause to be concerned. They were entitled to investigate and they were entitled to decide that what they had found gave good cause to instigate disciplinary proceedings. There are no facts from which we could properly conclude, absent explanation, that Mr Bachler's age played any part whatsoever in the Respondents' decision making in respect of the investigation, the disciplinary process and the decision to dismiss. In any event, we accept the Respondents' explanation for all of the steps that it took in this regard, which were because of the misconduct it uncovered.

170. For these reasons the complaint of direct discrimination because of age fails.

Unfair Dismissal

171. We find that the agreed reason for dismissal in the mind of the multiple decision makers, was conduct.

172. Was such belief reasonably held after conducting a reasonable investigation?

173. There was a thorough investigation. To begin with, they investigated the emails. They invited Mr Bachler to and held an investigatory meeting, where they discussed their concerns face to face and noted his answers. The investigation resulted in queries being raised by Mr Bachler. He wanted to see all the emails the Respondent was referring to so that he could see what was the date and time of the emails sent, so that he could respond to accusations that he was working during the Respondent's time, so that he could respond to the criticism that he was copying emails to his wife, so that he could see how many there were in truth and respond to the implication that he was being dishonest in the deletions he had made, so that he could respond to the suggestion that he had attended job

interviews and he had visited Sheldon Road during working hours.

174. The Respondent did not provide the copies of the emails at the preliminary hearing, nor afterwards, so Mr Bachler did not have the opportunity to respond.

175. Even if the Disciplinary Hearing went ahead with Mr Bachler's attendance or at a later stage, an outcome of dismissal would not have been fair without his having the evidence in advance. See the ACAS Code of Practice at paragraph 9.

176. The refusal to postpone the hearing in light of Mr Bachler's illness compounded the unfairness of the process being followed. The Respondent made no attempt to investigate whether Mr Bachler was fit to attend, for example by writing to his doctor or making an occupational health referral.

177. They made a remarkable assumption that it would be better for Mr Bachler if they were to proceed because he was suffering from stress, by putting him out of his misery.

178. Mr Harrison's flippant evidence that it could always be corrected on appeal was very surprising. Even when the Respondent said that the hearing would go ahead, they actually did not make it crystal clear that it would go ahead in his absence if he did not attend.

179. That the Respondents may have heard that he was doing a little bit of work for the benefit of the Respondent whilst signed off, is no reason to carry on. There is a world of difference in terms of stress between doing a little bit of undemanding work and attending a disciplinary hearing at which one might be dismissed for gross misconduct. No one put it to Mr Bachler that he was still working and that they thought he could therefore attend.

180. That the decision to dismiss was taken by four people, two of whom were involved in the investigation and only one of whom was the appointed Disciplinary Officer, is remarkable. See paragraph 6 of the ACAS Code of Practice.

181. Mr Harrison said that he had to involve the others because the Respondent's Policy said that the decision to dismiss had to be by a Director. That is in the Handbook at page 305. It also says that does not prevent a person of lower seniority being appointed to make the decision. The ACAS Code of Practice at paragraph 22 says that the decision to dismiss should only be made by a person with authority. Mr Harrison should not have been appointed to hold the Disciplinary Hearing unless he was given that authority.

182. Astonishingly, Mr Leeder told us in cross examination that the decision to dismiss had in fact been taken before the Disciplinary Hearing. This was plainly, grossly unfair.

183. The outcome letter does not spell out what it was factually that Mr Bachler had been dismissed for, making it impossible to formulate a structured and cogent appeal.

184. The answer to the question, was the belief in Mr Bachler's conduct reasonably held after a reasonable investigation? Is no.

185. Having regard to the First Respondent's size and administrative resources, the First Respondent may be a relatively small operation in itself but it is part of an international group of companies with circa 150 employees. The decision to dismiss in these circumstances is outside the range of reasonable responses. All in all, it seems to have been a text book unfair dismissal.

186. We turn then to what we lawyers call the question of Polkey. In other words, what would the outcome have been had the Respondent followed a fair procedure and what chance is there that Mr Bachler would have been fairly dismissed?

187. Had the Respondent followed a fair procedure the following would have happened:-

187.1. Mr Harrison, who is the junior of those involved, would have investigated and Mr Leeder, who is senior, a Director, would have Chaired a Disciplinary Hearing.

187.2. Mr Bachler would have been provided with copies of the emails after the investigatory meeting.

187.3. No one would have colluded and made a decision to dismiss before the Disciplinary Hearing, the Disciplinary Officer would have approached the hearing with an open mind.

187.4. The hearing would have been postponed in view of Mr Bachler's illness. On the evidence before us, he was signed off until 4 September and then a Disciplinary Hearing would have taken place possibly two weeks later on 19 September.

187.5. Mr Bachler would have been able to present his answers to the points of concern at the Disciplinary Hearing.

187.6. The decision on the outcome would have been made by a single person who had Chaired that hearing without the involvement of anybody else.

188. The question then is, having followed such a fair procedure, would this employer have fairly dismissed Mr Bachler? What the Disciplinary Officer would have had before them would have been:-

188.1. Evidence of confidential emails being sent by Mr Bachler to his wife but on the basis of what has been shown to us, two years earlier in 2021. Three of them. Remember the terms of reference of the investigation was back to January 2023. The sending of those emails were not just for proof reading by Mrs Bachler. That is misconduct and potentially gross misconduct. In light of the emails being historical and not recent, and on the basis that if this was the only conduct under consideration, that would have warranted a written warning.

188.2. The job interviews and site meetings at 28 Sheldon Road would likely have been shown by reference to diary entries, to have likely taken place in fact outside working hours and were not therefore misconduct.

188.3. Of 39 non-work related emails during working time, during the investigation reference period, some might have been explained as having been sent during lunch or at late lunchtimes but likely not all. Alone that, if that was the only misconduct, might have warranted a fair written warning.

188.4. That Mr Bachler had sent numerous emails during the investigation reference period to people in the building trade using his Solarlux email address, sometimes with Solarlux footing and invariably signed off with his dissolved company name, would potentially create confusion in the minds of people in the trade that the First Respondent was associated with a dissolved company. It might have damaged the reputation of the First Respondent and it might amount to Mr Bachler having gained some commercial advantage by improperly using the First Respondent's name. This is serious misconduct which might amount to gross misconduct and it might warrant a fair dismissal. Acting fairly, the Respondent would likely if this had been the sole allegation, have accepted Mr Bachler's mitigation that he was helping out long standing, disabled friends for no personal gain and they might have issued him with a final warning only.

188.5. They would have found that the Claimant had used his work email in searching for and applying for jobs. That is inappropriate use of the company email system on which, acting fairly and on the basis of this allegation standing alone, would likely have warranted a written warning.

188.6. They would have found that Mr Bachler had initially suggested that the work to Sheldon Road was in relation to the kitchen only, which was not true, it was more than that. On its own such dishonesty comes close to gross misconduct but on the particular facts, acting fairly within the range of reasonable responses, this employer would likely have issued a final written warning.

188.7. They would have found that Mr Bachler had deleted emails on 3 July 2023, after he had discovered that his email sent to Mr Leeder by mistake was going to be investigated. He then on 5 July 2023 offered complete transparency and invited Mr Leeder to inspect his laptop. He had deleted from his deleted file, a very deliberate step. It is argued on his behalf that if he had been meaning to mislead he would have done a better job of it and not left some of his emails undeleted. The Respondent was entitled to conclude and rightly would have concluded, that he had either done a bad job of trying to delete everything, or more likely, that he had been hiding the scale of his non-work related email traffic and as Mr Doedtmann had observed, had deleted emails relating to work other than in connection with the kitchen which the Respondent

already knew about. Mr Bachler's explanation that he was trying to transition to use of his personal email account, while reducing the size of his inbox so that his laptop would not malfunction, was not, we find, credible. The Respondent would likely have concluded and would be entitled to fairly conclude, that his explanation was not credible and that he was acting dishonestly with the objective of obstructing the investigation. It is more likely than not this Respondent would have dismissed Mr Bachler for that dishonesty. In our view such a decision would have been within the range of reasonable responses on its own and the more so, when combined with the other lesser incidents of misconduct.

189. Mr Bachler's period of loss therefore runs from 8 August to 19 September when the postponed Disciplinary Hearing would likely have taken place.

190. In light of our findings on Polkey, consideration of contribution is open to us but for the avoidance of doubt, the Claimant one hundred per cent contributed to his dismissal by his culpable conduct in his dishonesty, as outlined above. That would have been effective as of 19 September at the point when a fair process would have concluded.

191. For the avoidance of doubt, Mr Bachler's complaint that he had not seen the Company Handbook until it was sent to him on 4 August, does not assist him. He knew about the company rules and the disciplinary procedure from his contract. He is a person of seniority and experience and he would know very well that he should not have been using his company email account in the way that he was. He knew very well that he should not have been doing so, evidenced by his apology and explanation to Mr Leeder at the time of the email sent to him by mistake, and in his deletion of emails as soon as he knew there was going to be an investigation.

192. For these reasons Mr Bachler's complaint of unfair dismissal succeeds and the finding of this Tribunal is that he would have been fairly dismissed on 19 September 2023.

193. After delivering the above Judgment and following a short adjournment, the parties agreed terms of settlement as to remedy,

Approved by:

Employment Judge M Warren

Date: 10 November 2025

Judgment sent to the parties on

11 November 2025

For the Tribunal office

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